IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 395 OF 2021

KAINERUGABA ERICK MSEMAKWELI ..... APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF

THE ISHIK MEDICAL AND EDUCATION FOUNDATION ..... RESPONDENT

(Appeal from the Judgment and Decree of the Resident Magistrate's Court of Dar-es-Salaam at Kisutu)
(G. R. Tarimo, PRM)
Dated 12th day of November 2021
In
(Civil Case No. 363 of 2016)

JUDGMENT

Date: 20/2 & 06/03/2023

NKWABI, J.:

In this appeal, is the respondent not wandering that the appellant is actuated by a fallacy that the respondent is, in the words of the appellant, in re-examination: *"Running a big business but if it is not registered it remains unrecognized."* yet he thinks he would win the case? Has the respondent all along this case not been thinking that the appellant in this saga is actually actuated by acute envy?

Nevertheless, the dispute over the name Feza Boys' Secondary School was entertained by the trial Court. It was the appellant who instituted the suit

against the respondent. After a full trial, the trial court found that the appellant had not proved his case. It dismissed the suit for want of merits while ordering each party to bear their own costs.

In the plaint, the appellant while claiming that he registered the business name of Feza Boys' Secondary School in the year 2016, acknowledges therein too that the defendant's school is registered with the Ministry of Education Science and Technology under registration No. S0189 in paragraph 3 of the plaint but fell short of saying when it was so registered, and probably omitted to say when it was registered purposely to suit his convenience.

However, for the sake of clarity, in this suit in the trial court, the appellant had sought the following reliefs:

a. A declaratory order that the name ***Feza Boys' Secondary School*** belongs to the plaintiff.
b. An order for permanent injunction restraining the defendant from trading as and running their school by using the name Feza Boys' Secondary School.

c. Payment to the plaintiff specific damages to the tune of Tanzanian shillings fifty-two million (TZS 52,000,000/=) as relief for loss of profit by interference with business name.
d. Payment to the plaintiff Tanzanian shillings one hundred million (TZS 100,000,000/=) as part of defendant's profit and reserved assets that the defendant has gained by trading as Feza Boys' Secondary School.
e. Payment of general damages as may be determined by court.
f. Payment of punitive damages to the tune of Tanzania shillings four million (TZS 4,000,000/=).
g. Interest on the decretal sum at the court rate of 12% from the date of judgment till final payment.
h. Costs of and incidental to the suit.
i. Any other order(s) and/ or reliefs the honourable court may deem fit and just to grant in the circumstances.

After being defeated in the trial court, the appellant has come to this Court having the following grounds of appeal:

1. That the Trial Resident Magistrate erred both in law and facts for proceeding with unadmitted defendant's documents and used the same to give judgment.

2. That despite the availability of the evidences that the business name is owned by the appellant the Trial Resident Magistrate erred both in law and facts for failing to evaluate the evidence tendered by plaintiff/appellant before the court.
3. That the Trial Resident Magistrate erred both in law and facts for failing to evaluate the evidence tendered by plaintiff/appellant before the court.
4. That the Trial Resident Magistrate erred both in law and facts for failing to evaluate the evidence tendered by the respondent's witnesses.
5. That the trial court erred both in law and facts for invoking irrelevant provisions of law.
6. That the trial court erred both in law and facts for not evaluating final submissions of the plaintiff.
7. That the trial court erred both in law and facts for not declare and order the prayers contained in the plaint.
8. The Trial Magistrate erred in law and fact by deciding the matter in favour of the defendant while in fact the plaintiff successful proved the case triumphantly.

It is based on the above grounds of appeal the appellant prays for the following reliefs:

i. That the judgment and the decree of the Trial Resident Magistrate Court to be quashed and set aside and the reliefs in the plaint be granted as prayed.

ii. That the respondent be ordered to pay the appellant's costs both in the Resident Magistrate Court and in this Honourable Court.

iii. Any other relief(s) this Honourable Court may deem just and fit to grant in favour of the appellant.

The appeal was disposed of by way of written submissions. The appellant drew and file his submissions in support of the appeal in person. For the respondent, Mr. Saul Santu, learned advocate drew and filed the submission in reply.

In respect of the 1st ground of appeal which is that the Trial Resident Magistrate erred both in law and facts for proceeding with unadmitted defendant's documents and used the same to give judgment, in submission in chief the appellant pointed out the documents that were complained about are exhibit D2 which their admissibility was wrongly discussed in the

judgment and it was admitted as exhibit D2 collectively. He said, the unadmitted documents cannot form part of the court records.

In blessing the procedure adopted by the learned trial magistrate, the counsel for the respondent argued that the trial magistrate confined herself on dispensing justice rather than entertaining technicalities. It was added that the first ground of appeal has no merit, it be dismissed.

