

TANZANIA / JUDGMENT

MICHAEL SAROTA NYAMONGE VS CHRISTINA MASSAWE Draft Judgment

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13 June 2024

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IN THE HIGH COURT OF TANZANIA DODOMA SUB REGISTRY AT DODOMA (PC) CIVIL APPEAL
NO. 21817 OF 2024 (Arising from Civil Appeal No. 97 of 2023 of the District Court of Dodoma
(Hon. Kishenyi, PRM) from Civil Case No 206 of 2020 of the Dodoma Urban Primary Court (Hon.
Mwakaselo, PM) BETWEEN MICHAEL SAROJA
NYAMONGE.....APPELLANT VERSUS CHRISTINA MASSAWE
.....RESPONDENT

JUDGMENT

Date of last order: 18/11/ 2024 Date of Judgment: 17/02/ 2025 LONGOPA, J.: The short background of the matter is as follows: It was stated that Civil Case No. 206 of 2020 before Dodoma Urban Primary Court involved one Honest Dionis Massawe sued the appellant for TZS 13,000,000/= which was unpaid sale price of a lorry. The appellant had paid TZS 26,000,000/= out of TZS 39,000,000/= agreed purchase price. The Primary Court entered judgment in favour of Mr. Honest Dionis Massawe 1|Page won the case and ordered the appellant to pay the decretal amount. No appeal was preferred to challenge the decision. On the other hand, the appellant instituted a Civil Case No 22 of 2023 claiming from the administratrix of the estate of the late Honest Dionis Massawe a total of TZS 43,695,000/= arising from expenses the appellant /plaintiff as a result of defective lorry sold to him by the deceased. At this juncture, the administratrix of the estate of Honest Dionis Massawe applied for execution before the Dodoma Urban Primary Court of the Decree in Civil Case No 206 of 2020 whereas the appellant objected the same on ground that there was pendency of Civil Case No. 22 of 2023 before the District Court of Dodoma. The Dodoma Urban Primary Court ordered the execution to proceed thus such order made the appellant dissatisfied. He preferred an appeal to the District Court of Dodoma which dismissed the appeal as the two cases were distinct and unrelated. It further ordered execution to proceed. It is such decision of the first 2|Page appellate Court, the District Court of Dodoma dated 13th June 2024 that is challenged before this Court. On 3rd September 2024, the appellant being aggrieved by the decision of the District Court for Dodoma as the first appellate court instituted an appeal against the respondent on the following grounds of appeal, namely:

