IN THE HIGH COURT OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

CIVIL APPEAL NO. 14 OF 2023

REF. NO. 20230807000518583

(Arising from the Decision of the District Court of Musoma at Musoma in Civil Case No. 4 of 2022)

JEREMIA TEKELE MJUNGU ..... APPELLANT

VERSUS

CHARLES DEUS BWIRE ..... RESPONDENT

JUDGMENT

07th & 29th May, 2024

M. L. KOMBA, J.:

Appellant claimed for non-performance of an oral contract between himself and the respondent. It was alleged that parties above mentioned agreed to perform the said contract by; the defendant to let his property be used by the respondent and in return, the obligation of the respondent was to pay Tshs. 11,000,000- per month. The appellant adduced that he performed his duty but respondent defaulted. Aggrieved by the action of the respondent, appellant sue the former for recovery of unpaid amount as agreed. Upon full trial the trial court dismissed the plaintiffs claim on

account that there was no contract between the two. Unsatisfied he knock the door of this court with four grounds that;

1. *That since the dispute concerned land, the trial court erred on point of law to preside over and determine a matter on which it lacked jurisdiction*
2. *That the trial court misdirected itself on points of facts to find that the non-joinder of the village authority was not fatal to the merit of the case.*
3. *That the trial court misdirected itself to rely and act on the evidence of DW 2 who wasn't village chairman in support of an assentation that the land was allocated to the respondent by a local authority.*
4. *That the trial court misdirected itself on point of fact to find and act on respondent's version without any establishment of fact since authorities act by way of records (documents).*

When the appeal was filed, respondent was nowhere to be found even after the order of substituted service. For the sake of justice to the party who was ready in court, I ordered the matter to proceed ex-parte against the respondent. Appellant was represented by Mr. Baraka Makowe, learned advocate.

When give time, he argues all the grounds separately starting with the first ground that the trial court which had no jurisdiction to entertain the matter

as in judgment specifically pages 2, 3 and 5 the trial Magistrate use word like Mwalo, lease, landed property and lease consideration. It was his submission that it is not disputed that appellant filed a civil suit at District Court but he complained that the action by the appellant cannot confer the court with jurisdiction to entertain the matter as the subject matter was land which was supposed to be filed at District Land and Housing Tribunal. Basing on that assertion, he found the trial court had no jurisdiction and by law, this issue may be raised at any time. He prays the ground to be found with merit and nullify the trial court proceedings.

Submitting for the second ground about joinder of parties. He faulted the trial Magistrate for not ordering the joinder of the village chairman whom was mentioned by the defendant during trial. He referred this court to pages 33 and 37 respondent claimed that he was allocated the disputed land by the village council and paraded a witness who testified the same but was not the chairman. As the parties had two different stories of ownership: The appellant claim to own the land from inheritance while the respondent claim to be allocated by the village council. It was his submission that so far as both parties tendered no documentary evidence

that necessitated the trial court to call the village chairman so that can determine the mater to its finality but was not the case.

Mr. Makowe did not end there, he further faulted the trial Magistrate when he said the appellant testimony was fragile as that amount to shifting burden to him, instead it was the village chairman who was supposed to balance the assertion. He prayed this court to find the second ground to be meritorious.

On the 3rd ground, Counsel attacks the analysis of the evidence of DW2 that he was just chairman of Miners Association and not a village chairman but his testimony was given high priority. He submitted that the testimony of DW2 was only to the effect that the *mwalo* was owned by respondent as was allocated by the village council. However, he complained that the trial Magistrate relied on the assertion by DW2 and denied the plaintiff right.

Arguing for the 4th ground Mr. Makowe submitted that the trial court was not supposed to believe the testimony by the respondent as Government works on papers. He said it was his expectation that when the trial court relied on section 110 of the Evidence Act, (who allege must prove) the trial court was supposed to verify if the village council allocated land to

respondent. it was his explanation that so far as the appellant claim the land was inherited and leased to respondent, it was respondent who was supposed to prove his assertion. He urges me to note that section 110 of the Evidence Act, Cap 6 was not utilized properly as each side is supposed to prove his averment. He prayed under the 1st ground this court to nullify proceedings and decision of the trial court. Under 2nd, 3rd and 4th to nullify the decision of the trial court and find that the appellant managed to prove his case, he was entitled to prayers as in the plaint and costs of the case.

As indicated earlier, the matter was ordered to proceed ex-parte against the respondent, there was no counter submission. It is for this court to analyse submission and determine the appeal on merit.

Having carefully considered the submission, I will now embark on determination of the grounds of appeal fronted by the appellant. This being a first appeal, I will preface my determination with the position of the law as to the duty of the first appellate court as held in **Registered Trustees of Joy in The Harvest vs Hamza K. Sungura (Civil Appeal 149 of 2017) [2021] TZCA 139 (28 April 2021)** thus; it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at

its independent decision. It is also the final court of facts as was elaborated in **Firmon Mlowe vs Republic (Criminal Appeal 504 of 2020) [2022] TZCA 694 (9 November 2022).**

Starting with the first ground about jurisdiction of the court. It was the appellant who sued respondent at the trial court and the cause of action was contract. It is from plaint where court determine its jurisdiction specifically by analyzing cause of action. Reading paragraph 4 the appellant testified to had an oral agreement with respondent. Counsel for appellant claimed that judgment has words which suggest it was land issue. He referred this court to words like *mwalo*, lease, land property and the like and claim that it was supposed to be land suit and not otherwise. To my understanding, it is plaint which is supposed to have cause of action and it is the same pleading which is determining factor of the jurisdiction of the court and not judgment as submitted by the Mr. Makowe. See Order VII specifically rule 1 of the Civil Procedure Code, (the CPC). I find the plaint is elaborative that parties had and oral agreement and it was alleged that one part did not honor terms as agreed. This is pure civil case based on contract and not otherwise. I find the 1st ground lacks merit.

The second and third ground is about non joinder of the village chairman. Mr. Makowe submitted that so far as the respondent claiming that he was allocated the *mwalo* by village council, he submitted that chairman was supposed to be joined and faulted the trial Magistrate for not join a chairman in that suit. First of all, I wish to put it clear that a suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it. That is as per Order I rule 9 of the CPC. It is obvious that the claim by appellant that village chairman was not joined has no room to frustrate the case as stipulated in the cited provision of law. However, even appellant could have prayed for additional witness in case he found that witness was necessary but he did not. Further, under Order I rule 10 of the CPC, appellant had an option to pray for an order for the court to join a party whom he believes was necessary.

While faulting the Magistrate for not joining the village chairman, it has to be known that it is the plaintiff who has to prove his case and not otherwise basing on section 110 and 112 of Cap 6 which insist who allege must prove. See also **Abdul-karim Haji vs Raymond Nchimbi Alois &**

Another (Civil Appeal 99 of 2004) [2006] TZCA 22 (17 November 2006), Airtel Tanzania Ltd vs Majura Matage T/a Majura General Suppliers (Civil Appeal 60 of 2017) [2020] TZHC 829 (17 April 2020) and **C.R.J Construction Co. Ltd vs Maneno Ndalije & Another**, Rev.No.205/2015.

It was the plaintiff who allege there was a contract between the two, he was supposed to prove that fact to the balance of probability but that was not done. DW2 was a witness just like other witness and it was proper for his testimony to be analysed. I find the combined ground two and three are less of merit.

The last ground is about documentary evidence. Counsel Makowe complained that respondent had no documentary proof and insisted that Government works on papers. He commanded that the respondent was supposed to prove he was allocated the said land by documentary evidence. I find this was not fact in issue because the allegation by the appellant if at all was necessary, could not prove the existence of the contract between the parties as alleged by the appellant. However, it is the law in this jurisdiction, particularly section 3 of Cap. 6 that the standard of proof in civil cases is one on a preponderance of probability. This was

articulated well in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha,** (Civil Appeal No. 45 or 2017) [2019] TZCA 453 (11 December 2019) and reiterated in **Maria Amandus Kavishe v. Norah Waziri Mzeru (Administratrix of the Estate of the late Si Ivan us Mzeru) and another** (Civil Appeal No. 365 of 2019) [2023] TZCA 31 (20 February 2023) [2023] TZCA. In the former case, it was said:

> *'...since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other.'*

I had time to read the proceedings. Both parties including appellant did not tender any document to support what was testified. The trial Magistrate analysed testimony and arrived to the conclusion basing on balance of probability. So far as both parties did not tender any document, oral testimony was sufficed. While noting and agree that Government works on papers, that phenomena is not to the extent of this case as oral evidence is also acceptable. See section 61 and 62 of Cap 6 and the **Simon s/o Shauri Awaki @ Dawi vs Republic (Criminal Appeal No. 62 of 2020) [2022] TZCA 51 (23 February 2022).**

In the upshot, I find all grounds of appeal lacks merit. the appeal is hereby dismissed. No order as to costs.

DATED at **MUSOMA** this 29 day of May, 2024.

M. L. KOMBA

Judge