

TANZANIA / JUDGMENT

20090611 TZHC Mwanza

COURT
TZHCDECIDED
11 June 2009

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IN THE HIGH COURT OF TANZANIA ATMWA-NZA PRIMARY COURT CIVIL APPEAL NO. 62 OF 2007 (Arising from the District Court of Sengerema Civil Appl . . No. 14 of 2007 Originating from Kazunzu Primary Court Civil Case No. 7 of 2007) BETWEEN BONIFACE MAKORO .~ APPLICANT Versus SEMENI PETRO
•.....•.....•..• RESPONDENT

JUDGMENT

NYANGARIKA, J. The respondent sue the appellant at Kazunzu primary court to be handed over his Outboard Engine HPLS, No 153661 which was retained for debt of Tshs. 1,222,000/=. The primary court held that the said engine will only be handed over to the respondent on a condition precedent if he paid the debt. . The respondent was dissatisfied by the decision of the primary court and therefore appealed to the District court, (herein after to be referred to as the First Appellate Court). The First Appellate Court reversed the decision of the primary court and instead ordered that the outboard engine be restored to the respondent as the debt of 1,222,000/= was not proved. It is from the decision of the First Appellate Court that the appellant has now appealed to this court. 1 When the appeal was called for hearing, both parties appeared in person and had nothing to say apart from the Memorandum of Appeal and the reply thereof. There are four grounds of appeal which can be summarized to only one ground, to wit. "The First Appellate Court erred in law and fact by reversing the decision of the primary court and making an order that the outboard engine be restored to the respondent on the ground that the claim of Tshs. 1,222,000/= was not proved." I have carefully studied the primary court proceeding and judgment which was being appealed against in the First Appellate Court, and having carefully gone through the evidence on record, I am satisfied that the evidence on record, can dispose this appeal. According to the First Appellate Court finding, the proper approach for the appellant was to sue Madrid Company for the claim of Tshs. 1,222,000/= rather than taking possession of the respondent's property. The First Appellate Court has also made references to Madrid Company at length in its judgment. However, with respect to the First Appellate Court Magistrate, there was no proof led by either of the parties before the Primary Court that "Madrid" was a real company or business name duly registered under the laws of the land. 2 Whoever alleges a fact, unless it is unequivocally admitted by the adversary, has to prove it albeit on the balance of probability (See the case of Wolfango v. Tito Da Costa, ZNZ, Civil Appeal No. 102/2002 (unreported) (CA). . It is a trite Principle that the court cannot take for granted the existence of certain facts on the basis

of testimonies from witnesses without proof as the First Appellate Court attempted to. do in this case. But according to Pw1 (i.e. SM1), Pw2 (i.e. SM1) Dw1 (I.e. SU1), Dw2 (i.e. Su2) and Dw3 (i.e. SU3) there was no dispute that the respondent was a member in the said Madrid camp involved in the fishing business and that the appellant sold fish to Madrid . Camp worth Tshs. i,222,000/=.

There is also no dispute that the appellant has not been paid his debt of Tshs. 1,222,000/= for the fish he has sold to Madrid Camp. There is also no dispute that the out boat engine was retained by the appellant as security for payment of his debt. The records of the Primary Court show that there was no evidence led by the respondent to show that he was the owner of the out boat engine in his personal capacity. In my view, the respondent was supported at least to tender a receipt or any other kind of evidence available to show that he owned the out boat engine personally, otherwise, it may appear that the out boat engine was used by all members of Madrid Camp as interested parties with powers to use it as they may think fit in the fishing business. 3

The misdirection of evidence by the First Appellate Court is clearly manifested in the muddled of the assumption of the existence of the ... Madrid Company and ownership of the out boat engine by the respondent in his personal capacity without clear evidence. . . . From the foregoing reasons, the appeal is allowed with costs.. The judgment of the First Appellate Court is hereby set - aside and instead the judgment of the primary court of Kazunzu is restored. K. M. Nyangarika

JUDGE Date: 11/6/2009 . Coram: Hon. K. M. Nyangarika, J. Appellant: Present in person
Respondent: Absent B/C Rose Order: Judgment read today in the present of the appellant in person but in the absence of the respondent although aware of the date of delivery of the Judgment. Right, time and procedure of appeal full explained. ~C_ K. M. Nyangarika JUDGE 4

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