IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

PC. CIVIL APPEAL NO. 38 OF 2023

(C/F Civil Revision No. 4 of 2022, District Court of Karatu at Karatu, Original Civil Case No. 45 of 2022 Karatu Urban Primary Court)

YONA BARAN OMBAY .... APPELLANT

VERSUS

CORNEL DEODATIUS .... RESPONDENT

JUDGMENT

24th November & 18th December, 2023

TIGANGA, J.

Before Karatu Primary Court (the trial Court), the appellant herein sued the respondent claiming Tshs. 433,000/= being money for BUILDING construction tools. According to the evidence on record, both the appellant and respondents are masons. The latter borrowed such tools which included 17 woods, 2 shovels, two buckets, a plum bob, a harmer, 2 mattocks, and nails to finish building up his house. However, after he finished construction he did not return the said tools despite several gentle reminders.

Consequently, the appellant filed the suit before the Primary Court of Karatu at Karatu, and the trial court decided in his favour. Aggrieved by the decision, the respondent filed Civil Revision No. 04 of 2022 at the District Court of Karatu at Karatu (District Court) claiming that the estimated Tshs. value of Tshs. 433,000/= was never proved at the required standard and there was no proof of contract or handing over of the alleged construction tools.

The District Court nullified the trial court's proceedings quashed the judgment and ordered the same to start afresh on the ground that, the amount claimed by the appellant i.e. Tshs. 433,000/= is different from the one in the judgment i.e. Tshs. 430,000/=. He also observed that the trial and the execution proceedings were determined by two different magistrates without reasons assigned for such change. Aggrieved by such a decision, the appellant filed the current appeal on the following grounds;

1. That, the 1st appellate magistrate erred in law and fact in ruling out the case and ordering trial *de novo.*
2. That, the first appellate magistrate erred in law and fact to nullify the proceedings, orders, and judgment of the trial court which was in the appellant's favour without considering the prayers sought by the respondent in his chamber summons.

3. That, the first appellate magistrate erred in law and fact to order trial de novo on the grounds that, the appellant failed to tender receipts of the purported tools something which cannot be obtained for 2nd hand tools.
4. That, the 1st appellate magistrate erred in law and fact in ignoring evidence on records tendered by the appellant during the hearing of the civil case at the trial court.
5. That, the first appellate magistrate erred in law and fact ruling the appeal on grounds which were not in the respondent's affidavit in his revision.

During the hearing, the appellant appeared in person, unrepresented whereas the respondent defaulted appearance despite several summons issued to him. This appeal was therefore heard *ex-parte*.

Supporting the appeal, the appellant submitted that, he does not agree with the District Court's Orders that, the matter should start afresh just because he did not show proof of receipt of such tools borrowed by the respondent. He also claimed that, after the respondent's bull was seized, the same was kept to a pastoralist waiting for the final court orders. However, when the said bull was sold, it only paid for its upkeep. He thus prayed for all his entitlement. He prayed for this Court to adopt his grounds of appeal and allow the same.

I have gone through the lower court's records, grounds of appeal, and appellant's submission. What is to be determined as seen in the appellant's grounds of appeal is whether the District Court was justified to nullify the trial court's proceedings, quash the judgment, and order it to start fresh. From the outset I am of the considered opinion that it was not on the following grounds; First, one of the grounds of the reason for quashing the judgment is the fact that the amount declared to be paid by the respondent was not proved by receipts.

However, going through the appellant's evidence at the trial court, the respondent neither cross-examined nor objected to the value of the tools in question. More so even in his defence, the respondent herein never challenged the said value. In the case of **Masanyiwa Masolwa vs. The Republic**, Criminal Appeal No. 280 of 2018, CAT at Shinyanga, the Court of Appeal had this to say regarding the failure to cross-examine;