It was contended in rejoinder by the appellant that to-date the trial court's proceedings do not contain any admissibility ruling on the raised objections. He called upon this Court to nullify all the proceedings or grant the prayers contained in the amended memorandum of appeal. He cited **Geita Gold Mining Limited v. Sweetbert Hurbert,** Civil Appeal No. 269 of 2019 where it was held:

> *"In the final analysis, given that the arguments by the parties on the admissibility of exhibit D1 are on the record of appeal, we agree with Mr. Mutta that to correct the irregularity, it is appropriate to remit the record of the CMA for it to compose and deliver the ruling. We invoke our powers of revision bestowed to the Court under section 4(2)*

of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 to nullify and quash the proceedings of the CMA from 15/9/2016 onwards, the Award, the High Court proceedings in Labour Revision No. 109 of 2018 and the consequential ruling and orders. We accordingly order that the record of the CMA be remitted back for it to compose the ruling and deliver it to the parties as it had scheduled and thereafter proceed with the hearing and determination of the dispute according to law."

I agree with the appellant that exhibit D.2 was irregularly admitted by the trial court during judgment. I also accept that the same should not form part of the court record and should not be considered in the judgment since they do not have any evidential value. Thus, I expunge exhibit D.2 from the court record. My approach is as per **Jafari Musa v DPP,** Criminal Appeal No. 234 of 2019, CAT, (unreported) where the Court of Appeal said:

"Apart from that, even if the age that was shown in PF3 would have been valid, since the PF3 was not read out after being cleared for admission, it has to be expunged from the

record of appeal. The effect of the expungement of the PF3 is that it makes it redundant and of no evidential value."

I need not discuss the rest of complaints in respect of admission of the documents which I have already decided that they are fated to be expunged from the record. The cited case of **Geita Gold Mining Limited** (supra) is irrelevant in the circumstances of this case since the appellant has weaker evidence than that of the respondent. This position of mine that the appellant has a weaker case will be clear when I will be discussing the grounds of appeal that have been argued together. Each case, however, it should be remembered, must be decided according to its peculiar circumstances.

In his submissions, the appellant argued together the 2nd, 3rd, 4th, 6th, 7th and 8th grounds of appeal together. On the grounds of appeal, he contended that the appellant had evidence to prove that the business name is owned by the appellant having given registration Number 404492 since the year 2016, exhibit P.1 thus the 1st Tanzanian to own the business name Feza Boys' Secondary School. He also complains that there were other laws which were disregarded by the court. He also proceeded to narrate various provisions of the law. His evidence was backed by the testimony of PW2 an official from Business Registration and Licensing Agency hereinafter referred to as BRELA.

In reply submission, the counsel for the appellant argued that the appellant has no claim whatsoever against the respondent. The counsel prayed for the dismissal of the entire appeal. On these grounds of appeal, the appellant did not rejoin.

Admittedly, a court has to consider submissions of the parties. However, the status of submissions was stated in **Registered Trustees of the Archdiocese of Dar-es-Salaam vs. The Chairman Bunju Village Government,** Civil Appeal No. 147 of 2006 where it was observed that:

> *"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."*

Indeed, the above notwithstanding, recourse being had to the mundane law that an appellate court may re-evaluate the evidence and come to its own conclusion, that can be done in the same manner in respect of submissions.

A quick revisit of the appellant's evidence reveals that he had an idea of school business since 2005. In 2016 he decided to register the name with BRELA which informed him that there was no business name registered in the name of Feza Boys Secondary School. Then he saw on newspapers a school called Feza Boys School Secondary had form six examination results. It is when he found that his business name is being used by the defendant. In September 2016 he was arrested for being involved in attempted Coup d'état against Turkish government and the plotters were connected with Feza Boys Secondary School. He claimed, the defendant by using his name have been the best school in Tanzania in 2020 form six results and has got the best reputation in Tanzania than any other school accumulating wealth at his peril and without his permission.

In cross-examination the appellant disputed that the school was registered since the year 1998. The witness from BRELA one Abdrahaman Twaha categorically stated that they do not register schools. Now, I ask myself why then did they register the business name which is a school name? So, the appellant ought to have been directed to go to register his school to the responsible authority. This is what the witness had to say and I quote:

"We do not register school but if the name is intended for business, it must be registered in BRELA. Ownership is registration of the name even if he does not use it we do not register schools and I am not in a position to speak about registration of schools."

The evidence of the PW3 shows that the school with the name of Feza Boys Secondary school is owned by the defendant and it was registered since 1998 if he were not mistaken. While DW1 said the school was registered on 20/11/2000 by the Ministry of Education and Culture now the Ministry of Education, Science and Technology, the school has registration number S. 947.

Now, with the above evidence it is clear that the purported registration of the name of the school Feza Boys Secondary school by the appellant is a unwarranted attempt to infringe the school business of the respondent.

In his submissions, the appellant has called upon this Court to order for a retrial because of the improper admission of exhibit during judgment. However, retrials are rarely ordered. **Kanguza s/o Machemba V. Republic Criminal Appeal No. 157B of 2013** and stated a follows:

"An order for retrial should only be made where the interest of justice required it."

The above position of the law is meant to avoid giving a chance to the appellant to fill in the gaps. In this case, to order retrial is useless because the appellant has a weaker case (the evidence of the appellant is very weak). This reminds me of an old adage of *"being too clever by half"*. The appellant was too clever to register the name to BRELA, but did not bother to check which the authority that is responsible for registering schools. Yet, he did not go further and investigate to know when that school started conducting business in that name, or that he did not care. The appellant should know that he went to register a school to a wrong authority which is not responsible for registering schools. When he went to an authority responsible for registering schools, registration application was rejected because there was already another school registered in that name.

It is worth to note here that it is averred under paragraph 16 the plaint that the plaintiff failed to register his school with the Ministry of Education, Science and Technology because in the registry of the Ministry there is the same name due to the defendant illegal use of the same name. Therefore, it seems to me that the appellant went to BRELA to register the name as his

business name in order to oust the respondent from the use of the name the respondent has been using for about two decades. That is unenforceable. It would be prudent for the appellant to go to deregister the name from the register of BRELA because maintaining it there, would be ineffectual.

I think that the decision of the trial Court is supported by the position of the law as propounded, though by way of analogy, in the case of **Rashid Baranyisa v. Hussein Ally** [2001] TLR 470 though said in respect of a land matter it was held that:

> *"(i) the mere act of designating the area a trading Centre and surveying it did not have the effect of extinguishing the deemed right of occupancy of the respondent over the land and reducing him into a squatter.*
>
> *(ii) The purported allocation of the plot to the appellant was ineffectual."*

See also **Victor Robert Mkwavi v. Juma Omary,** Civil Appeal No. 222 of 2019, CAT (unreported) at page 9 where it was stated:

> *"Our settled jurisprudence, as stated by the Court in **Mwalimu Omari** (supra) and **Lohay Akoonay** (supra), instructs us that a preexisting customary right of occupancy*

cannot be extinguished by a subsequent grant of the right of occupancy on the same plot of land unless compensation was duly paid before the grant was made."

It appears to me that when the legislature created two parallel systems of registration it had an intention to have those two systems (regimes) to work parallel. One to cater for school and another to cater for business other than school.

I have re-evaluated the evidence in the record on the guidance of **the Registered Trustees of Joy in The Harvest v Hamza K. Sungura,** Civil Appeal No. 149 of 2017, CAT (unreported):

"... it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

The re-evaluation of the evidence that has been briefly shown above clearly shows that the appellant's evidence was weaker compared to the evidence in favour of the respondent.

I have to remind the appellant that the law should be interpreted to the extent that no common man should think that the law has parted company with common sense. It will be ridiculous if the registration of the name at BRELA would extinguish the right of the person who has been using the school's name registered under the National Education Act, 1978 under section 24, 25 and 26. There is no any provision under the National Education Act that requires the schools' names should be registered by BRELA. The respondent has right under the National Education Act. Prudence indicates that the appellant ought to have sought guidance from the authority responsible for registering school.

Therefore, the appellant's claim that he invented the name is false because the same name has been in use by the respondent for about two decades. Conversely, the appellant is the one who ought to be paying for damages to the respondent for damages and agony and lot of good will of the school, if any rather than himself claiming damages against the respondent.

In respect of ground number 5 of the grounds of appeal, the appellant is criticizing the learned trial magistrate for invoking irrelevant provisions of law and the case of **Francis Mushi v. Mshikamano** Group, Civil Appeal No. 34

of 2019. The respondents counsel argued that that ground of appeal lacks merit and prayed it be dismissed. The appellant did not make a rejoinder on ground number 5.

I have considered this complaint on ground number 5 I too think it is unmerited because the appellant went to register the name of a school to an authority (agency) that was irresponsible of registering schools. It is the appellant who is basing his claim on irrelevant laws concerning school registration. Ground number 5 is dismissed.

To conclude, all the grounds of appeal preferred by the appellant are wanting in merit, thus, the appeal is dismissed with costs. The respondent has to have her costs in the court below in line with her prayer in the submissions in reply.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 6th day of March, 2023.

THE HIGH COURT OF TANZANIA

J. F. NKWABI
JUDGE