

TANZANIA / JUDGMENT

JUDGMENT OF GIDION MWAKASEGE Final

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18 March 2025

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISRTY AT MBEYA CIVIL APPEAL NO. 12233 OF 2024 CASE REFERENCE NO.
202405261000012233 (Originating from Civil Appeal No. 6 of 2023 in the district court of Rungwe
in original Civil Case No. 2 of 2023 of the primary court of Rungwe district at Tukuyu-Urban)
GIDION MWAKASEGE APPELLANT VERSUS ZENA JOHN
KILIMA RESPONDENT

JUDGMENT

6th February & 18th March 2025 NONGWA, J. In the primary court of Rungwe district at Tukuyu-Urban, the respondent Zena John Kilima successfully sued the appellant Gidion Mwakasege for refund of Tzs 10,000,000/= and other ancillary reliefs. The appellant's appeal to the district court of Rungwe was dismissed. Briefly from the records, the parties entered into the contract of sale of land located at the hamlet and village of Bulongwe within Rungwe district for Tzs 20,000,000/= and it was paid in full on the date of execution of the agreement. Few days after the agreement, the respondent became aware that the land had conflict between the 1 appellant and one Peter Solomon Mwanjalila. He inquired with the appellant who agreed to return the purchase amount and Tzs 10,000,000/= was refunded. The appellant failed to refund the remaining money which prompted the respondent to sue him in the primary court vide Civil Case No. 2 of 2023. At the conclusion of hearing the court decreed that the appellant to pay the remaining purchase price Tzs 10,000,000/=, compensation at the tune of Tzs 2,500,000/=, interest and costs of the suit. Aggrieved the appellant unsuccessfully filed Civil Appeal No. 6 of 2023 in the district court of Rungwe which was dismissed for being devoid of merits. Feeling justice not yet done to him, has filed the petition of appeal after seeking extension of time on the following grounds; one, that the first appellate and trial court erred both in law and in fact to determine the case without having jurisdiction. Two, that the first appellate and trial court erred both in law and in fact to determine the case which was res subjudice. Three, that the first appellate and trial court erred both in law and in fact for failure to answer issues in affirmative. Four, that the first appellate and trial court erred both in law and in fact for failure to consider that the disposition was not nullified. Five, that the first appellate and trial court erred both in law and in fact to decide in favour 2 the respondent while the case was not proved on balance of probabilities hence the judgment was

biased against the appellant. And six, that the first appellate and trial court erred both in law and in fact for relying on uncertified copies of documents. He therefore prays the appeals to be allowed and judgment together with the decree of both first appellate and trial court be nullified and set aside. When the appeal came for hearing, the appellant appeared in person without legal representation whereas the respondent was represented by Mr. Luka Ngogo, learned counsel. By consensus it was agreed the appeal be disposed by filing written submission. In his written submission, the appellant dropped ground three, five and six. In addressing the first ground of appeal, the appellant submitted that the suit in the primary court was on ownership of the land. That once there is dispute relating to ownership of the land, normal civil courts cease to have jurisdiction. He referred the court to the case of Masoudi Shilangonga vs Kambangwa Rubengwa, PC Civil Appeal No. 27 of 2020 [2022] TZHC 15229 (14 December 2022; TanzLII) in support of the argument. Submitting in second ground that the matter was res subjudice, the appellant stated that when the matter was before the primary court there was another pending matter in the District Land and Housing Tribunal for Rungwe (the DLHT) in which the matter in issue was directly and substantially between the same parties. He referred to exhibit SMK 9 which proves there was a matter between the parties and on the same subject matter in the DLHT. The appellant reproduced section 8 of the Civil Procedure Code, Cap 33 (the CPC) and stated that the provision is intended to avoid multiplicity of cases, conflicting decision and inconvenience to the parties. He supported the argument with the case of Philip Kimbwereza vs International Commercial Bank (Tanzania) Ltd and 2 Others, Civil Case No. 19 of 2020 [2022] TZHC 14916 (8 March 2022; TanzLII) in which among others the court stated the doctrine of res subjudice intends to avoid not only multiplicity of proceedings but also possibility of producing conflicting decisions. Adverting to ground four, the appellant submitted that the disposition of the land was not nullified by the primary court though it ordered to reimburse the respondent purchase amount plus other reliefs. He argued that under section 3 and 4 of the Land Disputes Courts Act, Cap 216 (the LDCA), the DLHT has powers to determine disposition of right of occupancy, find out if the vendor had good title to pass and to declare if the same was valid or not. That as the sale agreement was not nullified, the same remain valid in the eyes of the law. He prayed the appeal be allowed with costs. In reply submission, Mr. Ngogo started his response with matter pertaining to misrepresentation and rescission of contracts as per the provision of section 18 and 19 of the Law of Contract Act, Cap 345. He then travelled to testimony of witnesses and some exhibits before he concluded that the sale agreement was voidable, the reason the appellant refunded part of the purchase price. Submitting in reply to issue of jurisdiction, Mr. Ngogo stated the dispute as rightly put by the appellate court was not for ownership of the land but refund of the paid money after the rescission of the sale agreement. This, he said, was a normal civil suit as the respondent did not claim the land. He contended that the appellant refunded the respondent Tzs 10,000,000 and made arrangement on payment of the remaining amount. That after the rescission of the contract and part refund, the matter remained a normal case for repayment of money to be enforced in normal civil court. On submission that the matter was res subjudice, counsel replied that section 8 of the CPC is not applicable on matters originating from primary court. He said, even assuming the matter was res subjudice, 5 under rule 12 of G.N 320 of 1964, the way forward is to stay the suit. On matter pending before the DLHT. Further that the matter

in the primary court was first to be filed, that is in the primary court was filed on 13/1/2023 while that of the tribunal on 30/1/2023. He added reliefs claimed in the two suits were not the same for applicability of the doctrine of res subjudice. Further that the suit was not as between the parties herein. Resisting ground four that the sale agreement was not nullified, counsel submitted that issue did not arise as the agreement was rescinded by mutual agreement of parties when the appellant undertook to refund the purchase money. Finally, counsel prayed the appeal be dismissed with costs. Having considered rival submission and record of appeal, I will dispose the appeal in the manner it was addressed by the parties. Starting with ground one on jurisdiction of the court over the matter. Jurisdiction of a court is a creature of statute and as such, it cannot be assumed or exercised on the basis of the likes and dislikes of the parties or even the court. That is why the Court has in several instances emphasized that, the question of jurisdiction is fundamental in court proceedings and can be raised at any stage of adjudication and it can as well be raised suo motu. As such, in adjudication the initial question to be determined is whether or not the court or tribunal is vested with requisite jurisdiction. I wish to begin by emphasizing that jurisdiction of the court is crucial for it to try a case. In *Shyam Thanki and Others vs New Palace Hotel* [1971]1 EA 199 the court stated; 'All the courts in Tanzania are created by statute and their jurisdiction is purely statutory.' The term jurisdiction is defined in *Halsbury's Laws of England*, Vol. 10, para. 314 to mean: 'The authority which a Court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision. The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim, or as to the area which jurisdiction is extended, or it may partake of both these characteristics. Emphasizing on the importance of jurisdiction of the court to determine the matter, the Court in case of *CRDB Bank PLC vs Lusekelo Mwakapala*, Civil Appeal No. 143 of 2021 [2023] TZCA 17637 (22 September 2023, TanzLII), held that; 7 'It is worth noting that, the question of jurisdiction is crucial and must be determined by the court/tribunal at the earliest opportunity. Jurisdiction is everything without which a court has no power to determine the dispute before it. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings. Generally, a court is barred to entertain a matter in which it has no jurisdiction.' When a question arises whether the court has jurisdiction over the matter, two things have to be looked upon before deciding whether the court is clothed with jurisdiction. One, look at the pleaded facts that may constitute a cause of action. Two, look at the reliefs claimed and see as to whether the court has power to grant them and whether they correlate with the cause of action. In this appeal the appellant has submitted that the matter was on ownership of the land which is the domain of the land courts. Mr. Ngogo on behalf of the respondent has different view. He sees the case being for repayment of the money. This takes me to the pleading filed by the respondent which is form No. 2 of G.N. 943 of 2020 and I reproduce; MAELEZO YANAYOJENGA DAAWA;

1. Kwamba; niliuziwa shamba na mdaiwa lililopo katika kitongoji cha Bulongwe kijiji Bulongwe cha Kata ya Bulyaga 8 wilaya ya Rungwe kwa thamani ya shilingi 20,000,000/= (shilingi miiioni ishirini za kitanzania) tarehe 15/9/2022 na nilimkabidhi fedha zote. Nakala ya mkataba naambatanisha kwa alama P1 na naomba iwe sehemu ya Ushahidi katika shauri hili.
2. Kwamba; tarehe 18/9/2022 nilikuja kugundua kuwa shamba hilo lina mgogoro ndipo nilipomfuata mdaiwa ambapo alikubali kunirudishia fedha zangu.
3. Kwamba; mdaiwa aliweza kunirudishia shilingi 10,000,000/= tarehe 21/9/2022 na aliahidi kunimalizia fedha iliyobaki baada ya mwezi mmoja nakala ya makubaliano hayo nayaambatanisha kwa alama P2, naomba yawe sehemu ya Ushahidi wa shauri hili.
4. Kwamba; hadi sasa mdaiwa hajanirudishia fedha hizo kitendo ambacho kinaniongezea hasara hazizalishi na mimi naendelea kulipia riba kwa sababu nilikopa fedha hizo. NAFUU NAZOOMBA
1. Mdai anilipe fedha yangu ya msingi shilingi 10,000,000/ =
2. Anilipe fidia ya jumla ya shilingi 3,000,000/=
3. Anilipe fidia ya hasara ya 5% kila mwezi ya fedha nazomdai kuanzia tarehe ya hukumu hadi tarehe atakayonilipa fedha zangu.
4. Gharama za kesi. 9
5. Nafuu nyingine Mahakama itavyoona zinafaa From the above laid claim and reliefs claimed, it is clear to me that the suit was not about ownership of the land rather refund of the money paid to the appellant. Reference to the executed land sale agreement is only a foundation of the claim. The land dispute arises only when two parties have battle over ownership of the land, there I agree with the appellant only courts established under the Land Act Cap 113, Village Land Act Cap 114 and the LDCA have exclusive jurisdiction to resolve. What a land dispute is, section 3(1) of the Land Disputes Courts Act, provides; '3(1) Subject to section 167 of the Land Act and section 62 of the Village Land Act, every dispute or complaint concerning land shall be instituted in the Court having jurisdiction to determine land disputes in a given area.' The above, is clear that only dispute concerning land is resolved by the land courts/tribunals. At hand things are different, having executed the land sale agreement, the respondent became aware that he was swindled that it had no conflict, this necessitated her to approach the appellant for return of the money paid. The appellant agreed and refunded Tzs 10,000,000/=, the remaining balance was not paid which 10 forced the respondent to claim through court processes. Further the respondent was not claiming possession of the sold land. On those circumstances as appearing in the quoted claim, the issue of land ownership did not arise. I therefore dismiss the first ground of appeal. The second ground is on res subjudice, the appellant submitted that there was also a land dispute in the DLHT. I agree with Mr. Ngogo that section 8 of the CPC was cited out of mistake. The matter having originated in primary court the proper law was rule 12 of the

Magistrate's Courts (Civil Procedure in Primary Courts) Rules, it provides; 'Where in any proceeding before a court, the court is satisfied that any issue between the parties is also an issue in another proceeding previously commenced between the same parties in the same court or any other court of competent jurisdiction in Tanzania, the court shall stay the proceeding until the previous proceeding has been decided.' The doctrine of res sub judice prevents a court or tribunal from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it. 11 I have considered the records of appeal, specifically Form No. 2 reproduced partly when discussing ground one and exhibit SMK 9 which is application in the DLHT and found that the issue of res subjudice does not arise. One, parties are not the same, in the DLHT the case has been filed by one Peter Solomoni Mwanjalila against Gidion Mwakasege, Zena Pansasa and Gidion Mwakasege. Two, subject matter is ownership of 3.5 acres whereas in the instance case was for payment of money. Three, per exhibit SMK9 the case in the primary court came earlier before that of the DLHT. With this explanation, the first appellate court correctly ruled that the matter was not res subjudice. Last is the issue pertaining to sale agreement. This will not detain me much. I agree with the reasoning of the first appellate court that dispute in the primary court was not on sale agreement. Indeed, the appellant did not dispute that he refunded TZS 10,000,000/=. The dispute was on the remaining balance of Tzs 10,000,000/= and other ancillary reliefs. As there was no discussion on the legality of the sale agreement, I agree with Mr. Ngogo that it was rescinded by mutual agreement of the parties when the appellant agreed and refunded partly the purchase amount. This ground is also dismissed. 12 In the premises, this appeal is devoid of merit and I hereby dismiss it with costs. V.M NONGWA JUDGE 18/3/2025 Dated and Delivered at Mbeya this 18th March 2025 in presence of Mr. Nikson Kiliwa Advocate holding brief for Mr. Luka Ngogo Advocate for the Respondent. V.M NONGWA JUDGE 13

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Prepared on 12 October 2026 · Esheria