IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

APPELLATE JURISDICTION

HC. CIVIL APPEAL NO. 18 OF 2005

(Originating from RM's court of Mara at Musoma

Civil Case No.2 of 2000)

1. PAULO NDERA
2. CHACHA RANGE
3. MWITA KIRARYO
4. MAIGA S/O ?
5. GHATI MOKERA } **.....APPELLANTS**
6. ANTHONY CHACHA
7. GETENYE WANDWI
8. MAHANGA NCHAGWA

Versus

GIBEWA MARWA BUNYIGE.....RESPONDENT

JUDGEMENT

9/10 & 30/11/2007

Sumari, J.

The respondent successfully sued the appellants in the Resident Magistrates' Court Civil case No.2 of 2000.

The respondent was arrested on 28/2/1997 together with 27 others on allegations of murder and incarcerated in remand custody till March, 1999 when acquitted by the High court for no case to answer.

Respondent at the trial court claimed that while in custody 1st,2nd 3rd and 4th appellants (defendants) jointly and without good cause attached his

52 herd of cattle and 10 sheep and divided them among themselves.

That at the same time 5th,6th 7th and 8th appellants (defendants) without justification or good cause attached his 42 herd of cattle, 30 goats, 22 sheep and 50 hens and divided them among themselves.

That at the same time the 5th, 6th, 7th and 8th appellants (defendants) burnt respondent's (plaintiff) 7 houses and assets therein including 7 beds,

7 mattresses, 3 cupboards at Machochwe village and 6 acres of cassava farms also burnt. Total claim against all appellants/defendants is 9,402,000/=.

The trial court's decision is infavour of the respondent/plaintiff. Upon dissatisfaction of the judgment appellants have appealed to this court. Appellants enjoyed the legal services of Mr. Kabonde, advocate while respondent is represented by Mr. Makowe, advocate. By consent this appeal was argued by way of written submissions. Mr. Kabonde for appellants raised 6 grounds of appeal which argued in seriatim. However, before engaging fully to argue the grounds of appeal, Mr. Kabonde brought into the attention of the court points of law which he observed and thought imperative to point out to show the irregularities committed by the trial court.

He pointed out that on 26/8/2002 the case was for hearing and plaintiff was absent without notice. Following the absence of the

plaintiff, respondent the case was dismissed with costs for none prosecution. Following the order of dismissal Mr. Makowe, advocate for respondent/plaintiff filed a chamber application to set aside the dismissal order but before the same was argued and considered, on 15/5/2003 the same advocate moved the trial court to vacate the order of 26/8/2002 as the plaintiff was present. It is on record that only 1st defendant, replied as follows: - "*We do not object*".
The trial magistrate proceeded with an Order that: - *"My order dated 26/8/2002 was made per incuriam as the plaintiff was present in court. Thus the suit is restored. Parties to be heard in the main suit. Hearing on 18-19/06/2003."*

This is the order which Mr. Kabonde is complaining of. I have extracted it from the original record of proceedings to satisfy myself of what happened. Mr. Kabonde's submission is to the effect that it was unprocedural to vacate the order without giving the other defendants right to reply. He thus urges this court to nullify whole proceedings. I subscribe Mr. Kabonde's submission that what the trial court deed is in fact unprocedural though it has been adversely contended by Mr. Makowe, advocate that the restoration of the case was granted according to law and on the admission of the appellants. He stressed that the record does not support the issue of non notification. But according to the affidavit in support of chamber application and counter affidavit there was a letter from the respondent's counsel informing the court of his absence. With due respect to Mr. Makowe, the said application is the one which is complained of; that the same was not argued, instead he hastened to move the trial magistrate to vacate the order on a reason that plaintiff was present a fact which

was not proved either. Not even deponed in the affidavit filed in the trial court's file dated 27/8/2002 sworned by Mr. Makowe.

So in short the argument which is valid here is that the application for restoration filed by the respondent was not heard, instead, the trial magistrate vacated the suit for reasons best known to him that the same was made per-incuriam as the plaintiff was present. Where do these facts come from, it is unknown as the record is silent and this is generally what is been complained of by Mr. Kabonde, for the appellants. I don't subscribed Mr. Makowe's point that it is time barred to raise this point of law at this stage, since this is an appeal. I would appreciate if Mr. Makowe's submission would have been advanced otherwise, that the same was not raised in the grounds of appeal as the same would be properly raised as a ground of appeal. (Emphasis is mine). That the way this point has been brought in this appeal is wrong. Generally Mr. Kabonde's submission is very valid in law but the same ought to have been raised as one of the grounds of appeal and not otherwise. Failure to bring it in the grounds of appeal it has no room to be entertained at this stage. It is therefore unfounded for that mere reason.

Let's move to another issue raised by Mr. Kabonde, that the trial court's proceeded without mediation being conducted; and that the case was heard continuous unabated while the life span of the case had expired. He has referred this court to the provisions of Order VIIIA Rule 4 of C.P.C., Cap.33 of the Laws (R.E.2002) and Order VIII Rule 3. Also as for the life span of the case he referred the court to Order XLIII to the proviso of Rule 6 of the same Code (Supra). He

prays this court to quash the trial court's decision which was made upon the demise of the case.

In response to this argument Mr. Makowe, for respondent submitted, and I share his views, that failure to conclude ADR cannot vitiate proceedings as the same is an irregular which does not affect either case in so far as substantive justice stands. However, as held in the previous point of law, it's my opinion that similarly this point ought to have been raised as ground of appeal. Failure to do so it has no room at this stage. As such I regard it as unfounded.

Mr. Kabonde, proceeded "without prejudice" to argue ground 1 of the appeal. But before moving to that, I wish to comment on Mr. Makowe's point of law raised in his early stage of his reply to Mr. Kabonde's submission. That "Whether before this court there is any competent appeal". The basis of this question is on the fact that the appeal was not accompanied by a copy of judgement and decree which is properly dated. He is saying the decree which accompanied the copy of judgement pronounced on 27/7/2005 bears a different date i.e. it was extracted on 16/8/2005. Mr. Makowe's submission is to the effect that the appeal was filed contrary to the mandatory provisions of Order XX Rule 7 of C.P.C, Cap. 33 of the laws (R.E 2002), a defect which renders this appeal incompetent. While I'm in full agreement with Mr.Makowe's submission, I however, hold that this argument ought to have been brought immediately by way of notice of preliminary objection, after having been served with a memorandum of appeal not in the way has brought it. The same has no room to be entertained at this stage. I regard it as unfounded.

Now, back to Mr.Kabonde's grounds of appeal. In his 1st ground of appeal he submitted that the trial court erred in law for awarding 42 heads of cattle to the respondent against the 5th, 6th, 7th and 8th appellants after the judgment has been pronounced. In support of his submission he referred this court to a case of **BIBI KISOKO MEDARD VS MINISTER FOR LANDS & URBAN DEVELOPMENT & ANOTHER (1983) TLR 250** where it was held inter alia that:

> *"In a matter of judicial proceedings, once a decision has been reached and made known to both parties, the adjudicating tribunal thereby becomes functus officio".*

What Mr. Kabonde is saying here is that the trial magistrate having pronounced his judgment, ought not to hear the advocate for respondent on the issue of awarding 42 heads of cattle which fact was not addressed in the judgment. That it was not proper as the court was already functus officio. That any rectification of the trial court's error must have gone to the High court by way of appeal if the respondent was aggrieved by the court's award and/or decision.

Mr. Makowe, in reply to this point does not object to the legal position of what is functus officio. But he said the rule does not apply to this particular case. That what is reflected on the courts' order is, according to Mr. Makowe, an omission as to who should pay what. A payment that has already been ruled prior. That no defendant was jeopardized with what is found on page 9 of the judgment (the order as to 42 heads of cattle). That the same did not any how alter and/or affect what was held in the judgment, which stands as determining the controversy between parties to the case. Mr. Makowe, however

admittedly said it might be irregular, but the irregularity is inconsequential for it does not touch and affect a substantive right pronounced and or reached by the court. He vehemently pointed that, in this case there was no overturning of a decision, which indeed is the true meaning of functus officio. He referred this court to a case of **SCOLASTICA BENEDICT V MARTIN BENEDICT (1993) TLR** 1. This case generally explains how courts are ousted of jurisdiction to overturn or set aside its own decision and that if that done by any court then the decision becomes functus officio; after making its decision. It is true as said by Mr. Makowe, that, there was no overturning of the decision by the trial court but what proceeded in the case was after the decision was made. (Emphasis added). What Mr. Kabonde, is saying as I understand and what was also held in the cited case of **SCOLASTICA BENEDICT**, (Supra) is that the courts after making decision have no jurisdiction to go back and make further orders thereto. In so doing the decision or order becomes focus officio. I find Mr. Kabonde's first ground as meritorious.

As for the 2nd ground Mr. Kabonde, submitted that the trial Magistrate erred in law and fact for his failure to observe that the claims against the appellants were made upon cooked stories as not single witness reported the incidents to the police. He contends that if what the respondent and his witnesses testified is to be believed, and then the nature of the incident amounted to a criminal case. The evidence testified showed that the cattle, goats, sheep, and hens were stolen and the houses set-ablaze. That under criminal law then charges of Criminal trespass, cattle theft and arson would be

preferred. No witness among those testified reported the incident to police station; except PW5 who purported to have reported the matter to police but upon cross-examination could not mention even the name of police post reported or police case file. That all witnesses evade the duty imposed upon them by S.7(1) of Criminal Procedure Act, Cap.20 of the laws (R.E. 2002) which is mandatory for any citizen to give information to police officer upon been aware of any commission or intention of any person to commit any offence.

