IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA SUB-REGISTRY

AT SHINYANGA

CIVIL APPEAL NO. 72 OF 2023

(Originating from civil appeal No 33 of 2023 of Shinyanga District Court, originating from civil case No 06 of 2023 Shinyanga Urban Primary Court)

MWANDU DOTTO LULALI.....APPLICANT

VERSUS

LULALI DOTTO LULALI.....RESPONDENT

JUDGMENT

28th February, & 22nd March, 2024

MASSAM, J;

This is the second appeal, where as the respondent filed the case before Shinyanga urban Primary court in Civil case No 06/2023 claiming for the recovery of Tsh 1,780,000/= which was the amount sent to the appellant with the agreement that the appellant has to buy a plot and start the process of construction something which was not done by the appellant. The trial court after a full trial was convinced by the evidence of the respondent that he proved the case on the balance of probabilities and ordered the appellant to pay the respondent Tsh 1,780,000/=.

Aggrieved with the decision of the trial court, he appealed to the District Court of Shinyanga via Civil appeal No33/2023 complaining that

the trial court erred by holding that respondent had proven his case on the balance of probabilities while the evidence given was unproven, biased contradictory and the cause of action was time barred. At the end of the trial the district court as the first appellate Court partly allowed his appeal to the extent that he has to pay the proved and admitted amount of Tsh 1,200,000/=.

Aggrieved again, he appealed to this court with four grounds of appeal as follows:

1. *That the District Court erred in law and fact in holding that the respondent proved his allegations/claims.*
2. *That the District Court misdirected itself in holding that the respondent gave strong evidence that was not corroborated and contradictory.*
3. *That the District Court fatally erred in law and fact in ordering the appellant to pay Tsh 1,200,000/= to the respondent which was unjustifiable.*
4. *That the District Court grossly erred in law and fact in entertaining the matter that was time barred.*

The hearing of this appeal was conducted by way of oral submission whereas both parties appeared in person unpresented.

On his submission the appellant urged that, this case was time barred and that there was no prove that he was given money as there was no eye witness.

On his response, the respondent had no much but prayed this court to dismiss the appeal with costs. The appellant had no rejoinder.

After a careful consideration of the records and the law, and now the point for determination is ***whether this appeal has merit.*** By urging this appeal and according to the four grounds of appeal listed by the appellant, this court will examine the 1st,2nd and 3rd grounds jointly and the last ground separately.

To begin with ground 1,2, and 3 which avers that the case was not proved to the balance of probabilities.The appellant is contending that, there was no eye witness who witnessed him being given the money by the respondent so the said claim was not proved.

First of all, it is a trite law that in civil suits unlike in criminal claims, every party to the suit has an evidential burden to be discharged and the Judge or Magistrate in deciding any civil claim has to compare whose evidence is heavier than the other this is what is called balance of probabilities as was defined in the case of **Re B [2008] UKH 35,** by Lord Hoffman as:

" if a legal rule requires a fact to be proved (a fact in issue), a Judge or Jury must decide whether or not it happened. There is no room for finding that it might happen. The law operated in a binary system in which the only value are 0 and X That fact either happened or it did not If the tribunal is left in doubt, the doubt is resolved by the rule that one part or other carries the burden of proof If the party who bears the burden of proof fails to discharge it, a value of O is returned and the fact is treated as not having happened if he does discharge it; a value of 1 is returned to and the facts is treated as having happened."

This principle also applies to the primary courts as per Rule 2(1) of The Magistrate (Rules of evidence in Primary Courts) Regulation of 1964 R.E 2002.

Again this court is aware that it is a trite law in civil cases that the one who alleges must prove. See Section 110 (1) of the Law of Evidence Act, Cap 6 R. E 2019, and the case of Pauline **Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported).Further to that in **Anthony M. Masanga vs Penina (Mama Mgesi) & Lucia (Mama**

Anna), Civil Appeal No. 118 of 2014 (CAT-Unreported) it was held that: -

> *"Let's begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act, Cap. 6 Revised Edition, 2002."*

Again, this was elaborated to the case of **Barelia Karangirangi vs. Asteria Nyalwamba** in Civil appeal no 237 of 2017 Court of Appeal at Mwanza.

From the evidence in the record there is no dispute that there was transaction of money from the respondent to the appellant with the agreement that the appellant will buy a plot and start the construction process but the same was not done by the appellant. The respondent is contending that he transferred the total amount of Tsh 1, 780,000/= in four installments, while on the other hand the appellant is admitting to have received Tsh. 1,200,000/=. Refer page 9 of the trial court proceedings where the appellant testified: **"mimi natambua Tsh 1,200,000/=**

kwa kua ni fedha aliyonitumia kwamba ninunue kiwanja hakunitumia fedha nyinginge zaidi ya hizo..."

It's from this testimony by the appellant that led the trial magistrate and later the first appellate to hold the case in favour of the respondent but in the first appellate court the amount was varied to which I agree with the first appellate court that the respondent did not manage to prove the rest of the amount apart from which the appellant agreed to have received.

Appellant's defense that he bought the said plot as they agreed with respondent but the same was taken by the government does not hold water as there was no exhibit proving that the appellant bought that piece of land as claimed by him.

This court after the peruse of the trial court proceedings found out that there was no proof of the amount claimed to be sent by the respondent to the appellant and from the proceedings all of his witnesses testified what they were told by the respondent and on top of that they had no idea on the amount sent to the appellant, nevertheless the appellant himself, admitted to have received the Tsh 1,200,000/= and that is what is said to be proved to the extent he recognizing as reached by the first appellate court as the appellant himself admitted the

said facts that he received the said amount of money . Hence, I find these three grounds with no merit.

In regarding to the last ground that the district court erred in law and fact in determining the matter that was time barred. I accede with the first appellate court that this matter was not time barred, the trial records reveals that the respondent sent the appellant the claimed amount on 2017 and on June, 2022 he came from Zanzibar and that is when he came to realize that there was no plot bought by the appellant nor the money sent to him, he unsuccessfully called their relatives to solve the matter, it is from this instant when the cause of action arose that's on 2022 and not 2017 as asserted by the appellant.

Likewise, according to the law of limitation Act, Cap 89 R.E 2019 under the first schedule item 7 provides for six years on the suits founded on contract. Refer the case of **Sullivan vs. Ali Mohamed** (1959) E.A 239, **John M. Byombalirwa v. Agency Maritime Internationale (Tanzania) LTD TCA** 13 [1983] TLR and**Stanbic Finance Tanzania Limited vs Glussepe Trupya andGhara Malavas** (2002) TLR at page 221 where the Court described cause of action as facts which exist to give rise or occasion to a party to make a demand or seek redress. In respect to that, this ground too was found

with no merit since the cause of action rose when the respondent found that the appellant has not bought the plot and start construction as agreed.

Consequently, and from the above findings this court finds out the appeal has no merit and is hereby dismissed.On that account, I find no reasons to interfere with the findings of the first appellate court. In regard of the relationship between the parties to be relatives no order of the costs given.

It is so ordered.

DATED at **SHINYANGA** this 22nh day of March, 2024.

THE HIGH COURT OF TANZANIA

R.B Massam

JUDGE

22/03/2024