

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

PC CIVIL APPEAL NO. 03 OF 2021

(C/O Mpanda District Court in Civil Appeal No. 05/2021 and PC Civil Case
No. 289/2020)

VANUS SINKAMBA APPELLANT

VERSUS


FESTO VALERIAN MUSHI RESPONDENT

Date: 23/08/2021 & 06/09/2021

JUDGMENT

Nkwabi, J.:

This is a second appeal. The appellant was sued in Mpanda urban primary court for T.shs 513,000/=. After hearing both parties the trial court gave a unanimous verdict that the appellant was liable to pay the respondent T.shs 343,000/= which the appellant admitted in his defence. The appellant was displeased with the unanimous decision of the trial court, he unsuccessfully appealed to the district court. Annoyed by the decision of the district court, he lodged a petition of appeal to this court while praying for this appeal to be allowed with costs. The petition of appeal has two grounds of appeal as follows:


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- 1. That, the first appellate court erred both at law and fact by not recognizing the electricity installation work made by the appellant to the respondent's house hence it erred in ordering the appellant to pay the respondent T.shs. 343,000/=.*
- 2. That, the first appellate court erred both at law and fact by giving contradictory orders with regard to the appellant's motor cycle which was illegally and unreasonably impounded and retained by the respondent.*

The background of this matter is that, on 19/09/2020 the appellant had promised the respondent to install REA project electricity in his business room and as they agree, and at the trial court respondent claimed to have given the appellant money in the tune of 513,000/= for the troubles and all the requirements until the installation has succeeded.

Despite the efforts of the respondent in providing all financial requirements to the appellant, still there was no any electrical installation made as agreed by the two. The respondent made follow ups, he never succeeded either to

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convince the appellant to refund him or proceed with the installation of electricity.

The appellant was summoned so that their differences would be settled and, on that day, he had a motorcycle, and they were expecting to have their settlement before an engineer known as Chacha, but as soon as the mentioned engineer saw the appellant, he exclaimed that he was a cone man, and the appellant was on his heels leaving the motorcycle behind. The respondent got hold of the said motorcycle after reporting the incident to the street chairman and the police station.

Thereafter, the respondent sued the appellant for the refund of his money in the tune of 513,000/= at the Mpanda Urban Primary Court. The decision therein was in favour of the respondent whereby the appellant was ordered to pay the respondent 343,000/= since the respondent failed to prove on 513,000/= debt.

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Once the matter came for hearing, both parties appeared in person, unrepresented.

In his submissions, the appellant reiterated his grounds of appeal, claiming that the trial court did not consider the work he had done. He added that, the District Court did not consider the costs he incurred in the work he did. The appellant prayed this court to see page 9 paragraph 3 of the typed judgement of the trial court. He added that, he was held liable by the trial court for the claim that he admitted the amount that he owed the respondent.

The appellant proceeded that the trial court failed to appreciate his evidence. He submitted that the magistrate turned to be a witness instead of an adjudicator. He submitted that he did a work valued at 295,000/= which was supposed to be considered by the trial court.

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He proceeded by submitting that the appellate court misdirected itself by giving a contradictory judgement. He said, the appeal was not an execution proceeding, the order for sale of the motorcycle is illegal as it contradicts that such order ought to be given in execution proceedings. The appellant thus prayed for this court to quash the said order for the appeal filed was not an execution application. He concluded by praying for his appeal be allowed, Tshs. 295,000/= be deducted from the debt he owes the respondent, and that the respondents should return the motorcycle to the appellant.

In reply submissions, the respondent argued that the submissions made by the appellant are all false. He supports the decision of the District Court and the trial Court's decision.

The respondent added that, he came to know that the appellant is a cone man after 7 months of biting around the bush with no any connection of electricity whereas the respondent had convinced him that the connection would have been made within 7 days. The respondent prayed for this appeal be dismissed.

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The appellant had nothing to add as rejoinder.

At the outset, I should observe that I am guided by **Neli Manase Foya v. Damian Mlinga [2005] T.L.R 167**, where it was decided:

"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of fact."

I will tackle one ground of appeal after the other. The 1st ground of appeal claims that the first appellate court erred both at law and fact by not recognizing the electricity installation work made by the him to the

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respondent's house hence it erroneously ordered the appellant to pay the respondent Tshs. 343,000/=.

I have watchfully raked the court record on this lamentation by the appellant and I am of the firm view, just as the two lower courts that the claim is wanting in merits. The decision of the lower courts is based on the appellant's admission of the amount at T.shs 340,000/=. The admission was clearly maintained, during cross examination, the appellant himself agreed that he owes the respondent 343,000/= and not 513,000/=. He was asked more than once by different people and he maintained his answer that he owes the respondent 343,000/=. The 1st ground of appeal is lame and dismissed.

Finally, I the 2nd ground of appeal, where the appellant claimed that the first appellate court erred both at law and fact by giving a contradictory order with regard to the appellant's motor cycle which was illegally and unreasonably impounded and retained by the respondent.

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On the 2nd ground of appeal, the appellant ventured that the appellate court misdirected itself and gave a contradictory judgment. The appeal was not an execution proceeding, the order so sale of the motorcycle is illegal as it contradicts order No. 2. It ought to be given in execution proceedings, the appellant proposed. He prayed this court to quash this order as it was not an execution application. He prayed this court to allow his appeal. Tshs. 295,000 be deducted from the 'deni' and the respondent ordered to return his motorcycle and costs be born by the respondent.

Respondent, argued while reacting to the assertions by the appellant that all the submissions of the appellant are false. He supported the decisions of the lower courts. He added, he came to know that the appellant is a conman after 7 months of no connection of electricity. He said the appellant convinced him that he (the appellant) would connect electricity within 7 days. He prayed the appeal be dismissed.

However, as per the records, the trial court had not made any order as far as the said motorcycle is concerned, but in appeal, the District Court ordered the respondent to return the motorcycle to the appellant, but in failure of

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the appellant to pay the amount he owes the respondent as ordered by both lower courts, the motorcycle should be sold and the respondent take his amount whereas the remaining amount as the proceeds of the sale should be given to the appellant. Keeping in mind, consideration to this motorcycle was alerted by the appellant himself in his grounds of appeal to the District Court, that the trial court made no order as to the detained motorcycle.

I buy the ground of appeal since, the trial or an appeal is not an execution proceeding. The first appellate court was wrong in issuing the complained order, such order could be issued in execution proceedings. It was correct for the trial court not to make any order in respect of the motorcycle as there was no counterclaim. It is trite law that the court cannot give a relief that has not been pleaded. The order made by the first appellate court in respect of the motor cycle is set aside. This ground of appeal wins.

Finally, based on the above discussion, the appeal is partly allowed. The appellant has to bear the costs of the respondent.

It is so ordered.

DATED and **Signed** at Sumbawanga this 06th day of September, 2021.



9 *M. Kabi*



J. F. Nkwabi

J. F. Nkwabi

JUDGE