IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM
(CORAM: MUGASHA, J.A., KITUSI, J.A., And RUMANYIKA, J.A.)
CIVIL APPEAL NO. 270 OF 2018

EUPHARACIE MATHEW RIMISHO t/a
EMARI PROVISION STORE .....1ST APPELLANT
EMAR COMPANY LIMITED .....2ND APPELLANT
VERSUS
TEMA ENTERPRISES LIMITED .....1ST RESPONDENT
BLANDINA MATHEW RIMISHO .....2ND RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam]
(Songoro, J.)

dated the 3rd day of January, 2018
in
Commercial Case No. 128 of 2015

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JUDGMENT OF THE COURT

6th & 13th March, 2023

MUGASHA, J.A.:

This appeal arises from the decision of the High Court of Tanzania (Commercial Division) by Songoro, J. **EUPHARACIE MATHEW RIMISHO t/a EMARI PROVISION STORE and EMAR COMPANY LIMITED,** the 1st and 2nd appellants are related as the former is the owner of the latter. The appellants and **BLANDINA MATHEW RIMISHO,** the second respondent were jointly and together sued by the first respondent for breach of contract. They were alleged to have defaulted to repay a loan obtained fr om the first respondent. Thus, **TEMA ENTERPRISES LIMITED,** the 1st respondent prayed to be granted reliefs against the appellants and the

2nd respondent as follows: **One,** payment of outstanding loan amount at a sum of TZS. 385,600,000.00; **two,** payment of interest on the principal sum at the agreed rate of 5% compounded per month from 28/10/2013 to the date of judgment; **three,** payment of interest at the court rate of 12% from the date of judgment to the date of payment in full; **four,** payment of a sum of TZS. 100,000,000.00 being punitive and general damages.

In the joint written statement of defence, the claims were denied and after a full trial, judgment was entered against the appellants who were condemned to pay among other things, a sum of TZS. 385,600,000.00 being the principal sum of the loan together with interest thereon. The 2nd respondent was found not liable on ground that she had merely assisted the first appellant in the entire process.

A brief factual account underlying the present appeal is to the effect that: the 1st respondent, a business entity trading as a liquor store had a good relationship with the 1st appellant, trading as Emar Provision Store. During the pendency of the said relationship and the circumstances surrounding it, on 18/4/2013 the 1st appellant sought and obtained of TZS. 150,000,000.00 from the 1st respondent on a promise to repay after a month that is, on 18/5/2013 together with an interest. The said loan was advanced through Elizabeth Massawe

(PW4) the Director of the 1st respondent as per agreement which was witnessed by Leonard Massawe (PW1) and attested by Thadeo Teddy Karua (PW2).

Before the initial loan was repaid, the appellants approached the 1st respondent and they obtained another loan of TZS. 130,000,000.00 which was handed to the 1st appellant by the Bank manager (PW3) in the transaction alleged to have been documented but it was not exhibited in the evidence. In order to secure the initial advanced loan, the 1st appellant had issued post-dated cheques which were collectively admitted as Exhibit P1. However, the respective cheques were not honoured by the bank which means there was no realisation on loan repayment.

As the 1st appellant defaulted to repay, the total loans advanced accumulated to a sum of TZS. 280,000.000.00. Thus, on 8/10/2013 the respective parties executed an agreement titled "***MKATABA WA KULIPA DENI***" which consolidated the two loans to a total loan sum of TZS. 385,600,000 which comprised the principal sum plus interest. Also the mode of payment was stated as the appellants were required to repay within four months from the date of ***MKATABA WA KULIPA DENI*** that is on 8/10/2013 and consequences including commencing a court case were spelt out in case of default. The ***MKATABA WA***

KULIPA DENI was tendered and admitted as Exhibit P.2 without being objected by the adverse side. Yet, it was averred that, the appellants and the 2nd respondent defaulted to pay the loan which prompted the 1st respondent to institute a case before the High Court (Commercial Division) Songoro, J, which is a subject of the present appeal.