1. That the Hon Principal Resident Magistrate erred in law and on facts in dismissing the appeal on the ground that the said appeal pending at the same court before Hon. Kishenyi, PRM bore no relation to civil Case No. 22 of 2023 between the same parties, when they are related.
2. That the PRM erred in law and on facts by his failure to evaluate the evidence in Civil Case No. 206 of 2020 and Civil case No. 22 of 2023, thus reaching the wrong conclusion. 3|Page On 18th November 2024, this Court ordered that the matter be disposed of by way of written submissions as per request by the parties and both parties complied with the submission orders. In the appellant's written submission, it can be revealed that the appellant reiterated that this appeal arises from Civil Appeal No. 97 of 2023 of the District Court Dodoma, which in turn arose from Civil Case No. 206 of 2020 of the Dodoma Urban Primary Court. The appellant drew the attention of this Court that in Civil Case No. 206 of 2020 of the Dodoma Urban primary Court, the last order is dated Feb 2021, but none of the litigants was present, and no judgment was read to the litigants. When the litigants reached settlement consent, the parties simply went to the Court and notified and the Court recorded the settlement consent of the parties. It was at this juncture that the Honourable Primary Court simply informed the parties that if the settlement consent will not be implemented the parties should go back to 4|Page the Primary Court. The appellant stated that in case this Court is interested to peruse the judgment, it would find out the judgment was not composed. The appellant further stated that in Civil Appeal No. 97 of 2023, though Christina Massawe appeared as the Administratrix of the estate of the late Honest Dionis Massawe, despite requests, the appellant had not been informed of the date of the death of the said Honest Dionis Massawe, and neither the appellant was shown any Letters of Administration granted to Christina, from Dodoma Urban Primary Court in Civil case No. 206 of 2020, Civil Appeal No. 97 of 2023 of the District Court of Dodoma, and even in the instant present appeal. According to the appellant, this matter is important, as it would determine the fate of all these cases referred to herein. It was the appellant's prayer that this honourable court be pleased to ascertain the date of death of the Late Honest Dionis Massawe in relation to Dodoma Urban Primary Court Civil Case No. 206 of 2020 and the status of the Administratrix in both cases and present appeal. 5|Page With regard to merits of the instant appeal, the appellant stated that in Civil Appeal No. 97 of 2023 arising from Dodoma primary Urban Court Civil Case No. 206 of 2020, the appellant prayed for stay of the case as there was, pending before the same court but a different Magistrate, Civil Case No. 22 of 2023, which pending Case arose out of Primary Court's Civil Case No 206 of 2020. The appellant stated that the reason for filing of Civil Case No 22 of 2023 is that he had a counter — claim in respect of Dodoma Urban primary Court Civil Case No. 206 of 2020 but he was informed by Hon. Primary Court in conducting civil cases procedure in Primary Court there was no counter claim procedure, if he had a claim then he ought to file a new and different case altogether from Civil Case No. 206 of 2020. It was at that juncture that appellant filed a Civil Case No. 22 of 2023 to cater for the appellant's counter — claim. It was argued that since the counter — claim is related to Civil Case No. 206 of 2020, the appellant prayed before the 1st

appellate court to stay 6|Page the execution in Civil Case No. 206 of 2020, as the decision in Civil Case No. 22 of 2023 will be rendered nugatory if a decision is made prior to the conclusion of the case. The appellant cited the decision of the Court of Appeal in Arusha Planters and Traders Ltd and two others V. Eurafrican Bank (T) Ltd, Civil Appeal No. 78 of 2001, Arusha (Unreported); [2009] TLR 363, at

- p. 370 which stated that in a proper case a consent judgment can be challenged by appeal, review or instituting a separate fresh suit though there is no specific provision in the Civil Procedure Code allowing a consent judgment to be challenged by way of instituting a separate suit. The appellant called upon this Honorable High Court to interpret the ruling of the Court of Appeal Judgment on the authority by Honourable Court of Appeal judgment on how to challenge consent judgment. The appellant argued that the 1st appellate court, the District Court acted in total disregard of the principle stated in that decision of the Court of Appeal thus reached to a wrong conclusion which in law is erroneous. 7|Page According to the appellant, since he exercised this right to institute a fresh suit, it was not proper for the Hon Magistrate to dismiss his claim for stay of execution, hence this appeal. It was the appellant's view that he has demonstrated in Civil Case No. 22 of 2023 that the respondent owes me more apart from the money being paid for the purchase of lorry and past TRA taxes and fines; repairs that appellant paid for lorry exceeded the balance of the respondent's debt and her refusal to adjust the claim to reflect the same as agreed earlier. The appellant reiterated further that to make the matter worse for the appellant in the execution proceedings the respondent requested Primary Court Magistrate to attach the lorry which was sold to the appellant since on July 2018 but up to this moment the lorry has not been transferred ownership to the appellants despite the whole balance being paid and the lorry has not operated for a long time due to the lack of EFD machine since the TIN Number appeared of the deceased. It was the 8|Page appellant's version of the story that he has not enjoyed or benefited from the money he used to purchase the motor vehicle. The appellant informed the Court that in Civil Appeal No 97 of 2023, the appellant was seeking stay of execution pending hearing and determination of my claim in Civil Case No. 22 of 2023, all matters arising from the sale to the appellant of defective vehicle by the late Honest Dionis Massawe, and had the Court analyze the claims in both appeal and lower Court Case, it would have realized that they related to the same parties same subject matter and claims hence the request to this Honorable Court to set aside case decision in Civil Case of 97 of 2023 and order stay execution of Dodoma Urban primary Court in Civil Case 206 of 2020. It was the appellant's humble submission that this appeal be allowed and the status of the Respondent be ascertained in all three cases referred to herein. On the other hand, the respondent refuted to the appellant's submission. The respondent stated that with regard to two preliminary 9|Page issues raised in the appellant's submission, the same are irrelevant. It was stated that the element of the absence of the parties during the pronouncement of Judgement of the Civil Case No. 206 of 2020 dated 8th February 2021 has nothing to do with the instant appeal. Firstly, a judgment may be pronounced in the absence of the parties; therefore, it is a non-issue whether the judgment of the Primary Court in Civil Case No. 206

of 2020 was pronounced in the absence of both parties. Secondly, the issue of consent judgment was not addressed anywhere in the judgment or proceedings, nor was it raised in the appeal before the District Court of Dodoma. Therefore, the respondent prayed for this honourable Court to ignore these preliminary matters that do not touch on the appeal. With regard to the issue of the letters of administration, Christina Honest Massawe was joined as a part of the suit by the appellant, as the respondent; with the capacity to be sued for being the administrator of the estate of the late Honest Dionis Massawe, a fact that was never disputed in any of the proceedings. Therefore, for the appellant at this juncture to raise an issue with the legality of Christina Honest Massawe whom he sued 10 | P a g e as the administrator is evidence of the malicious intent of the appellant to abuse the court process. Furthermore, the respondent stated that the capacity of Christina Honest Massawe was not raised as an issue in any of the prior proceedings nor is it a ground for appeal in this appeal pending before this honourable Court. Therefore, it was the respondent's view and prayer that this honourable Court be pleased to disregard the said element. On the first ground for appeal, it was submitted that the appellant stated that the filing of Civil Case No. 22 of 2023 was a counterclaim for the claims that were in Civil Case No. 206 of 2020 by then Honest Dionis Massawe. However, it was respondent's view that examining the registry number for both cases it is apparent on the face of the record that the case filed before the Primary Court for Dodoma by Honest Dionis Massawe was filed in 2020 while the Civil Case filed by the appellant was filed in 2023 before the District Court of Dodoma. There is a clear distinction that firstly the time of filing this case is three years apart, before different 11 | P a g e courts, one being the Primary Court of Dodoma and another being the District Court of Dodoma. Procedurally, this disintegration means that there are two separate court proceedings for this claim. Therefore, under no circumstances does this non-joinder of suit may be construed as counterclaim. It was respondent's statement that the remedy for the appellant being dissatisfied with the Judgment, which was delivered on 8th February 2021 by Msangi RM, was to file an appeal before the District Court of Dodoma and not to institute a fresh suit three years later as the counter Claim. This means that a party lacks the merits to file a counterclaim to a matter that has already been heard and decided, particularly on merits. The respondent stated that having carefully perused the decision of the Court of Appeal in the cited case of Arusha Planters and Traders Ltd, it held that a consent decree can be set aside on any ground that would invalidate an agreement/such as misrepresentation, fraud, or mistake. This can only be done by a suit. According to the respondent, it is 12 | P a g e clear that the separate suit was not on merit but rather to disclose the circumstances that led to a consent judgment that was obtained by a misrepresentation, fraud or mistake. Simply, a suit that would be permitted is that of setting aside the consent judgment and not raising the so-called counter claim. It was further stated that the judgment was not drawn as consent judgment, therefore this case is immaterial as an authority. Moreover, the respondent categorically stated that the case before the Primary Court of Dodoma was for an unpaid sum arising from the Contract of Sale between the appellant and Honest Dionis Massawe, while the Civil Case at the District Court of Dodoma arose from expenses incurred during the operation of the business by the appellant. It is obvious that these are different

matters arising from two causes of actions: one being a contract of sale while the other being costs in operation of business to which the respondent is not privy as the respondent is not responsible for undertaking of daily business activities of the appellant. 13 | P a g e Additionally, the respondent argued that the appellant is contradicting himself for claiming that the subsequent filed with the District Court of Dodoma was a counter claim, at the same time claims that the judgment by the Primary Court of Dodoma was a consent judgment. This clearly shows that the appellant does not have a genuine cause of action, except for abuse of the court process as a delay tactic to avoid execution and payment of the decree obtained against him. It was reiterated by the respondent that this appeal is a classic case of the persons abusing the court's process to enjoy non-compliance with the obligation and valid court's decision by filing a multitude of proceedings without any iota of merits to derail the enjoyment of the court's decree by the other party. It was the respondent's prayer at this juncture that this appeal to be dismissed with costs for lack of merits. Having heard the rival submissions of the parties to the appeal with regard to the grounds of appeal, I have dispassionately considered the 14 | P a g e appeal is light of the available records and grounds of appeal to establish whether or not the appeal has merits. This appeal is mainly premised on two grounds 1st appellate Court erred in law and fact to hold that Civil Case No 206 of 2020 and the Civil Case No 22 of 2023 bore no relationship at all; and error in not evaluating evidence in Civil Case No. 206 of 2020 and that of the Civil Case No 22 of 2023 thus reaching to the wrong conclusion. These grounds are interconnected and linked thus in addressing them it shall be pertinent to address them jointly. It should be noted at this juncture, the Judgment and decree in Civil Case No 206 of 2020 was not challenged by the appellant. The judgment and decree were entered in favour of the respondent on 8th February 2021 but remained unchallenged todate. What is being challenged by the appellant is the execution order for the decree in Civil Case No 206 of 2020. 15 | P a g e The provision of sections 20(1) and 22(1) of the Magistrates Courts Act, Cap 11 R.E. 2022 provide for appeal and revision as the available remedies to challenge decisions of the Primary Court. The time for challenging such decision is ordinarily within 30 days of the decision. As the decision of the Primary Court of Dodoma in Civil Case No 206 of 2020 was determined in 8th February 2021, it was expected that the person dissatisfied with such decision would challenge the same by sometimes in mid-March 2022. Nothing was done until sometimes in 2023 when allegedly Civil Case No 22 of 2023 before the District Court of Dodoma was filed. Stay of execution in the District Court exercising appellate powers is governed by the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, 1964 Government Notice 312 of 1964 which provides explicitly in Rule 8 that:

- (1) Any person who has filed an appeal to a district court may apply in writing to that court for a stay of 16 | P a g e execution of the decision or order against which he is appealing.
- (2) An appeal shall lie to the High Court from any order granting or refusing a stay of execution. According to the applicable procedure for matters originating from the Primary Courts, it is only when a person has preferred an appeal at the District Court that he may apply for stay of execution. The law allows the appellant to apply for stay of execution of the decision of

the court upon which the appeal is based. In the instant appeal, the appellant is challenging the execution order on the decree of the Primary Court of Dodoma in Civil Case No 206 of 2020 which was determined on 8th February 2021. The substantive decision of the Primary Court in favour of the respondent was never challenged except the execution of the same after the time to prefer an appeal had already expired long time ago. 17 | P a g e In respect of first ground that 1st appellate court erred to find out that judgment and decree in Civil Case No 206 of 2020 bore no relationship whatsoever with the pending Civil Case No 22 of 2023 before the District Court. I cannot agree with the appellant. This ground is devoid of merits and a far-fetched ground of appeal to warrant this court to interfere with and reverse the concurrent finding of trial and 1st appellate courts. First, the nature of the cases is different. It is on record that Civil Case No 206 of 2020 was based on enforcement of contractual obligations of parties to the agreement for sale of a lorry. On the other hand, Civil Case No 22 of 2023 is concerning expenses incurred by the appellant in operating the business of the lorry he purchased. Indeed, these are two different cases which are not related. Second, filing a fresh separate case against the respondent in law does not vitiate the judgment and decree entered into by the competent court which todate remained unchallenged. Failure to challenge the judgment and decree in Civil Case No 206 of 2020 by way of appeal or revision makes the decision of the court to remain intact and binding to the 18 | P a g e parties. The appellant cannot be heard in stay of execution while he never challenged such decision. Third, allowing the appellant to challenge the execution of the decree whose substantive decision remained unchallenged since 8th February 2021 today would amount to clear abuse of court processes. The appellant had all the time to challenge the judgment and decree of the court but opted not to do so. In simple terms, the appellant was never dissatisfied with such decision as he took no action whatsoever to challenge it, thus he cannot be heard that the pending fresh suit in the District Court warrants the Court's intervention to prevent execution of the decree which was never challenged. Fourth, the alleged counter claim does not qualify to be called so in law. The civil cases before the District Court exercising its original jurisdiction is governed by the Civil Procedure Code, Cap 33 R.E. 2019. Counter Claim is one of the pleadings that are raised only as part of the defence in existing suit. This is in accordance with the provisions of Order VIII Rule 13 of the CPC. It provides that: 19 | P a g e

13. No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counterclaim shall be presented except by the leave of the court and upon such terms as the court thinks fit, but the court may at a pre-trial conference require a written statement or additional written statement from any of the parties and fix a time for presenting the same: A counter-claim for it to be worth a name it must be in response to existing civil case where the person raising a counter-claim must be a defendant who is called upon to file Written Statement of Defence for that matter. So, counter-claim is a suit that is initiated in response to existing suit relating to the same subject matter. It is a cross-suit which only exists in presence of a pending case between the same parties. In the instant appeal, it is on record that Civil Case No 206 of 2020 was finally and conclusively determined

on 8th February 2021. By 2023, 20 | P a g e when the so-called counter claim was filed there was no existing and pending case between the parties at the District Court of Dodoma. Thus, claim that Civil Case No 22 of 2023 was a counter claim is misplaced and out of order. There cannot exist a counter claim to non-existing suit or to an already fully determined suit on merits. Indeed, this cements the cause for the 1st appellate court not to accord any weight to the alleged existence of counter claim. It can be stated with certainty at this juncture that the first ground of appeal has no merits whatsoever. I shall proceed to dismiss the 1st ground of appeal for being destitute of any merits. On the second ground of appeal, the appellant laments on the failure by the 1st appellate court magistrate to evaluate the evidence in Civil Case No 206 of 2020 and that of Civil Case No. 22 of 2023 thus reaching to a wrong conclusion. This ground is completely devoid of merits for the following reasons. First, the only appeal that existed before the District Court of Dodoma was on the grant of the application for execution of 21 | P a g e decree in Civil Case No 206 of 2020. The District Court was enjoined to determine validity or otherwise of the execution order alone issued by the District. It had no jurisdiction to go to the merits of the Judgment and decree in Civil Case No 206 of 2020 as the District Court was not moved to do so in the first place. Further, it would lack jurisdiction for the same would be beyond the time limitation thus out of the District Court's mandate. In the case of *Shule ya Sekondari Mwilamvya vs Kaemba Katumbu* (Civil Appeal 323 of 2021) [2023] TZCA (9 June 2023), at page 8, the Court of Appeal reiterated that: With respect, we do not subscribe to his argument because the law on time limitation is now settled that it goes to the root of the jurisdiction of any court, tribunal or judicial making body including the CMA. Second, the Civil Case No 22 of 2023 was still pending before another trial Magistrate at the District Court of Dodoma exercising original 22 | P a g e jurisdiction. That being the case, the 1st appellate Court's Magistrate had no jurisdiction as well to consider the merits of the case which he was not a trial magistrate. In the circumstances of the matter, the 1st appellate Court's Magistrate acted properly not to consider merits of the case to which he was not the trial magistrate. All the lamentations on this second ground of appeal are therefore delinquent of any iota of merits. The only available avenue for the 1st appellate court's magistrate was to determine whether or not grant of the execution order was correct or otherwise. It was not within the mandates of that court to determine anything beyond that scope of appeal. In the case of *Brooke Bond Liebig (T) Ltd v Mallya* [1975] 1 EA 266 (CAD), the Court of Appeal for Eastern Africa noted that: The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain 23 | P a g e circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could have been no mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed. This being a second appeal, I am guided by the decision in *Martin Kikombe vs Emmanuel Kunyumba* (Civil Appeal 201 of 2017) [2020] TZCA 224 (13 May 2020) (TANZLII), where the Court of Appeal stated that: It is settled law that a

second appellate court's power to interfere with concurrent findings of the courts below is limited to situations where it is plain that the findings are based on misdirection or misapprehension of evidence or 24 | P a g e violation of some principle of law or procedure, or have occasioned a miscarriage of justice. My perusal of the record reveals that the 1st appellate court upheld the decision of the Primary Court to order the execution to proceed on account that Civil Case No 206 of 2020 whose decree was to be executed had nothing related to the Civil Case No 22 of 2023 before the District Court of Dodoma. The 1st appellate court thus dismissed the appeal for lack of merits. Indeed, I am at one with the Honourable Magistrate that this was a proper decision to take in the circumstances of the case. The appellant was aware of existence of the Judgment and decree in Civil Case No 206 of 2020 which was delivered in 8th February 2021 but the appellant opted not to challenge it. The appellant could not invoke the court's powers to stay execution on pretext of existence of the so-called counter claim suit on a different court. 25 | P a g e Furthermore, the appellant raised two issues which were not part of grounds of appeal preferred. These related to: one, that this court ascertain the date of death of one Honest Dionis Massawe and the appointment of the respondent as administratrix of the estate. Two, that judgment before the trial court was delivered in absence of the litigants. Such submissions violated well entrenched principle that parties are bound by their own pleadings and by extension the grounds of appeal. The only exception is when the new issue raised relates to the jurisdiction of the Court. The guidance on submissions that are not part of the grounds of appeal is found in the case of Bahari Oilfield Services FPZ Ltd vs Peter Wilson (Civil Appeal 157 of 2020) [2021] TZCA 11 June 2021) (TANZLII), at pages 14-16, the Court of Appeal stated that: It is true that issues of jurisdiction may be raised at any time, but we have just concluded above that the argument by the appellant's learned counsel did not raise a jurisdictional issue. Therefore, we still have to address the 26 | P a g e question, whether the appellant can address issues not raised in the memorandum of appeal. The meaning of the above quoted provisions is plain in our view, that for one to access this Court on appeal he must present specific grounds of objection to the decision appealed against. Thereafter he may, under Rule 106 (1) of the Rules, file written submission in support of the appeal and any oral submissions at the hearing shall aim at clarifying the written submission. There is an obvious rationale for such requirements. One, this Court is not a court of first instance so the grounds for faulting a decision of a lower court must be specific lest we cross the line, Two, the other party has the right to know before hand the nature of the grounds upon which determination of the appeal may be based. That is an aspect of fair hearing, so as not to take the other party by surprise. We therefore agree with Mr. Mushi that the principle that requires parties to be bound by their 27 | P a g e pleadings extends to grounds of appeal in an appeal. On that basis our conclusion is that an appellant's written and/or oral submission must be in consonance with the grounds of appeal. The two aspects raised in submission in chief are not dealing with the jurisdiction of the Court thus it could not have been raised without violating the settled principle. I concur with the reply submission by the respondent that the best manner to treat such submission with total disregard. In conclusion, it is lucid that this appeal is delinquent of any merits as both grounds of appeal fell short of any iota of

truth and it deserves nothing than dismissal in its totality with costs. It is so ordered. DATED at DODOMA this 17th day of February 2025 E.E. LONGOPA JUDGE 17/02/ 2025. 28 | P a g e

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Prepared on 13 October 2026 · Esheria