Mr. Kabonde, also challenged the evidence of witnesses like Pw6 who could not give the identity of the cattle, which accordingly said he saw appellants selling them at the auction. That one would expect Pw6 giving clear description as to how could identify the same been the respondent's cattle. Mr. Kabonde stressed that these witnesses were unreliable.

Mr. Makowe, on this ground had raised a question whether it should be said that failure to report a criminal act would exonerate one from civil liability in respect of the act? Of course not I must say, as well answered by Mr. Makowe. He has drawn attention of this court that the attachment of the cattle was done in a broad day light and therefore the witnesses are reliable as they knew very well the appellants. That trial court found them credible. For him issue of identification of culprits or the cattle is immaterial in this case. What is material is whether incident indeed occurred.

These arguments drives me back to the evidence on record for evaluation. With Pw1's evidence is that he was told of what happened

after his arrest, that appellants wrested his cattle, sheep, goats and hens. And his houses set on fire. As to who exactly did what, among the appellants, he cannot certainly ascertain. Suffice to say his evidence is basically hearsay.

Pw2's evidence contradicts Pw1's evidence as to when the incident occurred. When Pw1 testified to have been told it occurred on 4/3/1997, Pw2 who is his wife told the court that it was on 5/3/1997.

This same witness Pw2 whom I regard as the most key witness as she alleges to have eye witnessed what happened on the incident day, in a broad day told the court in her evidence in chief that the 1st, 2nd, 3rd and 4th defendants went to her home and wrested 52 cattle and 10 sheep. However, when Pw2 XXD by 2nd defendant, she added the number of wrested cattle as 65 when grouping the same as to their age and sex (10 Bulls, 32 Koos, Mitamba 10 and Ndama 10). One should expect Pw2 to be much more thorough on the number of her cattle as she is the one who was after the same, her husband, Pw1 having been away. Instead, as it has been proved by her own evidence; she is not certain on how many cattle were taken. This is crucial as the order of the trial court depends on the claimed number of cattle allegedly taken. It must therefore, be proved exactly what the appellants took and with certainty.

Pw3's evidence also leaves much to be desired as to how many cattle were wrested. He is talking of 52 cattle been sold. As to how many cattle were wrested from his home, no number ascertained. As to how many cattle wrested from Pw2, also Pw3 could not ascertain.

One wonders, therefore, whether the cattle seen by Pw3 been sold by the 1st, 2nd & 3rd defendants were wrested from Pw1's bomas. Again on the issue of 10 sheep, this witness testified on XXD by 2nd defendant, that he saw 10 slaughtered sheep. As he did not mention these sheep in his evidence in chief it is not known whether the same are the ones Pw2 is claiming to have been wrested by defendants. In fact when Pw3's evidence closely scrutinized one doubts whether this witness happened to witness the incident as he claimed. No way can it be certainly alleged that Pw3's evidence supports Pw2's evidence. These two witnesses are alleged to have been in the bomas of Pw1 situating at Kibachebanche village. Pw3 further told the court when XXD by 1st defendant that there were so many people at the scene. But no other witness who witnessed the incident from that village was called to testify.

This brings doubts which suggest supporting defence of the appellants that there was enmity and hatred between the respondent's family and the village leaders among them appellants. More worse, when it is evident that the witnesses decided not to report the matter even to police when the act alleged against the appellants is clearly a criminal offence.

Further to that we have Pw4's evidence. This is the son of Pw1. This witness together with Pw5 and Pw6 resides at the other bomas of Pw1 which is in Machocho village. Pw5's evidence is purely hearsay. Pw4 and Pw6 testified that the incident took place on 4/3/1997. According to Pw4, the 5th, 6th, 7th and 8th defendants wrested 42 cattle, 30 goats, 22 sheep and 50 hens. In the same examination in chief

when trying to group the cattle in terms of their sex and age he said were 52 in number i.e. "***10*** *majike,* ***20*** *dume,* ***14*** *mitamba and* ***8*** *ndama. As for hen he grouped them to be* ***40*** *in number, i.e.* ***10*** *majogoo,* ***20*** *wanataga, waliokaribia kutaga* ***10***". This uncertainty as I earlier stated, in this case means a lot. What is been claimed by respondent must be proved to enable the court reach a fair decision when ordering a refund of the same or compensation. With this uncertainty, definitely the decision reached can hardly be valid. As well put by Mr. Kabonde in his submission the trial court failed to properly evaluate the evidence on record; that if it was done properly, the decision arrived would not be arrived i.e. appellants would not have been found liable; as the evidence against them is unreliable since its full of contradictions, hearsay and or weak in substance.

In view of the above analysis I am quite satisfied that respondent failed to establish his case on the balance of probabilities. With this finding I believe grounds 3, 4, and 5 of appeal too are disposed of as meritorious.

For the foregoing reasons I have endeavored to express I allowed this appeal with costs.

A.N.M. Sumari
JUDGE

Delivered in the absent of the parties.

At Mwanza
30/11/2007