> *"It is trite law that as a matter of principle, as indicated earlier on, a party who fails to cross-examine a witness from the adverse party on a certain matter is deemed to have accepted that point not cross-examined and will be estopped to ask the trial court to disbelieve what the witness said. See,* ***Paul Yusuf Nchia v. National Executive Secretary, Chama Cha Mapinduzi and Another****, Civil Appeal No. 85*

of 2005, ***George Maili Kemboge v. R****, Criminal Appeal No. 327 of 2013,* ***Damian Ruhere v. R****, Criminal Appeal No. 501 of 2007 and Nyerere Nyague v. R, Criminal Appeal No. 67 of 2010 (all unreported), just to mention but a few. In other words, failure by the appellant to cross-examine PW1 amounted to his admitting the fact that what she testified was indeed true."*

Failure of the respondent to challenge the value of the said tools at the trial court was as good as he admitted their value. In that regard, the District Court erred in quashing the decision based on such fact. The second reason adduced by the District Court for quashing the trial court's decision is the fact that the amount claimed by the appellant was Tshs. 433,000/= but the trial court declared and ordered the respondent to pay Tshs. 1,430,000/=. According to the District Magistrate, such variance was an incurable defect. I took the liberty of perusing on the said orders and I found no order as to Tshs. 1,430,000/=. The District Court therefore erred in making such observation.

A third reason for nullifying the proceedings was the fact that the execution was done by a different magistrate. However, it is on record that, on 29th September 2022, the appellant herein wrote a letter to the

Magistrate in Charge of Karatu Primary Court praying for execution procedures to ensue. The Magistrate in Charge proceeded with such execution which is governed under rule 54 of the **Magistrates' Courts (Civil Procedure in Primary Courts)** Rules.

Lastly, it caught my attention that, the reason for revision as outlined in the respondent's affidavit are as hereunder;

i. *That, the court order of payment of four million three hundred and thirty-three thousand Tanzanian shillings (Tsh. 4,333,000/=) is illegal and not executable since it was an assumption not reflected on the record of the trial court, it assumed value of the subject matter without any prove to that effect because the respondent did not certainly specify the value for each property, for instance, the alleged size, type of timber tree and its value, the value of the alleged 'Kobiro", 'Beleshi Mbili', 'Ndoo mbili', 'Mkono Mbao',' Miiko Miwili'. 'Nyundo ya Misumari' and 'Sururu Mbili"*

ii. *That, the trial court pronounced judgment in favor of the respondent without establishing and proving the existence of an agreement or contract between the applicant and the respondent meanwhile failing to call the necessary witnesses to the stand for instance one GABRIEL was a necessary witness who was not called to the stand.*

iii. *That, the trial magistrate failed to observe that the prosecution's witnesses controverted each other in identifying the properties alleged to have been restrained by the applicant.*

Reading between the lines, these do not fit as grounds for revision rather they ought to have been grounds for appeal. There is no reason as to why the respondent opted for revision while he had room for appeal. It goes without saying that, Revision and Appeal are two different remedies one has in challenging a decision he is aggrieved by, and the two do not work in alternative to the other. The right of revision cannot be exercised if the law provides for alternative remedies because revisionary powers conferred upon courts are wide and purely discretionary. They have to be exercised in exception and cannot be used as alternatives of appeal.

This has been emphasized by the Court of Appeal in its many decisions, one of them being the case in **Moses J. Mwakibete Vs. The Editor – Uhuru, Shirika La Magazeti ya Chama and National Printing Co. Ltd** [1995] TLR 134 where it was stipulated that;

> *"Before proceeding to hear such an application on merits, this court must satisfy itself whether it is being properly moved to exercise its revisional jurisdiction. The revisional powers conferred by accordingly to laws were not meant to be used as an alternative to the appellate jurisdiction of this court. In the circumstances, this court, unless it is acting on its own motion,* ***cannot properly be moved to use its revisional powers in cases where the applicant has the right of appeal with or***

without leave and has not exercised that option. *" (emphasis added)*

In the instance appeal, the District Court erred in entertaining the revision, while the appellant had room to challenge the trial court's decision by way of appeal.

In the upshot, this appeal is merited, it is allowed with cost to the extent explained above. The decision of the District Court is quashed and set aside whereas the trial court's decision is hereby upheld.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 18th day of December 2023

J.C. TIGANGA

JUDGE