

TANZANIA / JUDGMENT

sumayi emmanuel mayenga versus baraka fumbuka 2023 tzhc 23004 24 november 2023

COURT
TZHCDECIDED
24 November 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF SHINYANGA AT SHINYANGA PC. CIVIL APPEAL NO. 60 OF 2023 (Originating from Civil Appeal No. 19 of 2023 Busega District Court the same Originating from civil Case No. 149 of 2023 of Mkula Primary court) SUMAYI EMMANUEL MAYENGA APPELLANT VERSUS BARAKA FUMBUKA RESPONDENT

JUDGMENT

sz« October & 24h November 2023 F.H. MAHIMBALI, J The background of this fracas dates back in 2021 when the appellant secured 10,500,000/= a bank loan from CRDBBank. The said money had to be repaid in 17,852,023 (loan and interest). Part of the said money was used to purchase motorcycle - Bajaji worth 6,500,000/= and 3,500,000/= injected into the shop business of the respondent. It is alleged that both businesses were to be under the supervision of the respondent and that in servicing the said loan, the respondent had to be depositing to the appellant a total amount of 400,000/=. It appears that the respondent failed to service any of the loan as agreed. Since the respondent had failed to surrender proceeds of the said business as per their agreement, the appellant filed the suit at the trial court claiming for 1 - the refund of 17,812,203; however in the course of hearing, she prayed for the court to order the respondent to surrender the motor cycle and a shop to the appellant. The trial Court entered its judgement based on the prayers of the appellant and ordered the respondent to surrender the motorcycle and shop to the appellant. The respondent aggrieved by such decision, he appealed to the first appellate court, whereby the 1st appellate court ruled that the appellant was awarded reliefs which she did not claim in her pleadings and thus it nullified the judgment of the trial court and directed the appellant to file a case for claims of those properties (bajaji and Shop) and not claims for the supervision since the claim of Tshs 17,812,023/= which were not proved. The appellant was unhappy with the decision she has now preferred this second appeal, based on two grounds of appeal namely:

1. That Hon. Magistrate erred in law and facts for deciding the appeal on grounds which were not grounds of appeal without accorded parties right to be heard.
2. The. Hon. Magistrate erred in law and fact in holding that the case against the respondent was not proved to the required standard. 2 During the hearing of the appeal, the appellant enjoyed legal service of Mr. Outa learned advocate while the respondent appeared in person and unrepresented. Mr. Outa submitting on the first ground of appeal argued that the first appellate court erred in law in deciding the appeal on the grounds which were not grounds of appeal without there being right to be heard. He referred this Court to page 4 (last paragraph) of the 1st appellate Court

judgment.

Mr. Outa also averred that since they were not given the right to be heard on that, this was a violation of legal procedure. He referred this Court to the decision in the case of Mbeya Rukwa Auto parts & Transport Ltd. (2005) TLR 251. On the second ground of appeal Mr. Outa submitted that the case was not established to the required standard. He contended that as per trial court's proceedings, testimony of SM1 it is clear that there was ample evidence that he had borrowed 10,500,000/= from Bank with interest of 7,000,000/=. The said money was used for purchase of Bajaji for purposes of respondent to run Bajaji business and that through its profits to process the return of the borrowed money. Therefore, there was proof on the required legal standard of proof. In a clear digest to the decision of the trial court and that of the first appellate court, the reason contained 3 in the trial court judgment were sound than those of the first appellate court. He also added that even at the District Court, the respondent admitted to have been in supervision of the said business. As he failed to make any return of it, he then pressed that this appeal has merit and ought to be allowed with costs. On the side of the respondent, he resists the appeal as there are issues which are true and others are not. On the ground that the appellant was not given the right to be heard, the respondent resisted that argument. He averred that the appellant was given the right to be heard as per law and she was so heard. He finally prayed for the appeal to be dismissed with costs, taking into consideration that the said marriage is still subsisting as it has not been dissolved. Mr. Outa, in rejoinder, reiterated his submission in chief. With the said shop, almost 3,545,000/= was injected to the said shop. As regards the said Bajaji, the same belongs to the Bank as the debt has not yet been repaid. That he is a man, thus he should be the supervisor of the said project, that is a mere masculinity mind set. On the issue of right to be heard, he clarified that it is not on the case at large but on the relevant legal aspect as per judgment of the first appellate court. 4 I have dispassionately scanned the parties' submissions on what transpired to the subordinates' courts as far as claims of the appellant are concerned. Indeed, I have carefully examined the evidence in record, proceedings and the rival submission in respect of this appeal. I am of the considered view that the determination of this appeal is centered on what the appellant is entitled to. To begin with the 1st ground of appeal that hon. Magistrate erred in law and facts for deciding the appeal on grounds which were not grounds of appeal without accorded parties right to be heard. Mr. Outa biffing his submission had referred this court at page 4 of the 1st appellate court's judgment and contended that the court

erred to decide on the issue which was not on its table and thus the parties were denied with the right to be heard. The argument which was resisted by the respondent. I have keenly looked at page 4 of the 1st appellate court's judgment, I do not see reflection of the argument by Mr. Outa. What transpired before the 1st appellate court in due course of analysis of the evidence before it and submission made by the parties, the court formed its own issue for determination of the appeal whether the case has been proved on the balance of probability. 5 Page 4 " before going further and when checking grounds of appeal, it seems that the question that touches those grounds is whether the case has been proved on the balance of probability " Page 5" before going fa~ I have passed through a plaint filed by the respondent at Mkula primary court and found that she was claiming for money Tshs 17,852,023/- from the appel/ant (he husband) ff From the extracted above facts, its therefore clear that the honorable magistrate was evaluating the evidence persisted at the trial court. I am aware that where possible the appellate court should not interfere with the findings of the subordinate court, unless there is a dire need of doing so. See Director of Public Prosecution vs Simon Mashauri, Criminal Appeal No. 394 of 2017. The principle of non-interference gave exceptions where law and facts demand. Therefore, based on the nature and facts of the case, there was no way for the 1st appellate court not to interfere with the findings of the trial court. Since Mr. Outa has not pointed out as to what exactly new issues were determined by the pt appellate court without adhering the parties with the right to be heard, I find such ground is unfounded and misplaced and consequently is dismissed. 6 - With the second ground of appeal that the. Hon. Magistrate erred in law and fact in holding that the case against the respondent was not proved to the required standard. Considering evidence of the trial court, my turn point on that effect are that, the appellant instituted claims of Tshs 17,852,023/= against the respondent. The appellant's testimony was that, the claimed amount was due to short fall of the respondent not to give the proceeds generated from running business (motorcycle and shop) which could help her to service the loan secured from CRDB Bank. At the end, the appellant prayed before the trial court to be given supervisory power of motorcycle and a shop. The trial court blessed her prayer. When the matter came for appeal, the 1st appellate court found that the trial court grossly erred to rule in that way instead it reversed the decision of the trial court on the stance that the claim before the trial court was all about money and not properties. Therefore, it was an error for the trial court to issue order of supervision of properties to the appellant. I sincerely agree with the 1st appellate court that, the claims of Tshs 17,852,023/= were not proved before the trial court. However, I disagree with the conclusion of the 1st appellate court that the appellant should go and file a fresh suit for claim of such properties (bajaji and shop). 7 I so hold because, in my thorough scanning of the evidence and submissions, I do not see any dispute of ownership as regards to the properties concerned Bajaji. Neither the respondent nor the appellant resist that the such properties were bought by the appellant through the loan secured by her. The dispute is only on profit sharing of proceeds emanating from running such properties. I am therefore of the formed view that, the bajaji property in question which is uncontested, be restored to the owner that is the appellant for her to run it for servicing the said loan. As regards to the shop business, there is no sufficient material to guide the Court as to what extent the said 3,500,000/= injected into it revived the shop business or did what. Thus, the best recourse in my considered view is the return of the said 3,500,000/= into the shop

for appellant's own use it having failed to yield any profit. Therefore, the appeal is allowed to extent explained herein above with no orders as to costs It so ordered. DATEDat SHINYANGAthis 23rd day of November, 2023. F.H. Mahimbali Judge Judgment delivered today the 23rd day of November, 2023 in the presence Mr. Outa, learned advocate for the appellant, the Respondent being present in person and Ms Beatrice, RMA, present in Chamber Court. F.H. Mahimbali Judge

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