

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

HIGH COURT CIVIL APPEAL NO. 07 OF 2020

(Originating from the District Court of Chato at Chato in Civil Case No. 09/2019)

JAMES MSIGE APPELLANT

VERSUS

CHRISTIAN MANUNGA RESPONDENT

JUDGMENT

29/05 & 10/06/2020

RUMANYIKA, J.:

The appeal is against judgment and decree of 07/02/2020 of Chato District Court (the trial court) following breach of contract one Christian Manunga (the respondent) having been awarded shs. 2,038,500/= being balance of specific performance plus general damages of shs. 1,500,000/=.

Messrs Samson Bashaya and Erick Rutehanga learned counsel appeared for James Msige (the appellant) and the respondent respectively.

Following the global Covid-19 Pandemic and pursuant to my order of 27/04/2020 the parties were present online, I heard them by way of audio teleconferencing through mobile numbers 0754059029 and 0718027027 respectively.

Mr. S. Bashaya learned counsel chose to, he argued grounds 4 and 5 together and submitted that the trial court had no pecuniary jurisdiction because shs. 1,799,650/= fell under jurisdiction of a primary court (Sections 33(1) and 47(1) (b) of the Magistrate's Court Act Cap 11 R.E. 2019 as amended. That if anything the criteria for transfer of the case from a primary court to district court were not met (see the case of **Abbakari Mohamed Mlenga V. Juma Mfaume** (1989) TLR 145.

On ground 3, Mr. S. Bashaya submitted that their agreement had not been one to repay the loan by cash but fish.

For grounds 4 and 5 the learned counsel submitted that indeed the appellant was in receipt of 40 pieces of fishnets but for the reason of it being under size and prohibited, the government burnt the fishnets into ashes and the appellant therefore was not to blame as the contract was so frustrated (defence of **force majeure**).

Mr. E. Rutehanga learned counsel argued grounds 1 and 2 together and submitted that the trial court had pecuniary jurisdiction, for good reason one having sought and the case was transferred from primary court. With the issue of the amount claimed and awarded, counsel submitted that it was not irregularity in the real sense of the word. That contrary to provisions of Sections 110 and 111 of the Evidence Act the contract wasn't proved one frustrated. That is all.

At least it is evident and not disputed that either written or orally the appellant had received from the respondent loan of brand new forty (40) pieces of fish nets of even size worth shs. 2,650,000/= with the

arrangement that the former repays it in terms of fish until date of full payment. Until the case was pending in the trial court appellant had reduced it by shs. 850,350/= to date.

The issue therefore is no longer whether or not there was between the parties a valid contract or whether there was breach of contract but rather whether the defence of frustration was available and therefore whether the appellant was justified. In fact the appellant is on record having testified:-

“..... I remember on 25/06/2017 we were given fishing nets me and Yusuph Mfungo Kajura, 40 pieces of fishing nets 6 inches, 6 piece 3 double **we had an agreement that we shall be fishing and selling our fishes to** Christian Manungawe were not told the value of this fishing net, so we worked for about 8 months, in January 2018, we received a doria for preventing illegal fishing, those fishing nets given by Manunga were declared to be illegal, by that doria. So, we as fishermen we told the owner of these fishing nets Mr. Christian Manunga but he did not come, so thosefishing nets were destroyed by using fire.....”

In other words as Mr. S. Bashaya learned counsel submitted, the appellant would have fully performed but for the government anti-illegal fishing team who, if at all frustrated the contract as they burnt the fish nets into ashes.

Indeed a copy of the contract "Exhibit A1" leaves much to be desired actually it wasn't signed by the parties, leave alone it being secondary evidence and the provisions of Section 68 of the Evidence Act were not complied with. The exhibit is expunged from the record.

The 40 fish nets may have been found undersize, they were, for that reason seized and burnt into ashes by the government ant illegal fishing team yes, but the appellant did not sufficiently prove it much as even if the seizure certificate/ report was accepted in evidence, size and number of the fish net was not specifically established and proved leave alone the appellant's failure to bring at least a single member of the alleged ant illegal fishing team. Moreover, the appellant did not in his evidence state the circumstances that led him to accept and use, if at all the under size and prohibited fish nets according to him being a seasonal fisherman. With all the afore going not only the fish nets were not proved destroyed, but also the possibility of the appellant having had taken full advantage of the ant illegal fishing operation could not be ruled out. In other words therefore, like in his reasoned judgment the learned trial resident magistrate said, the respondent's case was on balance of probabilities proved. I shall have nothing upon which to fault the learned resident magistrate. The appeal is dismissed with costs.

Right of appeal explained.


S. M. RUMANYIKA
JUDGE
08/06/2020

The judgment is delivered under my hand and seal of the court in chambers this 10/06/2020 in absence of the parties with notice.



S. M. RUMANYIKA

JUDGE

10/06/2020