IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., GALEBA, J.A And MAIGE, J.A.)

CIVIL APPEAL NO. 84 OF 2019

OLIVA JAMES SADATALLY..... APPELLANT

VERSUS

STANBIC BANK TANZANIA LIMITED..... RESPONDENT

(Appeal from the Judgement and Decree of the High Court of Tanzania, at Dar-es-Salaam)

(Mwandambo, J.)

dated the 10th Day of July, 2018

in

Civil Case No. 92 of 2013

.....

JUDGMENT OF THE COURT

14th & 17th June, 2022

MUGASHA, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania, at Dar es Salaam in Civil Case No. 92 of 2013 dated 10th July 2018. In that case, Oliva James Sadatally, the appellant herein sued Stanbic Bank Tanzania Limited, the respondent for a claim of Tanzania shillings two hundred million (TZS. 200,000,000.00), being the value of goods and items unlawfully taken from the appellant's business premises which was earlier

on closed by the respondent without any justification and reopened in the absence of the appellant.

For the purposes of a better understanding of what underlies this appeal, the factual context is briefly as follows: On the 14/9/2012, the appellant and the respondent executed a loan agreement amounting to TZS. 30,000,000.00 repayable with interest at 4.75% per month, for a period of 12 months commencing on 14/10/ 2012 to 14/9/2013. According to the quick loan facility letter, the appellant had agreed to pay each installment to the tune of TZS. 3, 924,31469. It was also agreed that arrears exceeding thirty (30) days would be charged interest of 30% without any further notice.

The record shows that the appellant managed to repay part of the loan to the extent of three monthly installments in October 2012, November 2012 and December 2012, and defaulted paying the subsequent installments. Following the default, the respondent initiated recovery measures having closed the appellant's shop in 8/3/2013. The appellant's bid to have the shop re-opened was not successful but on 8/5/2013, the respondent re-opened the shop and auctioned the appellant's goods and managed to realise a sum of TZS. 1, 700,000.00 instead of the TZS.

34,000,000.00 which was the outstanding loan. The appellant claimed that this was not warranted in the absence of the default notice or any court order and yet, goods taken were worth TZS. 200, 000,000.00 while the appellant had already paid not less than TZS. 15,000,000,00. She claimed, the respondent's act to have subjected her to untold hardship and tremendous loss considering that the value of goods unlawfully taken was above the outstanding loan amount. The appellant asked the trial court to enter judgment and decree against the respondent on the following reliefs: **One,** a declaration that the respondent's act of taking away the items was unlawful; **two**, payment of the sum of TZS. 200,000,000/= being the value of the items taken plus commercial interest of 30% from 8/3/2013 to the date of judgment; **four**, payment of interest of 12% from the date of judgment up to the date of full payment; and **five**, any other reliefs the Court would deem fit to grant.

On her part, in the written statement of defence, the respondent denied the appellant's assertions and raised a counter-claim claiming from the respondent a sum of TZS. 34,420,268.00 being an outstanding loan amount, default interest and costs incurred by the respondent in recovering the loan amount due.

At the trial, apart from the appellant's own admission on the failure to repay the loan, she expressed her grievance on the closure of the shop by the respondent as that was not a subject of the loan agreement in case of default. She as well contended that, since the shop was closed and re-opened in her absence, many pairs of shoes she had purchased and stocked in the shop were taken away by the respondent. However, she had no inventory of what was in the shop but rather, receipts for the purchase of the shoes. However, her attempt to have the receipts tendered was not successful after the trial court had sustained an objection and rejected to admit the receipts because they were not originals.

On the other hand, Johnson Kakiziba (DW1) who was a sole witness on the part of the respondent stated that, as the appellant had defaulted repayment of the loan and since efforts to trace her through the phone were futile, the respondent was forced to close the shop and subsequently sell the goods and items in the shop in a bid to recover the loan amount. According to DW1, the items were sold in a public auction and fetched a sum of TZS. 1, 700,000.00 which was not sufficient to settle the debt as the outstanding balance stood at TZS. of 34,000,000.00. The defendant

prayed the Court to dismiss the appellant's claim and prayed for the judgment on a counterclaim.

After a full trial, the learned trial Judge was satisfied that, **one,** the appellant had breached the loan agreement having defaulted to pay the outstanding loan balance; **two,** the appellant's claim of TZS. 200, 000, 000.00 was not proved on the balance of probabilities in the absence of proof of the value of the goods which were in the shop; **three,** although the appellant's properties were lawfully attached, given the respondent's failure to notify the appellant on the closure and re-opening of the shop, the appellant was entitled to be paid general damages at a tune of TZS. 10,000,000.00. On the other hand, judgment was entered in favour of the respondent on the counterclaim on the amount prayed that is, TZS. 34,420, 268.38 less 1,700,000.00 on the outstanding loan.

