

**IN THE HIGH COURT OF TANZANIA  
(IN THE DISTRICT REGISTRY)  
AT MWANZA**

**PC. CIVIL APPEAL NO. 06 OF 2020**

*(Arising from the decision of the District Court of Geita in Civil Appeal No. 48 of 2018, Originating from Nyankumbu Primary Court in Civil Case No. 134 of 2018)*

**COSMAS KISANDU MSAMBAZYA ..... APPELLANT**

**VERSUS**

**ALPHONCE MIHAYO MDUSI ..... RESPONDENT**

**J U D G M E N T**

*Last Order date: 11.05.2020*

*Judgment Date: 18.05.2020*

**A.Z.MGEYEKWA, J**

This is a second appeal for the appellant who has lodged an appeal before this court following his dissatisfaction with the decision of the District Court of Geita in Civil Appeal No.48 of 2018, which decided in favour of the respondent.

Briefly, the respondent files a Civil Case No. 134 of 2018 before the Nyankumbu Primary Court, the trial Court ordered the appellant to

pay the respondent Tshs. 2,644,000/= and Tshs. 500,000/= as general damage. Dissatisfied, the appellant appeared before the District Court of Geita, the first appellate court which eventually confirmed the decision of the trial tribunal and proceeded to dismiss the appeal thereof. Hence he decided to file the second appeal before this court containing three grounds of appeal as follows:-

- 1. That the district court of Geita erred in law and fact by the failure to fault the decision and orders of the Primary Court of Nyankumbu as the same was procured based on illegal and voidable contracts.*
- 2. That the District Court of Geita erred in law and fact for failure to quash and set aside the decision and orders thereof, of the Primary Court of Nyankumbu of which decided in favor of the respondent while there was not sufficient evidence, proof of loss and damages incurred by the respondent for alleged breach of contract of sale of a motor vehicle.*
- 3. That the district court of Geita erred in law and fact by failure to quash and set aside the award of Tshs. h 2,450,000/= alleged fee paid to the advocate in the course of preparing sale agreement of motor vehicle while the said legal fees was not proved by the EFD receipt as per the requirement of section 36 (1) of Tax Administration Act, No. 10 of 2015*

The hearing was done by way of written submission whereas, the applicant filed the written submission as early as 27<sup>th</sup> April, 2020 and the respondent filed a reply as early as 5<sup>th</sup> May, 2020.

In support of his appeal, the appellant's Advocate opted to abandon the 1<sup>st</sup> ground of appeal.

Submitting on the 2<sup>nd</sup> ground of appeal, the learned Advocate for the appellant submitted that the appellant is challenging the first appellate court by sustaining the decision of the trial court which ordered the appellant to reimburse the respondent a total sum of Tshs. 3,144,000/= as damages and costs incurred by the respondent. He continued to submit that the trial court in answering the second issue the trial court was supposed to determine if the respondent suffered damages and to what extent. He went on to submit that the respondent in the said issue was supposed to prove the damage suffered by producing documentary evidence. He lamented that the trial court awarded costs which includes transport costs Tshs. 500,000/=: maintenance of the car Tshs. 164,000/= and Tshs. 30,000 deduction amount from the bank. He went on to state that the first appellate court confirmed the damages without satisfying itself whether they were proved. To fortify his submission he referred this court to the general principle of the law that he who alleges must prove.

Submitting for the third ground of appeal, he challenged the first appellate court for failure to quash and set aside the award of Tshs. 2,450,000/= as a legal fee paid to the advocate in course of preparing the sale agreement of the motor vehicle while it was not proved by EFD receipts to justify the said legal fees. He referred this court to section 36 (1) of the Tax Administration Act, No. 10 of 2015 which requires that any services rendered should be proved by EFD receipt to prove that the respondent paid the said amount to the advocate. He also cited the case of **Professor Emmanuel A. Mjema v Managing Editor Dira ya Mtanzania Newspaper and 2 Others** Reference No. 7 of 2017, High Court of Tanzania at Dar es Salaam (unreported). The appellant's Advocate blamed the first appellate court for not noting the irregularities otherwise he could quash and set aside the alleged legal fee for lack of justification and non-compliance of the law.

Concluding his argument, the appellant urged this court to find that the appeal has merit and this court to proceed to quash the decisions of both lower courts with costs.

In repost, Mr. Msalaba Kaunda the respondent's Advocate submit for the second ground of appeal, the case against the appellant was proved on the standard required by the law and that the appellant

should be insisted on paying a total of Tshs. 3,144,000/= as damages and costs incurred by the respondent for breach of contract of sale by the appellant herein. He went on to submit that even the appellant himself did not dispute the fact that the two has an agreement in which the appellant breached. He added that the respondent incurred the said costs following the appellant acts and any argument in denial is an afterthought that should not be entertained by this court. He urged this court to find that this second ground is devoid of merit.

On the third ground of appeal, in relation to EFD receipts, the learned counsel for the respondent referred this court to the case of M/S Buckreef Gold Company Ltd v M/S Tax plan Associates Ld and M/S first World Investment Court Broker Misc. Commercial Reference No.5 of 2016 (C/F Taxation Cause No.5 of 2016) in the High Court of Tanzania (unreported) this court defined what constitutes an EFD that:-

*" As correctly observed by the taxing officer EFD receipts are more relevant in Tax matters. There is no provision in the Advocates Remuneration Order, 2015 (GN. 264 of 2015) which requires proof of payment by the production of EFD's receipts ... EFD receipts may be relevant whenever there is a dispute as to whether one pays taxes or government renews or not."*

The learned counsel for the respondent continued to submit that the EFD receipts are mostly needed in the circumstances when there is a dispute as to whether one pays taxes or not. He added that the learned counsel who prepared the said sale agreement testified in court and tendered the agreement thus the production of EFD receipt is devoid of merit.

In conclusion, the learned Advocate for the respondent differentiated the cited authorities by the learned counsel for the appellant and insisted that the appeal has no merit and urged this court to dismiss the appeal with costs.

After careful perusal of the record of the case and the submissions made by the parties' advocates, I will determine the issue of ***whether this appeal is meritorious.***

I have opted to start with the second ground of appeal, that the Primary Court of Nyankumbu decided in favor of the respondent while there was not sufficient evidence, proof of loss, and damages incurred by the respondent. It is on record that in the trial court, the respondents were awarded Tshs 2,250,000/= as money paid to the Advocate, Tshs. 164,000/= being car service expenses, Tshs 30,000/= being bank

deductions as per the transaction made and Tshs 500,000/= being the expenses to include food, accommodation, and other miscellaneous by the respondent. Starting with the award of Tshs. 500,000/= being the costs for food and accommodation and other miscellaneous by the respondent, I find no proof that the awarded amount was proper. On the trial court records, the respondent failed to exhibit the court as to the legality of the claims to include legal receipts as to the costs he claimed to have incurred. The same is as for the award of Tshs. 30,000/= being the bank deductions after the withdrawal to facilitate the buying of the motor vehicle was not exhibited with any proof to include the automated bank statement to that effect. The principles of proof of claims are equally applicable, that is, he who alleges has to prove as provided under section 110 of the Evidence Act, Cap.6 [R.E 2019].

Similarly, in the case of **Lamshore Limited and J. S. Kinyanjui V Bazanje K. U. D. K** [1999] TLR 330 it was held that:-

*" He who alleges a fact has the duty to prove it"*

Borrowing a leave from the authorities above I find that the respondent (original plaintiff) is the one who alleged therefore he had a duty to prove his claims by oral evidence and documentary evidence. Therefore this ground is answered in affirmative.

In relation to the third ground of appeal, the appellant is claiming that the Advocate fee in a tune of Tshs. 2,250,000/= is not proved by any EFD receipt. I am of a settled view that proof of any payments to an advocate has to be by submitting an Electronic Fiscal Device receipts. (EFD Receipts) as stated under section 36 (1) of the Tax Administration Act, 2015. *Section 36 (1) provides as follows:-*

*" 36 (1) A person who supplies goods, renders services or receives payment in respect of goods supplied or services rendered shall issue a fiscal receipt or fiscal invoice by using electronic fiscal device."*

Additionally, the law under section 29 (1), (a) of the Value Added Tax, 2014 provides that:-

*" 29 (1) Notwithstanding the provision of section 28, a person shall be required to be registered for value added tax if:-*

*(a) The person carries on an economic activity involving **the supply of professional services in Mainland Tanzania**, whether those professional services are provided by the person, a member or employee of that person."* [ Emphasis is added].



Similarly in the case of **Professor Emmanuel A. Mjema v Managing Editor Dira ya Mtanzania Newspaper & Others**, Reference No. 7 of 2017 at the High Court of Tanzania, Dar Es Salaam, District Registry, my learned Brother, Hon. Mgeta, J, when taxing off the claims for instruction fees for failure to produce an EFD receipt as a proof for the same had this to say:-

*"It is a matter of law that all practicing advocates are registered, VAT payers. (see section 29 (1) of the Value Added Tax, 2014). According to section 36 (1) of the Tax Administration Act; 2015, a person who supplies goods renders services or receives payment in respect of goods supplied or service rendered shall issue fiscal receipts or fiscal invoices by using electronic fiscal devices. ...."*

Similarly, the same was observed by this court in the case of **Thinamy Entertainment Ltd & Others v Dino Katsapas** [24<sup>th</sup> April, 2019 TANZLII] my learned Sister Hon. Butamo, J in Commercial Case No. 86 of 2018.

It is undeniable that in the instant case, the respondent did not submit an EFD receipt to prove his claims of Tshs. 2,450,000/= being the Advocate fee for the preparation of the contract of sale, thus this court cannot award costs that are not proved as required by the law. It

must be understood that the service provider is duty bound to adhere to the laws and regulations to that effect. The advocate's service is regulated by the law and fixed rates and charges for the legal services rendered to a client and the use of EFD is a must.

Based on the above analysis and being alive of the legal principle that it is under exceptional case for the second appellate court to interfere with the decision made by the trial court, In the circumstances of this case where there was no EFD receipt tendered in court to prove the claim for the preparation of agreement fee to a tune of Tshs. 2,450,000/=, and with no proof for the use of Tshs. 500,000/= by the respondent as costs for food and accommodation and failure to exhibit for the bank deduction of 30,000/= the respondents' claims cannot stand. The only amount which is not disputed by both parties is Tshs. 164,000/= being motor vehicle service costs.

Since the two grounds of appeal are answered in affirmative, I find no any justifiable legal reasons to deal with the first ground of appeal, as it will not reverse the decision made above.

Based on the above findings, I partly allow the appeal to the extent that the appellant to pay the respondent Tshs. 164,000/= I set aside the

District Court decision and the trial court decision I allow the appeal without costs.

Order accordingly.

Dated at Mwanza this date 18<sup>th</sup> May, 2020.



A.Z.MGEYEKWA

**JUDGE**

18.05.2020

Judgment delivered on 18<sup>th</sup> May, 2020 via audio teleconference, and both parties were remotely present.

A.Z.MGEYEKWA

**JUDGE**

18.05.2020