IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CIVIL APPEAL NO. 37 OF 2019

(Originating from Resident Magistrates' Court of Arusha Civil Case No. 51 of 2017)

SIMON FELIX SHAYO .....APPELLANT

Versus

SEVERIN JOSEPH MWACHA..... RESPONDENT

JUDGMENT

11th August & 5th November, 2021

MZUNA, J.:

The appellant Simon Felix Shayo has lodged this appeal challenging the judgment and decree issued by the RMS' court Arusha (the trial court) which adjudged in favour of the respondent Severin Joseph Mwacha.

A brief background of the matter is that the appellant and respondent were at one time business partners. They agreed to conduct and operate the business in the name of *Tanzanite City Park* at Kimandolo in the city of Arusha with the condition that there should be contribution of capital from both sides in order to increase their income. To make this possible, the defendant obtained a loan facility of Tshs 4,930,000/- from Arusha Umoja Group as a guarantor. Unfortunately, the plan went short

as the misunderstanding between them cropped up. The written agreement which was entered into could not solve their misunderstanding and therefore they resorted to settlement through some meeting and negotiations which however did not yield a fruitful result. It is from this unhealthy development which necessitated the respondent to file the suit in court.

In the trial court, the respondent claimed among others for refund of the money, the principal amount for breach of contract; Capital amount injected by the respondent during business commencement; The loan paid by the respondent to Arusha Umoja Group; Interest, subsistence allowance and costs for legal consultation.

The court granted the respondent almost all what was prayed for being Tshs 10,000,000/- (out of the claimed 15, 354,200/=) being the amount paid to the defendant at the time of business commencement; Interest of Tshs 400,000/- per month from the principal amount in No.1 above from July 2016 to March 2017 worth Tshs 3,600,000/-; Monthly subsistence allowance at the tune of Tshs 200,000/- from February 2016 to March 2017 worth Tshs 2,800,000/- from February 2016 to march 2017 worth Tshs 2,800,000/-; Payment of monthly allowance at the tune of 200,000/= from the month which the defendant stopped paying

the plaintiff plus costs for legal consultation and preparation of demand notice Tshs 500,000/- as well as costs of the suit. The grand total which is 37,184,200/=.

Aggrieved, the appellant has come up with the following four grounds:-

1. *That, the learned trial magistrate erred in law and in fact for determining the matter in which the court didn't have pecuniary jurisdiction.*
2. *That, the learned trial magistrate erred in law and in fact for determining the matter without considering evidence on record as adduced by appellant and his witness during the trial thus arriving to an erroneous decision.*
3. *That, the learned trial magistrate erred in law and in fact for failure to properly assess and analyse evidence adduced by the appellant herein thus arriving to an erroneous decision.*
4. *That, the learned trial magistrate erred in law and fact for awarding the prayers which were not prayed during the hearing of the case thus arriving to an erroneous decision.*

At the hearing of this appeal which proceeded by way of written submissions, the appellant appeared in person, unrepresented whereas the respondent enjoyed the service of Ephrahim A. Koisenge, learned advocate.

The main issue(s) for determination are one whether the trial court was seized with pecuniary jurisdiction? Two, whether the trial court

properly evaluated and analysed the evidence from both parties? Three, did the court award what was prayed and proved in evidence?

Let me start with the first issue, on pecuniary jurisdiction. Arguing ground one the appellant contended that, the trial court had no pecuniary jurisdiction to determine the matter which its specific claim is at the tune of 35,844,200/=. To substantiate his claim, he referred to section 18 (1)(a)(ii) of the Magistrates' Courts Act [Cap. 11 R.E 2019] and the case of **Tanzania Revenue vs. Tango Transport Company limited**, Civil Appeal No. 84 of 2009 CAT at Arusha (unreported). This case was emphasising on the essential consideration of the jurisdiction. Therefore, the appellant was trying to convince this court that the jurisdiction of the claimed amount was supposed to be filed in the Primary court rather than in the trial court.

In reply Mr. Koisange dismissed this argument by the appellant for the following reasons:- First, this issue was raised during the preliminary objection in the trial court and was decided on 23/08/2018. According to him the appellant has read the law upside down because the cited provision by the appellant does not apply in the circumstances of this case. He said, the relevant provision is section 18(1) (a)(iii) of the MCA. He urged this court to dismiss this ground of appeal.

Section 18(1)(a)(iii) of the Magistrates' Courts Act [Cap. 11 R.E 2019] provides;

"18.-(1) A primary court shall have and exercise jurisdiction

(a) in all proceedings of a civil nature-

(ii) for the recovery of civil debts, rent or interests due to the Republic, any district, city, municipal or town council ..

(iii) for the recovery of any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed thirty million shillings, and in any proceeding by way of counterclaim and set-off therein of the same nature not exceeding such value"

Reading from the above provisions between lines, this appeal fits squarely into the section cited by the respondent i.e section 18 (iii) above because the contract was between individuals or natural persons. Section 18(1)(a)(ii) cited by the appellant is distinguishable in that respect because it deals with the civil debt arising from contract, rent or interests due to the Republic, any district, city, municipal or town council or township authority. It does not deal with individuals as in the circumstances of this appeal. I would agree that issue of jurisdiction can be dealt with even on appeal in view of the decision in the case of **Tanzania Revenue vs. Tango Transport Company limited** (supra). That case is however distinguishable because the subject matter in the present case the claim is 35,000,000/- and therefore above Tshs

30,000,000/-. Issue of jurisdiction does not therefore arise. This ground is bound to fail.

I revert to the second issue. As rightly submitted by Mr. Koisenge grounds two and three are resembling. I so conclude because, they are all about evaluation of evidence. The appellant is urging this Court to allow his appeal because he alleges that the trial magistrate did not properly analyse and evaluate the evidence. He said, that he gave evidence in the trial court to the effect that the family meeting resolved that the appellant was obliged to give the respondent Ths. 15,452,000/- as costs incurred by him in renovating and operating the business in the name of Tanzanite City Park. That out of that money the appellant had already paid 5,000,000/= and the remaining to be 10,452,000/= contrary to what the trial magistrate awarded. He also said that he does not dispute having partnership in business with the respondent but the respondent collected all the empty crates of beer after he had failed to pay the remaining sum the fact which was not disputed by the respondent. Also, the appellant submitted further that the trial magistrate awarded the amount of 200,000/- in continuation contrary to evidence on record that the agreed amount be paid for only four months 200,000/- for each month and he had already paid 400,000/= which

covers two months and therefore the remaining is 400,000/=. Reasonably therefore the appellant is surprised where do the amount of 3,600,000/- come from as an interest rate.

Regarding the issue of analysing and evaluating evidence, the appellant cited a number of case like **Stanslaus Rugaba Kasusura and The Attorney General vs Phares Kabuye** [1982] TLR 338, **Yasin Ramadhan Chang'a vs R** [1999] TLR 489, **Ndizu Ngasa vs. Masisa Magasha** [1999] TLR 202 and **Martha Michael Wejja vs Attorney General and 3 others** [1982] TLR 35.

In reply Mr. Koisenge disregarded the submission by the appellant on these grounds. He contended that, it is on record that the appellant testified and agreed that the essence of 200,000/= was for subsistence allowance on monthly basis until when the appellant finally realizes payment of money due in June, 2016 which was not paid. He referred this Court to pages 35, 36, 38, 39 of the trial court typed proceedings and page 13 of the Exhibit A1. The reference made was to show the Court that what the trial court ruled out had a source from the evidence and therefore the decision reached was just and fair.

In dealing with this issue, I find support from the case of **Tanzania Sewing Machine Co. LTD Versus Njake Enterprises LTD**, Civil Appeal No. 15 of 2016 (Unreported)

> *As first appellate Court, we are alive to our duty to respect and exercise caution before interfering with the evaluation of evidence and the conclusions and findings of the trial court which had the full advantage of seeing and hearing the witnesses. This Court sounded that caution earlier in* ***Japan International Cooperation Agency (JICA) vs. Khaki Complex Ltd.****, Civil Appeal No. 107 of 2004 (unreported) when it referred to a statement of law from an English case of* ***Watt vs. Thomas*** *(1947) A.C. at page 429:*
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> *"...It is a strong thing for an appellate court to differ from the finding on a question of fact of the judge who tried the case, and who has had the advantage of seeing and hearing the witness. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court itself have come to a different conclusion.* "

I have carefully and extensively gone through the records and evidence of the trial court. Through such evidence the following facts are not disputed. That according to Exhibit A1 which was also agreed by the appellant specifically at pages 35 and 36 of typed proceedings of the trial court, there was an agreement between the parties that the appellant shall up to June, 2016 pay to the respondent the full amount

of Tsh. 15,354,200/=. In case of failure the respondent shall keep on being paid 200,000/- by the appellant until full payment. The percept reads at page 14 of Exhibit A1;

> *Simon na Mwacha wamekubaliana hawataendelea kufanya ushirkiano wa umoja kwa moja kwenye biashara ya Tanzanite City Park na kwa msingi huo Simon atamlipa Mwacha Tsh. 15,354,200/= na ameahidi kumlipa ifikapo mwezi wa sita (June) 2016.*
>
> *Na kwa kipindi ambacho atakuwa bado hajapokea fedha hizo basi kila mwezi atakuwa akipewa Tsh 200,000/=...*

According to such transcript which is also not disputed its existence by the appellant that amount could not be denied at all. However, the evidence shows clearly that and of course, even agreed by Mr. Koisenge the appellant partly paid 5,000,000/= to the respondent. Therefore, the outstanding amount remained is Tsh. 10,354,200/-. In the meantime, it must be understood that Tshs 15,354,000/= was the amount covering capital injected into the business by the respondent and renovations of the building. This is justified by Exhibit A1 which reads at page 14

> *Hivyo basi Mwacha alikuwa anadai Tsh. 15,354,200/- ambayo itaendelea kujadiliwa na kikao kama fedha iliyoingia katika ukarabati na uendeshaji wa biashara.*

As alluded to above, another amount which was agreed upon by parties through the meeting convened as per exhibit A1 is the subsistence allowance of 200,000/- monthly. However, another fact which is not disputed here is the reality that the appellant on that amount already paid 400,000/=. He is claiming that the agreed time for subsistence allowance was for only four months. Therefore, to him the remaining outstanding sum is only 400,000/- which covers two unpaid months. This is vigorously disputed by Mr. Koisenge. He supports the judgment by the trial court that the said subsistence allowance continues until final realization of the outstanding debt.

As also above said, Exhibit A1 clearly resolves this tag of war. At page 14 of Exhibit A1 among other things provides that;

> *Na kwa kipindi ambacho atakuwa bado hajapokea fedha hizo basi kila mwezi atakuwa akipewa Tsh. 200,000/- na Mwacha ameahidi kwamba ataendelea kuwa na nia njema juu ya Biashara ya Tanzanite City Park.*

Reading the above paragraph intensively it is obvious that the agreement between parties of paying the so called subsistence allowance to the respondent was to terminate on June, 2016 upon full payment of the outstanding sum of 15,345,200/=. Unfortunately as agreed, the appellant only paid 5,000,000/= out of the outstanding sum. Therefore, failure to assume his responsibility as per agreement the

payment of 200,000/= continues until final payment. In the circumstances however, perusing the records and evidences of the trial court it was wrong for the trial magistrate to award monthly subsistence allowance at the tune of Tsh. 200,000/= from February 2016 to March, 2017 worth 2,800,000/= and at the same time order payment of monthly allowance at the tune of 200,000/= from the month which the defendant stopped paying the plaintiff. They are emanating from the same and one thing. I disallow it.

On the last ground the appellant submitted that, it was wrong for the trial magistrate to award prayers which were not prayed during hearing. He gave an example of preliminary consultation fee of 500,000/- and the interests of 400,000/= which was not calculated and proved. Mr. Koisenge in reply argued that this ground has no merit. He so argued because the said prayers were prayed in the plaint. He said Exhibit A2 which was tendered and admitted in evidence shows clearly that the respondent prayed for the legal consultation of 500,000/= which also the appellant did not object.

Let me say from the outset, legal fees are matters which are subject to proof during taxation of costs. The ordinary rule of law is that, evidence should be given only on plea properly raised. This view is

passionately shared by the Court in a number of cases some of them are **James Funke Gwagiro vs The Attorney General** [2004] TLR 161, **Tanzania Tobacco Processors Limited versus The Commissioner General (TRA)**, Civil Appeal No. 174 of 2019 CAT at DSM (unreported)

Merely claiming in the plaint does not entitle a party to relief unless otherwise proved by evidence.

In the event therefore, upon re-evaluating the evidence, I rule as follows;

i) The appellant shall pay to the respondent the principal sum of Tsh. 10,354,200/=

ii) Tsh. 200,000/= monthly allowance from the month of May 2016 when he stopped paying the same until full payment of the principal sum.

~~*iii) Interest of 400,000/= to the principal sum since July 2016 up to March, 2017 worth 3,600,000/=*~~

iv) *Costs of the suit.*

This appeal is partly allowed to the extent above indicated with costs.

Order accordingly.

M. G. MZUNA,
JUDGE.
05/11/2021