The appellant is aggrieved by the outcome of the trial and has preferred an appeal raising four grounds of complaint in the Memorandum of Appeal as hereunder:

1. *That, the Honourable trial Judge grossly erred in law and fact by ignoring the receipts tendered by the plaintiff as the evidence during the trial.*

2. *That, the Honourable trial Judge grossly erred in law and fact by finding in favor of the defendant while on the balance of probabilities the evidence tendered by the plaintiff was heavier than that tendered by the defendant.*

3. *That, the Honourable trial Judge grossly erred in law and fact by finding in favor of the defendant while the defendant admitted that the plaintiff's shoes and other goods of unknown quality were taken from the plaintiff's shop by one Majembe Auction by way of force.*

4. *That, the Honourable trial Judge grossly erred in law and fact by entering judgment in favor of the defendant to be paid TZS. 34, 420, 268 as the amount claimed on counterclaim while the defendant took the plaintiff's goods worth more than the amount claimed by the defendant.*

At the hearing, the appellant was present in person unrepresented, whereas the respondent had the services of Mr. Zacharia Daudi, learned counsel. Parties adopted written submissions earlier filed.

Basically, the appellant is faulting the trial court for **one,** not admitting in evidence the receipts worth TZS. 200,000,000.00 for purchase of items taken from her shop and concluding that the claim was not proved on the balance of probabilities; and **two,** judgment in favour of the respondent to be paid a sum of TZS. 34,420, 268.00 in respect of the

counterclaim which is far below the value of items taken by the respondent from the shop. In the premises, the grounds of appeal will be deliberated and determined together.

It was the appellant's submission that, the shoes which were taken by the respondent were valued at TZS. 200,000,000.00 as per the original receipts which were tendered but not admitted in evidence. In this regard, it was argued that, the burden of proof shifted to the respondent who apart from admitting to have taken the items from the shop, fell short of establishing the value thereof. As such, the appellant argued that, the trial Judge had applied a double standard having accepted the respondent's evidence that, the sum realized after the sale was TZS. 1,700,000.00 which was far below the receipted value of TZS. 200,000,000.00. In the premises, the appellant urged us to allow the appeal with costs.

On the other hand, it was submitted for the respondent that, the refusal to admit the receipts was justified because they were not originals and as such, there was no primary evidence to prove the documentary account. It was further submitted that, the receipts were neither relevant nor authentic having been partly authored in Chinese language and the appellant never bothered to submit the receipts for translation before

introducing them in evidence. In this regard, it was the respondent's submission that, in the absence of the valid receipts, the appellant did not prove her case on the balance of probabilities and did not meet the threshold of proving her case as required by the provisions of section 110 of the Evidence Act [CAP 6 R.E. 2019] (the TEA).

Similarly, it was the respondent's argument that in the absence of any proof on the value of the items alleged to have been taken away by the respondent, in the wake of outstanding loan, the trial Judge was justified to enter judgment on the counter claim in favour of the respondent. Finally, the respondent urged the Court to dismiss the appeal with costs.

From the grounds of appeal and the submissions of the parties, there are basically three issues which stand out for our determination namely:

1. Whether, the learned trial Judge, correctly rejected to admit in evidence copies of receipts on the value of items which were in the appellant's shop.
2. Whether, the appellant managed to prove her claim on the balance of probabilities.

3. Whether the respondent was entitled to the reliefs in the counter claim.

On the propriety or otherwise of the rejection of the receipts in respect of the purchase of items alleged to have been in the appellant's shop, the record at page 123 of the records shows that, after PW1 had prayed to tender the receipts as exhibits, the move was objected to by respondent's advocate on the ground that the receipts were not originals. And, that as the receipts were written in the Chinese language, it could not be ascertained if they related to the shoes which were alleged to be in the appellant's shop or not. The respondent's objection was sustained on account of the following reasons:

> *"The receipts are consciously not originals but in any case, there is nothing to suggest that they relate to the purchase of the subject of the instant suit on which the witness is giving evidence. The prayer for tendering the receipts is thus rejected as prayed by the learned advocate. The copies are returned accordingly.*

It is crucial at the outset to point out that, a copy of the document intended to be relied on as evidence whether certified or not, falls under

the category of secondary evidence in terms of section 65 of the TEA which stipulates:

" Secondary evidence includes-

(a) Certified copies in accordance with the provisions of this Act;

(b) Copies made from the original by a mechanical process which in themselves insure the accuracy of the copy and copies compared with such copies;

(c) copies made from or compared with the original;

(d) Counterparts of documents as against the parties who did not execute them;

(e) Oral accounts of the contents of a document given by some person who has himself seen it".

Proof of documents by secondary evidence is only on circumstances stated under the provisions of section 67 of the TEA which stipulates:

"(1) Secondary evidence may be given of the existence, condition, or contents of a document in the following evidence cases-

(a) When the original is shown or appears to be in the possession or power of-

(i) The person against whom the document is sought to be proved;

(ii) A person out of reach of, or not subject to, the process of the court; or

(iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;"

According to the record, the trial Judge had rejected the receipts because they were not originals. It is also on record that the appellant told the trial court that other receipts which were in the shop went missing after the respondent had taken away the items from therein. According to the provisions of section 68 of the TEA, before the appellant could rely on the copies of the receipts, she had two options of either serving the party in possession of the document with a notice to produce the document in court, or requesting the court to issue summons to the party in possession of the document to appear in court and testify. Nonetheless, for reasons best known to the appellant, she fell short of utilizing any of the two options. Therefore, in event, it is the appellant herself who failed to comply with the dictates of the law. It is unwarranted to shift the blame against the learned trial Judge on the alleged application of double standard.

