

TANZANIA / JUDGMENT

Majuto

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA TABORA SUB REGISTRY AT
TABORA PC CIVIL APPEAL NO. 20 OF 2023 (Arising from the decision of the District Court of
Tabora in Civil Appeal No. 24 of 2022, Original Civil Case No. 112 of 2022 before Tabora Urban
Primary Court) MAJUTO MAULID SHABANI..... APPELLANT VERSUS FATEH
DEWJI REMTULLAH..... RESPONDENT

JUDGEMENT

Last order: 05/03/2024 Judgement date: 06/06/2024 MANGO, J The matter was initiated by the Respondent, Fateh Dewji Remtullah who instituted Civil Case No. 112 of 2022 before Tabora Urban Primary Court claiming payment of Tshs. 4,402,000/- from the Appellant. According to the Respondent, the amount include Tshs. 2,400,000/- as rent due; Tshs 1,200,000/- as payments for the scale; Tshs. 702,000/- payments made to SIDO and Tshs. 100,000/- as unpaid debt. The trial Court ruled in favour of the Respondent. Aggrieved by the decision of the trial Court the Appellant unsuccessfully appealed to the District Court of Tabora via Civil Appeal No. 06 of 2022. He has now approached this Court for a second appeal armed with the following grounds: - i

1. That the first appellate Court erred in law and in fact by upholding the judgement of the lower Court which decision was based on merely records of the Ward Executive officer and not the decision of the Ward tribunals
2. That the first Appellant Court erred in law and in fact by upholding the decision of the lower Court within which failed to litigate the issue of Tshs. 4, 402,000/- including 702,000/- SIDO, Tshs 1,200,000/- scale and Tshs. 100,000/- which were not transactions forming the same agreement in the Mkataba wa kupangisha Mashine ya Kusaga eneo la la sido kiloleni Banda No. 1
3. That the first Appellate Court erred in law and in fact by upholding the decision of the lower Court without considering the fact that the trial lower Court had ignored to admit the evidence and witness adduced by the Appellant

4. That the first Appellate Court erred in law and in fact to ignore the facts that parties entered oral agreement within which the appellant had paid the Respondent the sum of 3,650,000/- of the said 4,500,000/- as sale agreement or payment of buying a milling machine located at Mapambano Ward dated 5/06/2020
5. That the first Appellate Court erred in law and in fact by not considering the fact that parties had entered the two contracts one namely a contract that the Appellant hired the machine from the Respondent on 1/01/2013 which ended by 5/06/2020. And a second contract on the sale of machine dated 5/6/2020 within which the milling machine was presented to the ownership of the Appellant by sale agreement or by 2 payment of Tshs. 4,500,000/- dated 25/12/2020 as annexure DI and MN
6. That the first appellate Court erred in law and in fact to consider the records of the Ward Executive officer which were neither final decision nor Order of the Ward Tribunal
7. That the first appellate Court erred in law and in fact to uphold the decision of the lower Court on merits of the Respondent without considering the fact that sum of Tshs 4,402,000/- ordered by the Court were not part of the oral agreement of payment or buying a milling machine On 5th March 2024 when the matter was heard, the Appellant prosecuted the appeal in person while the Respondent was represented by Advocate Flavia Francis. On the first ground of appeal, the Appellant challenged the District Court for affirming the decision of the trial Court on the reason that, the trial Court did not consider evidence produced by the Appellant. According to him, the trial Court considered proceedings before the Ward Executive Officer and presumed that the Appellant conceded before the Ward Executive Officer that, the machine belongs to the Respondent. He argued that, the presumption is not correct, the machine belongs to him following execution of oral and written agreements to purchase the machine between the Appellant and the Respondent On the second ground of appeal, he argued that, the Respondent did not explain where the claims of Tshs 4, 402,000/-, Tshs. 702,000/-, Tshs 3 1,200,000/- and Tshs. 100,000/- originate. He argued further that, the claim is not borne by their agreement for hire of a milling machine. On the third ground of appeal, he submitted that, the Court refused to admit his documents that is, payment slips (hand written acknowledgement of payments) which establish that, he purchased the machine from the Respondent. The Appellant prayed to adopt the contents of his fourth, fifth, sixth and 7th grounds of appeal for consideration by the Court. In her submission in reply, Advocate Francis challenged merits of the first and sixth grounds of appeal. She argued that, the issue raised therein is not borne by record. Record establishes that there was no decision by Ward Executive Officer nor were there any case before the ward tribunal that was considered by the court On the second ground of appeal, the learned advocate referred the Court to the 3rd page of proceedings of the trial court. She then submitted that, the referred page contains explanations as to where the disputed amount arose. According to the proceedings of the lower Court, TZS 2,400,000 was costs for hiring the machine; TZS 702000/- SIDO payments; TZS 1,200,000/- Value of the Scale costs; and TZS 100,000/- was the amount borrowed by the Appellant from the Respondent. On the third ground of appeal, the

learned advocate argued that, the same is not borne by record. She explained that, proceedings of the trial Court does not show the alleged Courts refusal to admit evidence tendered by the 4 Appellant or any of his witnesses. She concluded that, this ground of appeal is unfound. On the fourth ground of appeal, she argued that, the alleged payments by the Appellant was not proved that is why the Court could not have considered them in its judgement. On the fifth and seventh ground of appeal, she submitted that, the existence of two contracts was not an issue that arose before the trial court. The main cause of the dispute between the Appellant and the Respondent is the Respondent's indebtedness which resulted to his failure to meet his contractual obligations. The Appellant had no rejoinder, he merely reiterated his submission in chief. Briefly, Court record establishes that the Respondent owned milling machines. The machines were installed in a rented building. On 1st January 2013, the respondent hired the machines at the monthly rate of Tshs. 100,000/-. Their relationship proceeded well until June 2019 when their contractual terms had to change due to rent charges from SIDO. The Appellant alleges that, there was a dispute on ownership of the rented building between the SIDO and the Municipal Council. Due to the said dispute, they were not paying rent. In June 2019 the dispute was resolved in favour of SIDO and he was ordered to pay a monthly rent of Tshs. 108,000/-. Thereafter their contractual terms had to change to accommodate rent charges. According to the Respondent, they agreed that the Appellant will pay rent charges to SIDO which was Tshs. 108,000/- per month and Tshs. 100,000/- monthly as costs for machine hire to the 5 Respondent. Unfortunately, the Appellant paid rent up to December 2019 and defaulted to pay costs for machine hire from July 2019 to the time when the suit was filed before the primary Court. On his part the Appellant does not dispute that he hired the machines from the Respondent. He however alleges that, in the year 2020 he entered into an agreement to purchase the machines from the Respondent. According to him, the agreement was made orally and they agreed the sale price to be Tshs. 4,500,000/-. He paid the amount in instalments and on 25th December 2020 he paid Tshs. 1,000,000/- as the last instalment. In total he paid Tshs. 3,650,000/- out of Tshs. 4,500,000/-. Having considered the rival submissions by the parties and Court record, I can now determine the appeal. I find the first, third and sixth grounds of appeal to be meritless because they are not borne by Court record. Court record establishes that, the Primary Court decision based on evidence tendered before it and not what transpired before the Ward Executive Officers Office. In respect of the third ground of appeal which concerns the alleged refusal by the trial Court to admit the Appellants evidence, Court record indicates that all documentary evidence tendered by the Appellant were admitted and marked as exhibit DI, D2, D3, D4, D5 and D6. On the second ground of appeal, I have noted that the machine hire agreement between the Appellant and the Respondent did not include rent payments to SIDO as correctly highlighted by the Appellant. I also noted that, aside from the Tshs. 100,000/- which was borrowed by the Appellant 6 the remaining amount were not proved by the Respondent on the required standards. I understand that this being the second Appellate Court is barred from interfering with concurrent factual findings of the two courts which determined this matter. However, the principle allows such interference where the findings were made

based on misdirection or misapprehension of evidence or violation of some legal principle(s) and has occasioned miscarriage of justice. See the decision of the Court of Appeal of Tanzania in the case of Neli Manase Foya versus Damian Mlinga (Civil Appeal 30 of

2004) [2004] TZCA 39 (27 October 2004). In the appeal at hand, findings of the two courts were made contrary to a well-established principle that, whoever allege must prove. See section 110 of evidence Act, [Cap. 6 R.E 2019]. The Respondent alleged before the trial Court that he claims Tshs 1,200,000/- as the value of his scale. He alleged further that, the scale was sold after the Appellant's failure to pay a loan advanced to him by Tanzania Postal Bank. Unfortunately, he did not tender any evidence to prove the alleged value of the scale. He did not tender any evidence that proves the scale to his property and how did he acquire the same. Although the issue of ownership of the scale was not disputed by the Appellant, evidence as to when the scale acquired and the price at which it was purchased would have assisted the Court in ascertaining the value of the scale. The only available evidence is the price at which the scale was sold as contained in exhibit P5. According to this document, the market value of the scale by 21st June 2021 was Tshs. 400,000/- only. Thus, the 7 established value of the scale is Tshs. 400,000/- only and not 1,200,000/- as alleged by the Respondent. The claim for Tshs. 2,400,000/- as costs for machine hire moves this Court to the fifth ground of appeal which concerns the alleged agreement for sale of the machines between the Appellant and the Respondent. Court record indicates that, there is no dispute that the Appellant and the Respondent had two agreements. First an agreement for hire of the machines which was executed on 1st January 2013 and oral agreement for sale of the machine to the Respondent which its date of commencement is not clear. Despite failure to establish the date of commencement of the oral agreement to purchase the machine, the first instalment of the purchase price for the machine was received by the Respondent on 5th June 2020. According to the Respondent the amount paid was merely for holding the machines to prevent him from selling it to other persons. Ordinarily such payments are counted as part of the purchase price. Moreover, exhibit D2 indicates clearly that the Respondent received Tshs 500,000/- as primary payment for the purchase of the machine. The document indicates further that, other amounts which are not specified will be paid between 15th June 2020 and 20th June 2020, and the last instalment will be paid on 5th July 2020. Thus, the existence of oral agreement for sale of the machine to the Appellant cannot be ignored. The Respondent alleges that, the Appellant after he paid Tshs. 500,000/-, never paid any other amount for purchasing the machine up to July 2021. Thus, their agreement for purchase of the machines was terminated. The Appellant alleges that he paid Tshs. 3,650,000/- out of 4,500,000/-, of the agreed purchase price for the machines. 8 It should be noted that, it is not easy to ascertain terms and conditions of oral agreements which was executed in absence of independent witnesses. Enforceability of such contracts depends solely on the voluntariness of the parties to the agreement to observe the terms and conditions agreed upon. However, conduct of parties may assist in establishing some terms and conditions of an oral agreement. I would have determined the validity of the sale agreement and payments made by the Appellant in his efforts to buy the machines

from the Respondent but, I noted that the issue was raised during defence case as a counter claim. The Respondent, who was the plaintiff before the trial Court had already closed his case thus, he was not heard on the Appellant's claim. The remaining relevant question is whether the Respondent established his claim of Tshs. 2,400,000/- from the Appellant as costs for machine hire. Evidence on record establishes that the Appellant stopped paying costs of machine hire sometimes 2019. According to the Respondent, he had not received such payments from July 2019 to July 2021. It is clear from record that, the relationship between the Appellant and Respondent changed on 5th June 2020 after the Respondent received the first instalment for the purchase of the machine. That means, from that date the Appellant was no longer a tenant of the Respondent but a purchaser of the Respondent's machines. In such circumstances, the Respondent ought to have claimed payments for machine hire for the period from July 2019 to April 2020 which is only ten months and makes the amount due to be Tshs. 1,000,000/-. Despite that, it was the Respondent's testimony before the trial Court that on 19th June 2020 he received Tshs. 400,000/- from the Appellant as machine hire fee for four months. Although the amount is alleged by the Appellant to be part of payment made for purchase of the machine, if the said Tshs. 400,000/- will be considered as part of machine hire fee, it means, the Appellant did not pay machine hire fees for six months only and the amount due is TZS 600,000/-. In short, the Respondent managed to prove that he claims from the Appellant Tshs. 100,000/- as unpaid debt, Tshs. 600,000/- as machine hire fees for six months from November 2019 to April 2020, Tshs. 400,000/- as the value of the scale which makes the total of Tshs. 1,100,000/- instead of Tshs 4,402,000/-. I am aware of the undisputed payment of Tshs. 500,000/- made by the Appellant in favour of the Respondent for the purchase of the machine. However, as both parties agree the amount was paid for the purchase of the machines, the same cannot be counted otherwise in this matter. As I have noted in this judgement, the Appellant raised the existence of the oral agreement to purchase the machine during defence thus the Court failed to afford the Respondent with the right to be heard. In that regard, I hereby employ revisionary powers vested in this court to order the Appellant's counter claim regarding payments he made in execution of an oral agreement to purchase the machine, and validity of the said agreement be determined afresh by a competent Court at the option of parties. For those reasons, the appeal is hereby partially allowed. Dated at Tabora this 6th day of June 2024 Z.D.MANGO JUDGE 11

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