IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(PC) CIVIL APPEAL NO. 01 OF 2022

(Arising from Kigoma District Court Civil Appeal No. 29 of 2021 before E. B. Mushi - RM, originating from Ilagala Primary Court Civil Case No. 06/2021 before N.W. Tungaraza - RM)

OMARY SALUM ..... APPELLANT

VERSUS

JEREMIAH IBRAHIM (NYONGA) ..... 1ST RESPONDENT

JESTUS MWANISENGA ..... 2ND RESPONDENT

JUDGEMENT

1/12/2022 & 6/2/2023

Mlacha, J.

The appellant, Omary Salum filed a suit at Ilagala Primary Court, Civil Case No. 6/2021, against the respondents, Jeremiah Ibrahim (Nyonga) and Justus Mwamisenga claiming Tshs 8,129,000/=being the value of his shop which was closed by the respondents illegally. The shop is located at the market of Kashagulu village, Uvinza district, Kigoma region. The suit was dismissed. His appeal to the district court was not successful hence the present appeal.

The grounds upon which this appeal is based read thus:

1. That, the 1st Appellate Court erred in law and in fact in holding that the proceedings and judgment of the trial primary court had not contravened the mandatory provisions of Rule 46(2) of THE MAGISTRATES COURTS (CIVIL PROCEDURE IN PRIMARY COURTS) RULES.
2. That, the 1st Appellate Court erred in law and in fact in dismissing the 2nd ground of appeal relating to the Respondent's breach of the principles of natural justice before closing the Appellant's shop on the ground that the same had not been raised during trial, in total disregard of the legal position that the same is paramount and can be raised at any stage of the proceedings.
3. That, the 1st Appellate Court erred in law and in fact in the re-analysis and re-evaluation of evidence as adduced by the parties during trial thereby arriving at unjust decision in favour of the Respondents.
4. That, the 1st Appellate Court erred in law and in fact in affirming the trial court's decision that the Appellant had not proved the claims to the required standard.

The appellant appeared in person while the respondents were represented by Mr. Sadiki Aliki advocate. The parties presented their submissions orally

but before going to examine their submissions, a presentation of the background may be useful.

The evidence adduced at the primary court reveal that, PW1 Omary Salum (the appellant) has a shop at the market. He left his shop temporarily for lunch on 4/6/2021. When he came back he found it locked by an additional padlock. He reported the matter to the Village Executive Secretary (VEO) who told him that it could be opened within 3 days. Three days elapsed but it could not be opened. He reported the matter to the police station who advised him to go and discuss it with leaders of the market. They sat to discuss the matter but the first respondent (Nyonga) refused to open the shop demanding Tshs 6,000/= for the watchman. He decided to go to court. PW2 Ramadhani Amiri met the appellant and the first respondent arguing at the meeting. The appellant said that he cannot pay the money. The second respondent said that they cannot open the shop until the money is paid. PW3 Kaledo Nestory is a friend of the appellant who took part in asking the respondents to open the shop in vain.

DW1 Jeremiah Ibrahim is the secretary of Traders at the market of Kashagulu village. He told the court that traders agreed to contribute money for paying watchmen. Failure to pay the money had sunctions which included

to be sent to the VEO for enforcement and payment of fine. They employed watchmen who needed salaries and traders had to contribute. They were supposed to start their job on 1/4/2021. Each shop owner was to pay Tshs 6,000/= monthly. Mama Lishe and Tailors were to pay 4,000/= monthly. They agreed that if a person could fail to pay the money his shop could be closed and pay a fine of Tshs 3,000/=. He was also to pay for the padlock because it could remain with him thereafter.

DW1 proceeded to tell the court that he is the one who was collecting the money. The appellant paid for the month of April. He could not pay for the month of May 2021. He promised to pay on 2/5/2021 but could not do so. The village chairman called him but he ignored him. They informed the VEO who allowed them to go ahead as agreed. They then moved to the shop where they found one padlock. They added another. DW2 Justus Mwanisenga, the chairman of the market told the court that the appellant refused to pay the money as agreed by the traders union. DW3 Clement Edward is the VEO of Kashagulu village. He told the court that he received a phone call that the appellant had refused to pay as agreed and directed them to proceed as agreed in the meeting and lock the door with a padlock. He also directed the appellant to come to him on the next day but instead of

coming he moved to report at the police station. He was sent back to the village to solve the dispute. They could not manage to solve the dispute. On being cross examined, DW3 told the court that what was done by the defendants/respondents was lawful because they did what was agreed earlier. The court received minutes of three meetings of traders, exhibits D1, D2 and D3 dated 11/11/2017, 28/2/2021 and 29/3/2021 respectively. Among the issues agreed in exhibit D3 was that each shop owner should pay Tshs. 6,000/= per month with a delay fine of Tshs 3,000/=. In default his shop could be blocked by padlocks. The padlock could be his after paying the value of it.

Based on the evidence of DW1, DW2, DW3 and exhibit D1, the trial court found the case to be baseless and it was dismissed. On appeal to the district court, E. B. Mushi RM (now SRM) followed the same line of argument and dismissed the appeal. She added that there was no any evidence proving loss to the appellant to the tune of Tshs. 8,129,000/=.

The appellant being a layman could not submit on the grounds of appeal. He said that there was evidence proving that his shop was closed by the respondent. His shop is still closed to date with two padlocks. His shop merchandise are still inside. He added that he is not aware of the condition

of his goods since he does not have the keys. He went on to say that the fine for failure to pay a watchman was Tshs 3,000/= but they wrote 6,000/=. He said that he is not aware of any law which gave them mandate to close the shop.

Submitting in reply, Mr. Sadiki Aliki argued the court to dismiss the appeal saying that the appellant did not submit on the grounds of appeal. He has instead raised new issues which cannot be entertained by this court. He referred the court to **Madame Marry Silvanus Qorro v. Edith Donat Kweka and Wilfred Steven Kweka,** [2019] 1 TLR 434 on this point. He went on to tell the court that there was justification in closing the shop because the parties had agreed so. He added that the respondents are leaders at the market who had power to do so. He referred the court to exhibit D3 which has an agreement of traders that failure to pay the watchman could lead to closure of the shop. He added that there is no proof that the shop is closed to date.

Submitting on ground one, Counsel had the view that the appellate magistrate evaluated the evidence properly at page 5-6 of the judgment. In ground two, counsel had the view that this issue was not raised at the primary court and thus baseless. In ground three counsel submitted that the

district court evaluated the evidence properly based on exhibit D3 and thus baseless. In ground four counsel had the view that the appellant failed to prove his case. He had no evidence to prove the claim of Tshs 8m, he said.

In rejoinder, the appellant asked the court to visit the locus in quo to see if the shop is closed or not.

This is a second appeal. A second appellate court is not expected to disturb concurrent findings of two courts bellow save; i) where the said findings are not supported by the evidence on record or where the reasons in support of the findings are unsatisfactory, ii) where the findings are based on a wrong proposition of law or principle of evidence, such that if that wrong proposition of law or principle is corrected, the findings will cease to exist, iii) where the findings are inconsistent with a crucial document or other undisputed evidence on the record or iv) where the findings are otherwise substantially or seriously perverse and unjustified so as to occasion a grave miscarriage of justice if left to stand. This is contained in the decision of the supreme court of Ghana made in **John Kwadwo Bobie v. 21st Century Construction Co. Ltd a.k.a 21st Century Real Estate Ltd& 7 Others, (SCG),** Civil Appeal No: J4/5/2014 at pages 8-9.

The Court of Appeal had a similar position in **Daniel Matiku v. Republic,** Criminal Appeal No. 450 of 2016 where it was said thus:

> *"...The law is well-settled that on second appeal, the court will not readily disturb concurrent findings of facts by the trial Court and first appellate Court* ***unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or none direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice.*** *" (Emphasis added)*

In a numerical form the exceptions can be put thus; i) where the findings are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of evidence or ii) where there is a misdirection or non direction on the evidence or iii) where there is a violation of some principle of law or procedure which have occasioned a miscarriage of justice.

A finding of fact is said to be *perverse* if looking at it with an oblique eye, one can see a behavior which is unreasonable or unacceptable in a given situation, something which is contrary to acceptable standards of practice and procedure.

Reading through, I could not see any of those things in the records of the two courts. The lower courts directed themselves correctly on exhibit D3 which was the relevant document and the basis of the decision of the respondent which is complained of by the appellant. They also directed themselves correctly on the burden of proof; that he who alleges must prove the existence of a fact on the balance of probabilities. Exhibits D1, D2 and D3 are minutes of meetings of traders of the market who included the appellant. They have names and corresponding signatures. These are agreements which are binding to all traders at the market including the appellant. The lower courts directed themselves correctly on these exhibits with a special eye on the relevant clause of exhibit D3. On Tshs. 8m claimed as the value of the shop, they spoke correctly that the appellant had failed to prove the claim. The burden of proof was on him to prove that he had suffered loss to that amount. He had no evidence to prove the fact. In law he who alleges the existence of a fact must prove it existence in the standard required. See **Jasson Samson Rweikiza v. Novatus Rwechungura Nkwama,** (CAT), Civil Appeal No. 305 of 2020 and **Leonard Dominic Rubuye T/A Rubuye Agrochemical Supplies v. Yara Tanzania Limited,** (CAT), Civil Appeal No. 219 of 2918.

That said, I will now move to examine the grounds of appeal. Ground one has a complaint that, the district court has failed to find that the proceedings and judgments of the primary court contravened rule 46 (2) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules 1964, GN 310 of 1964. Reading through the judgment of the district court (Mushi -RM) I could not see any none compliance with this rule. She cited rule 46 in full and discussed it well. I agree with her. I will try to show it but my discussion will be limited to sub rule (2) which is the subject of the appeal.

Rule 46 (2) reads as under:

> *"(2) The evidence of each witness* ***shall be given on oath or affirmation*** *save in the case of a* ***child of tender years,*** *who in the opinion of the court, does not understand the nature of affirmation". (Emphasis added).*

Having read the evidence on record, I could not see any child witness. All the witnesses were adult Christian and Muslims. They were all dully sworn or affirmed according to their religion. There was therefore full compliance to rule 46(2) making ground one baseless which is dismissed.

Ground two talks of breach of principles of natural justice. That, the appellant had a right to be heard before closing the shop. I think this complaint lack

substance because the evidence on record speak otherwise. The evidence of DW1 Jeremiah Ibrahim at page 23 and 24 show the following:

> *"**Ulikuwepo wakati tunafunga sema baada ya kukwambia ulikana kufunga na kuondoka**. Zilikuwepo kufuli 3, ya kwako 2 na ya kwetu moja.....*
>
> ***Alikuwepo lakini wakati wamajibizana alifunga na kuondoka**. Nilikuwepo mimi na wafanyabiashara waliokuwa wanazunguka. Nilitekeleza kama tulivyokuwa tumekubaliana wafanyabiashara 46 ..... Taarifa zilitoka tangu tarehe 1/4/2021 kuhusiana na kulipa na waliokuwa wanadaiwa wengine baada ya taarifa walilipa." (Emphasis added)*

This literally means that the appellant was present at the moment of closure but left after receiving the message from the respondents. He closed the shop and moved away after talking to the respondents. That, there were 3 locks; 2 belonging to the appellant and 1 belonging to the respondents. He was present and left after an exchange of words. The first respondent and other businessmen were present. They implemented as agreed by 46 traders. Information was given on 1/4/2021. Some traders paid but the appellant could not pay despite the notice.

This evidence is clear that the appellant had prior information that the respondents could come to claim the money or close the shop in default. He was also informed of the need to pay the money on the date of closure but reacted by closing the shop and leaving. The question of the right to be heard is thus baseless and is dismissed.

Ground three has complaint that the 1st Appellate Court erred in law and in fact in the re-analysis and re-evaluation of evidence as adduced by the parties during trial thereby arriving at unjust decision in favour of the Respondents. My reading of exhibit D3 which was the basis of the judgments of the lower courts did not leave me with any doubts. Exhibit D3 read in part as under;

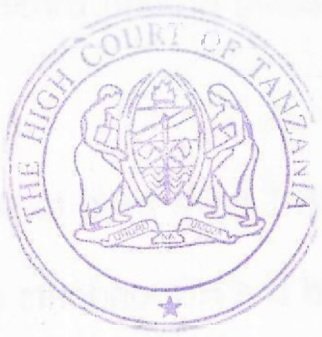
> *".....walikubaliana kulipa kila baada ya mwisho wa mwezi. Wenye vibanda vya maduka kila mwisho was mwezi Sh. 6,000/=. Elfu sita..... Kwa yeyote mfanyabiashara akichelewa kulipa kwa muda tuliokubaliana* ***atalipa faini ya Sh. 3,000/=, elfu tatu****. Aidha* ***tutafunga kibanda chake. Tutaweka kufuli zetu"*** *(Emphasis added).*

This means that parties had agreed for a monthly pay of Tshs 6,000/= with a fine of Tshs 3,000/= for defaulters. It was also agreed to close the shop frame by putting an additional lock. This is exactly what was done. There

was no an error in the analysis of evidence making ground three baseless and dismissed.

Ground four speaks of fault of procedure which I have tried to show that there was none. It also invites the court to hold the respondents are liable for economic damage arising out of the exercise. In view of what have been said above, the respondents cannot be held liable for any economic loss. If anything, it was caused by the arrogance of the appellant who failed to pay the monthly contributions and fine and yet decided to close his shop and leave. Again, as pointed out, the appellant brought no evidence to prove the loss other than mere words of mouth. Ground four is equally baseless and dismissed.

All said and done, the appeal is found to be devoid of merits and dismissed. The appellant is advised to pay the fee of Tshs. 6,000/= and fine of Tshs. 3,000/= as agreed and proceed with his business. If there may be any loss at the shop it should be associated with the appellant not the respondents. It is ordered so. No order for costs.



L.M. Mlacha

Judge

6/2/2023

Court: Judgment delivered. Right of Appeal Explained.

L.M. Mlacha

Judge

6/2/2023