Moreover, according to what is pleaded by the appellant in paragraphs 7 and 12 of the plaint, the shop was closed on 8/3/2013 and remained so up to 8/5/2013 when it was re-opened and items therein sold. Prior to that, she had approached the respondent with a view that the shop be opened so that she could sell the items in order to service the outstanding loan but the respondent declined. The record is silent as to why the appellant never approached the respondent so that they could prepare a joint inventory of what was found in the shop which probably, could have added value in the evidence relating to what was actually found in the shop before the respondent embarked on the sale. Thus, as correctly found by the learned trial Judge, a two months' closure of the shop was not in any way resisted by the appellant before the same was opened or else she could have retrieved the receipts which she alleged to have been in the shop and that apart, she never reported the matter to any authority.

That apart, could the appellant's oral account be acted upon to substantiate the value of the items taken from the appellant's shop? Our answer is in negative because section 61 of the TEA categorically stipulates that:

"All facts, except the contents of documents, may be proved by oral evidence."

Since the appellant recounted that the receipts worth TZS. 200,000,000.00 were documented, her oral account could not be relied upon to prove the contents of the documented receipts. See: the case of **DANIEL APAEL URIO VS EXIM BANK**, Civil Appeal No. 185 of 2019 (unreported).

In view of the aforesaid, the question which follows is whether the appellant managed to prove her case which takes us to the determination of the second issue. According to the provisions of section 110 of the Evidence Act [CAP 6 R.E.2019], he who alleges must prove. This was emphasized by the Court in the case of **PAULINA SAMSON NDAWAVYA V. THERESIA THOMAS MADAHA**, Civil Appeal No. 53 of 2017 (unreported), having stated:

"...It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other..."

See: also the cases of **ANTHONY M MASANGA VS PENINA MAMA NGESI AND ANOTHER,** Civil Appeal No. 118 of 2014, (unreported), **GODFREY SAYI VS ANNA SIAME AS LEGAL REPRESENTATIVE OF THE LATE MARY MNDOLWA,** Civil Appeal No. 114 of 2012 and **MATHIAS ERASTO MANGA VS MS. SIMON GROUP (T) LIMITED,** Civil Appeal No. 43 of 2013 (all unreported). In the latter case the Court among other things, stated:

> *"the yardstick of proof in civil cases is the evidence available on record and whether it tilts the balance one way or the other..."*

We shall accordingly be guided by the stated principle to determine if the appellant discharged the burden of proof on the balance of probabilities. In the event, the copies of the receipts were rejected in evidence and rightly, it is glaring that the appellant did not substantiate the loss suffered on the alleged value of TZS. 200,000,000.00 which remained unsubstantiated. Besides, her evidence that some of the receipts were impounded during her absence, dents her credibility on the assertion that at the trial, she had the original receipts worth TZS. 200,000,000.00.

In the circumstances, in the event of the appellant's failure to establish the value of the merchandise which was taken by the respondent, the alleged loss of TZS, 200,000,000.00 remained unsubstantiated and as such, the appellant did not discharge the required burden of proving her case on the balance of probabilities. Thus, the learned trial Judge was justified to hold that she was not entitled to the claim of TZS. 200,000,000.00.

Finally, is the issue on the counter claim in which the appellant challenges the trial Judge's holding in favour of the respondent whereas she had furnished receipts showing that the value of the items taken by the respondent was TZS. 200,000,000.00. and not what was realized on the auction that is TZS. 1,700,000.00. Since it is settled that the appellant did not prove the loss suffered, and in the wake of the appellant's own admission of having outstanding loan and defaulted payment contrary to what was agreed in the loan agreement, the respondent managed to prove her case on the counter claim. Thus, the learned trial Judge was justified to awarding the respondent the counterclaim to the tune of TZS. 34,420, 268.00.

In view of what we have endeavoured to discuss, we do not find any cogent reason to fault the decision of the trial court. Thus, the grounds of appeal are not merited and we dismiss the appeal in its entirety with costs.

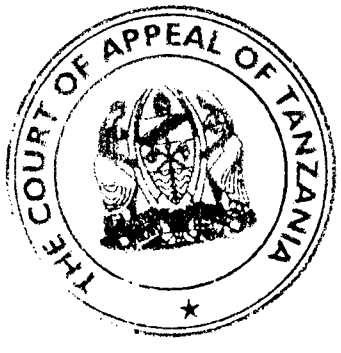
DATED at **DAR ES SALAAM** this 16th day of June, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 17th day of June, 2022 in the presence of Appellant in personal and Mr. Laurent Leonard, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL