

IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MOSHI SUB- REGISTRY
AT MOSHI
PC CIVIL APPEAL NO. 09 OF 2023

*(C/F Civil Appeal No. 04 of 2023 in the District Court of Same at Same.
Originating from Civil Case No. 65 of 2022 in Same Urban Primary Court)*

HAMZA MRINDOKO MSOFFE.....APPELLANT

VERSUS

FLORA MBONEA MMBAGA..... RESPONDENT

JUDGEMENT

Date of Last Order: 14.05.2024
Date of Ruling : 12.06.2024

MONGELLA, J.

The appellant in this matter is the son in law of the respondent. He was sued by the respondent, his mother-in-law, in the primary court of Same district at Same urban (hereinafter, trial court) in Civil Case No. 65 of 2022. The suit was for recovery of T.shs. 30,000,0000/- which she claimed to have given the appellant for improving his business going by the name of Katue Events.

The trial court found a debt of USD 5000 proved and ordered the appellant to pay the same. The respondent, aggrieved by said decision, appealed to the district court of Same at Same (the 1st appellate court) vide Civil Appeal No. 04 of 2023.

The 1st appellate court found in the respondent's favour and thereby ordered the appellant to pay the respondent USD 9000. Now dissatisfied by the decision of the 1st appellate court, the appellant has preferred this appeal.

The appeal was argued in writing whereby both parties were represented. The appellant was represented by Mr. George Raphael while the respondent was represented by Mr. Mbaraka Katela, both learned advocates.

While composing the judgement, this court discovered that there was a legal issue that was not addressed by the parties directly in their submissions. This issue was in regard to whether admission of electronic evidence by primary court was proper and in accordance with the law. This court refrained from composing the judgement and instead, on the date fixed for judgement, the proceedings were re-opened and the parties invited to address the court on the legal issue vide written submissions. This was for purposes of affording the parties their constitutional right. See, Court of Appeal decision in **Alisum Properties Limited vs. Salum Selenda Msangi** (Civil Appeal 39 of 2018) [2022] TZCA 389 (24 June 2022) TANZLII; **Abbas Sherally and Another vs. Abdul S. H. M. Fazal boy**, Civil Application No. 33 of 2002 (unreported); **Charles Christopher Humprey Kombe vs. Kinondoni Municipal Council** (Civil Appeal No. 81 of 2017) [2020] TZCA 1932 (12 June 2020) and; **Said Mohamed Said vs. Muhusin Amir & Another** (Civil Appeal No. 110 of 2020) [2022] TZCA 208 (25 April 2022)

A schedule in filing written submissions to that effect were thus fixed. However, none of the parties filed their submissions before this court as ordered. In fact, when the matter came for necessary orders, neither of them appeared before this court. This serves as clear indication that they abandoned their right to be heard on the issue raised. In that regard, this court will hereby resolve the legal issue raised.

Upon observing the records of the two lower courts, it came to my attention that during the trial in the primary court, the respondent tendered three exhibits, which qualified as electronic evidence. The exhibits were; a remittance transfer combined disclosure document issued by the first bank of Pennsylvania. This was admitted as Exhibit DW1; WhatsApp texts and photographs shared via WhatsApp, which were admitted as exhibits DW2, DW3 and DW4.

It appears on record that initially, upon composing its judgement, the trial court came into awareness of the nature of the evidence it had received. The trial magistrate ordered the parties to address her on whether being a primary court, it had jurisdiction to admit electronic evidence. After receiving the parties' submissions, the trial court held that it lacked such jurisdiction. The matter was dismissed and the parties advised to file the case in the district court.

The respondent filed Civil Appeal No. 06 of 2022 in the district court. In this appeal, the appellate Magistrate found the trial magistrate

erred on ground that there was surviving evidence on which she could rely on to make her decision. The matter was thus remitted to the trial court for judgement to be drafted.

In my view, however, the appellate Magistrate erred in his decision. No doubt as I have indicated, the mostly relied evidence before the trial court was electronic in nature. The admissibility of electronic evidence is articulated under **Section 64A of the Evidence Act**, [Cap 6 R.E. 2022] and **Section 18 of the Electronic Transactions Act** [Cap 442 RE 2022]. The former provision refers to the later as providing governing rules on admissibility of electronic evidence. The provision states:

Section 64A:

- “(1) In any proceedings, electronic evidence shall be admissible.
- (2) The admissibility and weight of electronic evidence shall be determined in the manner prescribed under section 18 of the Electronic Transactions Act.
- (3) For the purpose of this section, "electronic evidence" means any data or information stored in electronic form or electronic media or retrieved from a computer system, which can be presented as evidence."

It is settled that the **Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations** GN No. 22 of 1964 are the governing rules of evidence in primary courts. Thus, the Evidence Act is inapplicable in primary courts. The Electronic Transactions Act, which is paired to

the Evidence Act is therefore also inapplicable in primary courts. No amendments were made to accommodate the said provision in primary courts. In the foregoing, the primary court lacks the jurisdiction to admit electronic evidence as it is not equipped with the capacity to access rules of admission of electronic evidence.

I find the fact that there was some other piece of evidence supporting the claims being irrelevant given the fact that the parties submitted electronic evidence. The 1st appellate court's instruction for the trial magistrate to compose its judgement in abandonment of the electronic evidence tendered was not only an intervention of her independence, but also unlawful. This is in the sense that doing so would amount to dragging the trial magistrate into ignoring the other part of the parties' evidence, which is contrary to the rules of drafting judgements requiring all admitted evidence to be considered.

Further, the appellate court erred in finding that there was sufficient evidence for the trial magistrate to rely on. That was not its place considering that the matter was not determined on merits. The act of requiring the trial magistrate to compose judgement resulted to a judgement based on electronic evidence. The same has yielded questions on whether rules of admissibility of such evidence were observed.

Considering my observations as hereinabove, I find that the trial court lacked jurisdiction to determine the matter. In that respect, I hereby nullify the proceedings of both lower courts and quash the

judgements thereof. I further set aside each order emanating from the said proceedings.

The parties are at liberty to file a fresh cause in the relevant district court if they so wish. Considering that the error was occasioned by the lower courts, I make no orders for costs.

Dated and delivered at Moshi on this 12th day of June, 2024.



X *L.M. Mongella*

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA