

TANZANIA / JUDGMENT

BADILI VS MOTE

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6 March 2025

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB-REGISTRY OF DAR ES SALAAM AT DAR ES SALAAM CIVIL APPEAL NO. 2323 OF 2025 YAHAYA SELEMAN BADILI APPELLANT VERSUS CHACHA MARYOKI MOTE RESPONDENT (Arising from the judgment and decree of the District Court of Ubungu at Ubungu in Small Claim No. 21954 of 2024)

JUDGMENT

4th and 6th March 2025 KISANYA, J.: This appeal is brought forth following a small claim filed by the respondent, Chacha Maryoki Mote, against the appellant, Yahaya Seleman Badili, in the District Court of Ubungu, under Rule 5(1), 8(2), 10(1), and 11(2) of the Magistrates' Courts (Small Claims Procedures) Rules, 2022, GN No. 159 of 2023 (henceforth "the Rules"). In the statement of claim, the respondent alleged that he and the appellant had entered into a contract for the collection and supply of peas and sesame from peasants in the Ruvuma Region. Under this contract, the respondent would transfer money to the appellant through two bank accounts held at CRDB Bank and NMB Bank (account numbers withheld). The respondent averred to have complied with the contract by transferring a total sum of TZS 45,000,000/= to the appellant's accounts on different occasions, but the appellant only delivered sesame worth TZS 10,519,038/=. Claiming that the appellant failed to deliver the remaining cereals or refund the outstanding balance, the respondent instituted a small claim seeking judgment in the sum of TZS 34,480,962/=, compensation, costs of the claim, other appropriate reliefs, interest at a commercial rate of 8% from the date of default to the date of judgment, and interest at a court rate of 12% from the date of judgment until full payment. In his reply to the statement of claim, the appellant categorically denied the respondent's claim. He refuted any contract with the respondent to trade in peas and sesame, asserting that no such contract existed. Instead, the appellant stated that in September 2023, he had entered into a contract with the respondent for the trade of maize, which he claimed had already been fully performed and concluded. The appellant further contended that trading in sesame and peas is legally restricted in the Ruvuma Region, making it impossible for him to have engaged in such a transaction with the respondent. He maintained that the funds deposited into his accounts by the respondent were payments related to the maize trade contract. Consequently, he urged the trial court to dismiss the respondent's claim in its entirety. To substantiate his statement of claim, the respondent presented three witnesses, whose testimonies were provided through affidavits in accordance with rule 16(6) of the Rules. These

affidavits were adopted as part of the court proceedings, and each witness was subsequently cross-examined by the appellant's counsel. In contrast, the appellant was the sole witness in his defense. He testified under oath before the learned trial magistrate. After considering the evidence from both sides, the trial court found that the respondent had met the necessary standard to prove his claim. Consequently, the trial court granted the six reliefs against the appellant. First, a declaration that the appellant breached the contract. Second, an order for payment of TZS 34,480,962 (decretal sum). Third, interest at a rate of 8% per annum from the date of default to the date of judgment. Fourth, general damages amounting to TZS 10,000,000/=. Fifth, interest at a rate of 12% per annum on the total awarded amount from the date of judgment until full satisfaction of the decree. Sixth, costs of the suit. Dissatisfied with the trial court's decision, the appellant filed the present appeal before this Court, raising four grounds to following effect: One, the trial court erred in law by assuming jurisdiction over the matter without 3 having the necessary territorial jurisdiction. Two, the trial court erred in law by entering judgment against the appellant without sufficient evidence to substantiate the respondent's claims. Three, the trial court erred in law by basing its decision on contradictory evidence. Four, the trial court erred in law by awarding general damages contrary to the applicable legal principles and the evidence presented. During the hearing of this appeal, the appellant was represented by Mr. Eliseus Ndunguru, learned Advocate, whereas the respondent was represented by Mr. Felix Okombo, also learned Advocate. The hearing was conducted via the Virtual Court System. In the process of reviewing the case record for the hearing, I observed that the three witnesses called by the respondent had not been sworn before giving their testimony in cross-examination. As some grounds of appeal challenge this evidence, I found it appropriate to first ensure the legality of the trial court's proceedings by inviting the parties to address this issue along with the other grounds. Specifically, the parties were asked to address on whether the evidence in question was taken in accordance with the law and, in the event that it was not, to propose the legal consequences or remedy that should follow. 4 At this point, I will focus solely on summarizing the parties' arguments on the issue raised suo motu by the Court, as I find it sufficient for the resolution of this appeal. Submitting on the issue, Mr. Ndunguru pointed out that on 5th November 2024, the trial court granted permission for the respondent's witnesses to testify by affidavits, which were accepted to form part of the proceedings. However, he conceded that their oral testimony was given without being sworn in, which he argued represented a procedural lapse. In the light of this, Mr. Ndunguru submitted that this omission was fatal. As a result, he contended that no valid evidence was presented by the respondent and that it was improper for the trial court to find that the case had been proven. As for the next steps, the learned Counsel urged the Court to disregard the evidence in question, quash the trial proceedings, and order a retrial from the stage at which the matter was initially heard. Mr. Okombo, in response, emphasized that Section 4(a) of 4(a) of the Oaths and Statutory Declarations Act [Cap. 34 R.E. 2019] requires all individuals giving evidence to do so under oath. He argued that the respondent's witnesses (PW1, PW2, and PW3) had testified via affidavits, in line with rule 16(6) of the Rules. He further asserted that, since the witnesses had already sworn an oath in their affidavits, the trial court was correct in 5 admitting the affidavits and allowing the witnesses, including PW1, to tender exhibits. Mr. Okombo further argued that, as the oath was

already included in the affidavits, there was no need for the trial court to swear in the witnesses again. Nonetheless, the learned Counsel conceded that the law requires witnesses to take an oath, and failing to do so invalidates the proceedings. In his view, the only appropriate remedy in such a case would be a trial de novo. After carefully considering the submissions of both parties and reviewing the record of appeal, the central issue before us is whether the respondent's witnesses testified under oath. If they did not, the next consideration is the appropriate legal remedy. At the outset, I concur with Mr. Okombo, that the requirement for witnesses to take an oath before providing evidence is clearly outlined in section 4(a) of the Oaths and Statutory Declarations Act (supra), which states: "4 - Subject to any provision to the contrary contained in any written law an oath shall be made by

(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court".⁶ The stated requirement is further reinforced by rule 16(6) of the Rules, which prescribes that evidence in small claims proceedings must be provided orally under oath or through a sworn affidavit by a witness. The provision stipulates: "Evidence shall be given orally, under oath or affirmation, or by affidavit of witness; Provided that, a witness who give evidence by affidavit may be summoned for cross-examination at the instance of the court or opposite party." (Emphasize supplied). It is, therefore, a fundamental requirement that any person appearing as a witness in court must be sworn or affirmed before testifying. The law is also settled, that failure to swear in or affirm a witness before they testify is a serious procedural flaw that nullifies the evidentiary value of their testimony. This position has been consistently upheld in case law, including Catholic University of Health and Allied Science (CUHAS) vs Epiphania Mkunde Athanase, Civil Appeal No. 257 of 2020 (unreported), and Erick Dominic Massawe vs Richard Kelly & Another (Civil Appeal No 343 of

2020) 2024 TZCA 44 (15 February 2024). In the second case, the Court of Appeal held that: "... failure to administer an oath or affirmation to a witness before that witness testifies is a fundamental irregularity that renders the witness's evidence worthless."⁷ Oaths and affirmations have a central role in judicial proceedings. After taking an oath or affirmation, a witness becomes bound to state only the truth, nothing but the truth." In the present case, it is not disputed that the three witnesses for the respondent gave their evidence in chief through affidavits, which were sworn by an advocate. However, their oral evidence during cross-examination before the learned trial magistrate was not taken under oath or affirmation, thus violating the requirements of rule 16(6) of the Rules. The fact that the witnesses were sworn by an advocate at the time the affidavits were taken does not suffice. The trial magistrate ought to have administered the oath before permitting the witnesses to testify orally in court. Consistent with the decision in Erick Dominic Massawe vs Richard Kelly & Another (supra), I find that the failure by the learned trial magistrate to administer the oath before the respondent's three witnesses gave oral evidence renders the proceedings before the trial court invalid and prejudices the parties' cases. I am aware that that the appellant has raised a ground touching the territorial jurisdiction of the trial court, which is a matter that goes to the root of the case and ought to be determined at this stage.

However, I have taken into account that this issue was raised as a preliminary objection before the trial court and was dismissed. Furthermore, the respondent's claim in the pleadings, stating that the contract was made in Dar es Salaam and Ruvuma, 8 might lead one to believe that the trial court had jurisdiction. In order to determine whether this assertion is correct, it would necessitate a review of the evidence, particularly as both the arguments for and against this ground hinge on the evidence on record. Since I have already determined that the evidence is invalid for being presented contrary to the law, I find it inappropriate to make a decision on the issue of jurisdiction at this stage. In view thereof, I hereby invoke the powers vested in this Court under section 44(1)(b) of the Magistrates' Courts Act [Cap. 11, R.E. 2022] and nullify the proceedings before the trial court from 5th November 2024, quash the judgment, and set aside the resulting decree. As to the way forward, I remand the record to the trial court for the small claim to be heard afresh by another magistrate, starting from 5th November 2024, when the hearing commenced. Since the appeal is resolved based on an issue raised by the Court sua sponte, each party is hereby ordered to bear its own costs. DATED at DAR ES SALAAM this 6th day of March 2025. S.E. KISANYA JUDGE 9 Delivered via virtual court system this 6th day of March 2025, in the presence of the Mr. Eliseus Ndunguru, learned Advocate for the appellant, Mr. Felix Okombo, learned Advocate for the respondent and Ms. Zawadi, RMA. Right of appeal is dully explained. S.E. KISANYA JUDGE 10

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