IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J. A., WAMBALI, J.A And SEHEL, J. A.)

CIVIL APPEAL NO. 160 OF 2018

SIMON KICHELE CHACHA.....APPELLANT
VERSUS
AVELINE M. KILAWE.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania sitting at Mwanza)

(De-Mello, J.)

Dated the 11th day of July, 2017
in
Civil Appeal No. 31 of 2014

.....

JUDGMENT OF THE COURT

24th & 26th February, 2021.

SEHEL, J.A.:

This second appeal arises from Civil Case No. 02 of 2013, wherein the respondent claimed judgement and decree against the appellant for a sum of Two Million Six Hundred Thousand Tanzanian Shillings (TZS. 2,600,000.00) being principal sum of the loan amount plus Seven Million and Eight Hundred Thousand Tanzania Shillings (TZS. 7,800,000.00) being contractual interest on the loaned amount.

The facts of the case were such that: - on 14th May, 2012 the appellant entered into a loan agreement with the respondent whereby he

extended a loan of TZS. 2,600,000 in the presence of the Ward Executive Officer, Evarist Ndongo (PW2). The loan was to be repaid within three (3) months with an interest of 30%. The agreement was tendered and admitted as Exhibit P1. The loan was secured with a Certificate of Title No. 35994 on Plot No. 579 Block U Mutex area in Musoma Township which was tendered and admitted as Exhibit P2. It is the evidence of the respondent (PW1) that the appellant repaid part of the loaned amount, that is TZS. 400,000, leaving an outstanding balance of TZS. 2,200,000.00 plus contractual interest of 30%.

The appellant on his part who testified as (DW1) disputed the claimed amount. However, he acknowledged that he took a loan of TZS. 2,600,000.00 which he translated to mean that TZS. 2,000,000.00 was a principal sum and TZS. 600,000.00 was a three months interest. It was his evidence that on 13th July, 2012 he paid the respondent TZS. 400,000.00 but the respondent after deducting the amount paid exaggerated the accrued interest and made the outstanding balance to be TZS. 8,000,000.00 which he could not be able to repay. He said he was willing to repay TZS. 2,000,000.00 but the respondent refused to accept the amount. Hence, he sought the assistance of the Primary

Court to pay back the loan to the respondent. To that effect, he tendered a letter dated 21st May, 2013 and it was admitted as Exhibit D1.

At the end of the trial, the trial magistrate delivered his judgment in favour of the respondent. He awarded the respondent TZS. 2,200,000.00 as principal sum; 30% contractual interest; interest at court's rate and costs of the suit.

Aggrieved with the decision of the trial court, the appellant appealed to the High Court of Tanzania (the first appellate court) which partly allowed the appellant's appeal by reducing the interest rate from 30% to 5% chargeable from the due date of September, 2012 till payment in full. As such, the appellant was ordered to pay the respondent TZS. 2,200,000.00 being principal, interest rate at 5% per month from September, 2012 till payment in full and costs.

Still aggrieved, the appellant appealed to this Court with a five point memorandum of appeal that: -

1. *That, the learned High Court Appellate judge erred in law to grant the respondent 5% interest per month from the date of signing the loan contract when the respondent is not the legally authorized and or licenced registered money lender.*

2. *That, the learned High Court Appellate Judge erred in law to condone and or legalize loan contract tainted with illegality of the respondent on unauthorized money lender to grant loan upon charge of shylocks exorbitant loan interest.*
3. *That, the learned High Court Appellate Judge erred in law when she failed to take into consideration that the respondent used to evade payment of his principal loan money TZS. 2,000,000.00 with interest of TZS. 600,000.00 Total TZS. 2,600,000.00 from the appellant with intent to create unnecessary increase of illegal interest and bill of costs.*
4. *That, the appellant had paid the respondent TZS. 400,000.00 out of TZS. 2,600,000.00 and is only indebted to the respondent TZS. 2,200,000.00 which the appellant tried to pay the respondent but the respondent refused to receive the same for want of taking my collateral house bond.*
5. *That, the judgment of the High Court was against the provisions of section 24 of the Banking and Financial Institutions Act No. 5 of 2006.*

The appellant and the respondent filed written submissions in support and in opposition of the appeal, respectively. Further to that, at the hearing of the appeal, both the appellant and the respondent appeared in person, unrepresented and, after fully adopting their respective written submissions, made brief oral submissions.

The appellant beseeched us to allow the appeal. Though he did not dispute that he borrowed money from the respondent he was of the view that the interest of 5% per month was exorbitant such that he could not repay it.

In the written submissions, the appellant argued the first and second grounds of appeal together. The remaining grounds number three, four and five were also argued together.

For the first and second grounds of appeal on contravention of the conditions stipulated under section 7 of the Banking and Financial Institutions Act, Cap. 342 R.E 2002 the appellant submitted that the respondent had no valid licence to advance loan with interest to the appellant. Therefore, the Court should find the contract illegal thus void. On this, the appellant put reliance on the decision of the High Court in

David Charles v. Seni Manumbu, Civil Appeal No. 31 of 2006 (unreported).

Regarding the third, fourth and fifth grounds of appeal, the appellant made a general summary on the efforts made to repay back the loan to the respondent. It was his submission that despite all efforts made, the respondent avoided to receive the money for his own ill motive of retaining the security of his Title Deed.

With that submission, the appellant moved the Court to allow his appeal with costs by setting aside the decision of the High Court. That apart, the appellant in his oral submission acknowledged to have taken the loan but he requested the Court to reduce the interest of 5% per month.

In his oral account, the respondent implored us to find that the appellant defaulted to repay the loan for the past ten years hence caused much inconvenience to him. Further, in his written submissions, the respondent argued that the appellant on his free will and with sound mind entered into a contract with him on 14th May, 2012 which was reduced in writing. He further submitted that according to the conditions of the contract which the appellant signed, the borrowed money was to

be repaid within a period of three months and in case of default an interest of 30% per month would be charged together with the attendant legal action to follow. On the issue that the respondent should have a licence, he argued that the agreement was purely a contractual matter and not a financial transaction as found and held by the two lower courts. He also relied to a decision of the High Court in the case of **Amandus Zicky Masinde v. Nyamsera Marumba**, Civil Appeal No. 88 of 2016 (unreported). In so far as the respondent is concerned, the appeal lacked merit, it ought to be dismissed with costs and the High Court decision be upheld because he was happy with the outcome.

The appellant did not have anything to rejoin.

On our part, having gone through the memorandum of appeal, written submissions and heard the parties' oral submissions we wish to narrow down non-contentious issues. It is not disputed by the parties that the appellant entered into a contract with the respondent to borrow money of TSZ. 2,600,000.00 which was to be repaid within three months from the date of its advancement. It is further not disputed that the appellant repaid TZS. 400,000.00 leaving an outstanding balance of TZS. 2,200,000.00.

The only contentious issue is the chargeable interest of 5% per month awarded to the respondent by the first appellate court.

In order to resolve this issue, it is imperative that we revisit the agreement concluded by the parties (Exhibit P1) on 14th May, 2012. Clause 2 of the agreement provides that the respondent advanced to the appellant TZS. 2,600,000.00 to be repaid on 13th July, 2012 with no interest chargeable therefrom. Further, Clause 3 of the agreement apart from stating that the appellant deposited his certificate of title as a security (Exhibit P2) it also states that in case the appellant defaulted to repay the loan within the agreed timeframe an interest of 30% per month would be chargeable and legal action would be taken against him. As alluded herein, the appellant does not dispute the conclusion of the agreement. As he is not disputing the agreement dated 14th May, 2012 (Exhibit P1) the appellant is bound by the terms and conditions of that agreement.

It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly

stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus: -

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."*

With the same spirit of the principle of sanctity of contract and being mindful with the clauses of the Exhibit P1, we are reluctant to accept the appellant's excuse for non-performance of the agreement which he freely entered with sound mind. On our part, we are satisfied that the contract entered between the appellant and the respondent had all attributes of a valid contract. It was not prohibited by the public policy and it is on record that the appellant was not complaining about his consent to the agreement being obtained by coercion, undue influence, fraud or misrepresentation in order to make it voidable in terms of the provisions of section 19 (1) of the Law of Contract Act, Cap. 345 R.E 2002. We therefore wish to emphasis here that since the appellant at the time he concluded Exhibit P1 with the respondent was a free agent and he was of sound mind, he must adhere and fulfill the terms and

conditions of it. But so long as the first appellate court reduced the contractual interest from 30% to 5% per month and the respondent did not appeal against it, we find no good reason to alter the interest of 5% per month awarded by the first appellate court. More so, the respondent submitted, in his oral and written submissions, that he was satisfied with the finding of the first appellate court.

Lastly, we do not see the need to venture on the complaint that the respondent had been avoiding the appellant. This is an issue of fact which was adequately considered and determined by the two lower courts. This being a second appeal, we refrain in interfering with lower courts' concurrent findings of fact. We held the same view in the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L. R 31 where at page 32 we said:

> *"Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."*

The appellant, in the instant appeal, has failed to show either a misapprehension of evidence, or a miscarriage of justice or violation of some principle of law or procedure that would justify this Court to interfere with the concurrent findings of fact on failure to make payment on time to the respondent. We find no justification on the appellant's complaint at this second stage of appeal.

In the circumstances, we do not find merit to all the grounds of appeal. We accordingly dismiss the appeal with costs to the respondent.

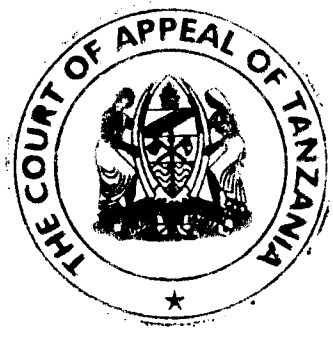
DATED at **MWANZA** this 25th day of February, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Judgment delivered on this 26th day of February, 2021 in the presence of the appellant in person and in the absence of the respondent is hereby certified as a true copy of the original.



D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL