

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

PC CIVIL APPEAL NO. 9 OF 2023

(Originating from Civil Appeal No. 3/2022 of the District Court of Iramba at Kiomboi and Civil Case No 5/2022 of the Ulemo Primary Court)

MARCO ELIAAPPELLANT

VERSUS

CHRISTOPHER KILIMBA.....RESPONDENT

JUDGMENT

Date of last order: 04/10/2023

Date of judgment: 11/12/2023

KHALFAN, J

The appellant herein challenges a concurrent finding of both the District Court of Iramba at Kiomboi ("first appellate court") and Ulemo Primary Court ("trial court") where he was ordered to pay the respondent a total of TZS. 1,300,000/= being the amount that the appellant was alleged to be indebted by the respondent.

A brief background of this matter shows that the appellant, being the owner of a certain piece of land; arranged for the sale of the said land with the respondent to one Albert Majebele for a sum of TZS. 4,500,000/= who



paid an advance of TZS. 2,000,000/=. However, upon the failure of the said Albert Majebele to complete the payment, the appellant and the respondent arranged for another sale of the said land to one Frank Nkilya. This second sale of the land in question caused the matter to be referred to the village authority whose decision initiated this dispute to the trial court.

It was alleged by the respondent that before the village authority, the appellant was ordered to return the sum of TZS. 4,500,000/= to the said Frank Nkilya and upon such order, the appellant borrowed from him a total of TZS. 1,300,000/= which he would refund later.

The testimony of the respondent was supported by SM2 who stated that he witnessed the appellant asking for money from the respondent after being ordered to repay the amount of money that he was paid by Frank Nkilya. Likewise, SM3 stated that the appellant, having been asked to repay the money, asked the respondent to help him pay; that they would settle the same by themselves.

A handwritten signature in blue ink, appearing to be 'Khalid', is written over a faint, circular official stamp.

Nevertheless, the appellant denied such allegation and said that the respondent was ordered to pay TZS. 1,300,000/= by himself because he was also involved in the claim of selling the land twice.

The appellant brought SU2 and SU3 to support his defence. SU2 stated that he found the appellant and the respondent in the police lock up where he was informed that they were indebted TZS. 1,700,000/= and TZS. 1,300,000/= respectively but he was not told the reason of such debt. SU3 who is a police officer stated that he was given instructions by OCS (Officer Commanding Station) to receive a sum of TZS. 1,300,000/= from the respondent being the verdict entered by the ward tribunal against the respondent.

The trial court, having heard the matter, found merit in the respondent's claim and accordingly ordered the appellant to pay the respondent a total of TZS. 1,300,000/=.

The appellant, being dissatisfied with such decision of the trial court, decided to lodge an appeal to the first appellate court which confirmed the decision of the trial court due to the reason that the respondent's claim before the trial court was well founded; hence, this appeal.



The appellant's appeal is based on the four grounds which however are harmonised by the appellant's written submission to form two grounds thus abandoning two grounds. The remaining two grounds are as follows:

- 1. The first appellate court erred in law and fact by considering the respondent's evidence which was weak and contradictory.*
- 2. The first appellate court erred in law and fact by receiving new evidence at the appellate stage without following the proper procedures provided by the law.*

It is in the appellant's submission that the evidence of the respondent adduced during trial was not clear as to whether the said amount of TZS. 1,300,000/= was borrowed by the appellant since there was no evidence to prove any sort of such agreement. It is further submitted that where there is a claim of special damage, then a claimant has a duty to prove the same strictly as per the holding in the case of **Zuberi Augustino vs. Anicet Mugabe** [1992] TLR 137 page 139.

With regard to the second ground, it is stated in the submission that the first appellate court received new evidence contrary to the provision of section 21 (1) (a) of the Magistrates' Courts Act, [Cap 11 R.E 2019] (the MCA) which requires that the District Court, while exercising its appellate



jurisdiction, to direct the Primary Court to take additional evidence and certify the same or for the reasons recorded in writing, to hear additional evidence itself.

The appellant made reference to paragraph 3 of page 15 of the first appellate court's proceedings where the respondent narrated the circumstance under which the said claim of TZS.1,300,000/= emanated from. It is the appellant's submission that such facts do not appear in the records of the trial court. The case of **A.S Sajan vs. Co-operative and Rural Development Banck** [1991] TLR 44 was referred to bolster the contention.

For that reason, it is the appellant's submission that such set of new evidence initiated the decision of the first appellate court which is against his favour. Hence, it is the appellant's prayer that this appeal be allowed with costs.

In the reply submission, the respondent contended that the trial court correctly decided in his favour because the evidence adduced revealed that the respondent gave the appellant a total of TZS.1,300,000/= for the



agreement of repaying it considering that the sale of the land which is the source of this matter belonged to the appellant.

Replying on the second ground, the respondent contended that the first appellate court did not receive any new evidence as alleged. He submitted that the agreement between the parties on the advancement of money to the appellant was deliberated during the trial and there was no new proof that was produced to that effect during the appeal before the first appellate court.

Besides, the appellant contended that the decision of the first appellate court did not rely upon such facts which are alleged to be new evidence on the ground that it is encompassed with reasons to its findings. Having replied as such, the respondent prayed to this court for dismissal of the appeal with costs for want of merit and to uphold the trial court's decision.

Considering the submissions by the parties, this court shall determine the merit of this appeal. However, this court, in making its findings, shall be guided by the principle of law stated in the case of **Jamali Ally @ Salum vs. The Republic**, Criminal Appeal No. 52 of 2017, CAT, Mtwara (unreported) that the second appellate court should not disturb the



concurrent findings of the fact unless it is clearly shown that there has been a misapprehension of the evidence or a miscarriage of justice or a violation of some principle of law or practice.

I will start with the second issue which challenges the first appellate court for taking new evidence against the provision of section 21(1)(a) of the MCA as it raises the point of law which must be determined first.

It is a well settled principle of law that the first appellate court is restricted from taking additional evidence during appeal as rightly submitted by the appellant. In the instant matter, the provision of section 21(1)(a) of the MCA is relevant. The same provides:

"21. (1) In the exercise of its appellate jurisdiction, a District Court shall have power- (a) to direct the primary court to take additional evidence and to certify the same to the district court or, for reasons to be recorded in writing, to hear additional evidence itself;"

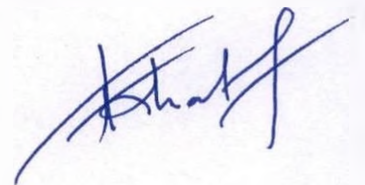
That being the position, I will now examine if the first appellate court received new evidence as alleged. In perusal of the first appellate court's proceedings particularly in paragraph 3 of page 15 as referred to by the



appellant, unfortunately, I find it incredible to agree with the appellant as there is no any new evidence adduced. Instead, I have realised that what the appellant is implying is inclusion of new facts in the appellants' submission which also are not allowed to be raised during appeal.

In expounding the consequence of inclusion of the new facts, it is clear from the first appellate court's judgment that the first appellate court was not persuaded by the submission made by the parties during appeal in making its decision. Thus, the contents of paragraph 3 of page 15 of the first appellate court's proceedings have not by either means initiated the outcome in the first appeal. I find it desirable to quote some paragraphs of the first appellate judgment:

"The testimony of the witness Fanuel s/o Jeremia @ Mlumba (SM2) proves the fact that, because this witness participated in purchasing that house when Albert s/o Majebele purchased that house in 2016. Therefore, from the finding of this court, I come to the conclusion that, the fault was caused by the appellant... the records reveal that, the witnesses of the Respondent Fanuel s/o Jeremia @ Mlumba (SM2) and John s/o Frank @ Mkilya (SM3) testified before the Trial Court that, the Appellant prayed the respondent to pay Tsh. 1,300,000/= for him,



so as to solve the matter which he was facing at the time of refunding money to Frank s/o Mkilya because he had a deficit of that amount... I have examined and scrutinized the evidence from both parties, and found that, the order from that office of the VEO of Ulemo was not both parties to refund Tshs. 3,000,000/= to Frank s/o Mkilya,..."

Based on the above, there is no doubt that the first appellate court considered the evidence adduced during the trial to make its own findings. So, even if this court would decide to expunge the new facts appearing in paragraph 3 of page 15 of the first appellate court's proceedings, the findings of the first appellate court would not be affected. Therefore, I find no merit in the second ground of appeal.

At this juncture, I will determine the first ground of appeal which touches the weight of evidence adduced by the respondent during trial.

Having intensively examined the evidence adduced during trial, this court totally agrees with the findings made by the lower courts that the appellant was indebted by the respondent a sum of TZS. 1,300,000/=. I have come to this conclusion after weighing the evidence adduced during trial. The evidence of the respondent and his witnesses (SM2 and SM3)



shows clearly that it was the appellant who was ordered by the village authority to repay the second buyer the amount paid to him after having sold the same land twice.

The records reveal further that having been ordered to repay the second buyer, the appellant asked the respondent to advance him the said TZS. 1,300,000/= with the assurance of repaying the same but the appellant did not repay the same hence the matter was preferred to the trial court by the respondent which has made its way to this court.

It was the appellant's defence that the respondent paid the said TZS. 1,300,000/= as fine for being involved in selling the said piece of land twice but I find the same unfounded considering that SU2 and SU3 who were brought by him to support his defence, were all absent before the village authority where the said order was given. Hence, they knew nothing about what transpired therein. As a result, their testimony becomes hearsay with no evidential value.

Under such circumstances, it is clear to me that the evidence of the respondent is heavier than that of the appellant, hence it is the



respondent who must win the case. See the case of **Hemedi Saidi vs. Mohamedi Mbilu** [1984] TLR 113.

Therefore, this court finds that both the trial court and the first appellate court correctly applied the available evidence to decide that the appellant was indebted TZS. 1,300,000/= to the respondent. Accordingly, the first ground of appeal also lacks merit.

In the upshot, this appeal lacks merits in its entirety and the decisions of the lower courts are hereby upheld. Consequently, the appeal is dismissed with costs.

It is so ordered.

Dated at Dodoma this 11th day of December, 2023.




F. R. KHALFAN
JUDGE