At the trial, the appellants and the 2nd respondent resisted the claim and denied to have entered into such loan agreement (Exhibit P2). It was the 1st appellant's contention that she did not authorise the 2nd respondent to obtain the loan on her behalf and that, the 2nd appellant who was a separate entity from the 1st appellant did not guarantee the loan. However, as earlier stated, none of the appellants did object or challenge the admission of Exhibit P2. As earlier stated, judgment was entered against the 1st appellant Euphrace Mathew Rimisho as borrower and the 2nd appellant, Emar Company as guarantor who were both jointly and severally condemned to pay the 1st respondent a total sum of TZS. 385,600,000.00 as the outstanding loan.

Aggrieved, the appellants have fronted seven grounds of complaint as follows: -

1. *The Honourable trial judge erred both in law and in fact in holding that there was a loan agreement for TZS 150,000,000/= between the 1st respondent and the 1st appellant and that the said amount of TZS 150,000,000/= was disbursed to the 1st appellant without any evidence on record.*

2. *The Honourable trial judge erred both in law and fact in holding that PW1 had testified to have seen the amount of TZS 150,000,000/= being disbursed to the 1st appellant and 2nd respondent contrary to the testimony of PW1 on record.*

3. *The Honourable trial judge erred both in law and in fact in holding that there was a loan agreement for TZS 130,000,000/= granted to the 1st appellant without any evidence on record.*

4. *That the honourable trial judge erred in law and fact in holding that, PW2, Thadeo Teddy Karua, who witnessed Exhibit P2 for both the 1st appellant and the 1st respondent, was a credible witness and that Exhibit P2 was authentic document.*

5. *That the honourable trial judge erred both in law and fact in holding that the 2nd appellant was a guarantor for the loan between the 1st appellant and the 1st respondent without any evidence on record and thus wrongly held that the 2nd appellant is liable.*

6. *The honourable trial judge in both in law and fact in holding that Exhibit P1 were security for the loan*

7. *The honourable trial judge erred both in law and fact in holding that the 1st respondent was eligible to advance loans on interest*

Save for the 2nd respondent, parties filed written submissions which were adopted at the hearing of the appeal. In appearance was advocate Edward Chuwa assisted by Ms. Anna Lugendo, learned counsel for the appellants, advocate Philemon Mutakyamirwa, for the 1st respondent whereas the 2nd respondent appeared in person, unrepresented. Before composing this judgment, following our direction which was obliged by the trial court that, stamp duty be paid in respect of the loan agreement exhibit P2 before being considered for admission as additional evidence, we re-called parties who addressed us on the matter.

Mr. Chuwa opted to argue together the first three grounds in which the learned trial judge is faulted for acting on evidence which was not before the court to conclude that the loan advanced to the appellants was TZS. 150,000,000.00 and TZS. 130,000,000.00. On this, it was argued that, since the initial loan agreement failed the admissibility test, there was no documented account on the alleged

two loans and as such, the contradictory oral account of PW1 and PW2 on the sums disbursed to the appellants, rendered the claim not proved on the balance of probabilities.

It was further, submitted that the claim on the loan amount of TZS. 136,000,000 was not proved as no document was exhibited which is against PW3's account who testified about the respective agreement being made in his presence. In addition, it was contended that the claim was flawed with contradictory evidence considering that while PW1 in the witness statement deposed to have seen the 2nd respondent being given TZS. 150,000,000.00, during cross examination the sum stated was TZS. 20,000,000.00. As for the loan sum of TZS. 130,000,000.00, while PW2 stated to have seen the appellant being given TZS. 130,000,000.00 a few days after being given TZS. 150,000,000.00, during cross examination he denied to have seen the appellant being given the loan. In this regard, the learned trial Judge was faulted on ground that the impugned judgment did not resolve the prevalent contradictory evidence.

Moreover, as to the loan agreement in respect of the sum of TZS. 150,000,000.00 which was admitted as exhibit P4, Mr. Chuwa submitted that, such admission in the evidence is not proof that the sum of TZS. 130,000,000.00 was advanced to the appellants. On being

probed by the Court as to why Exhibit P2 was not objected by the appellants, he argued that, since the admissibility of a document is not conclusive proof of its contents, the Court should look into the totality of the evidence to determine the rights of the parties.

On the other hand, it was argued by Mr. Mutakyamirwa that, the documentary account namely Exhibits P1, P2, P3 and P4 which are interrelated as executed by the parties, clearly show that the total sum of the loan advanced to the appellants is TZS. 385,600,000.00 which entails the principal sum together with interest which was to be paid not later than 18/5/2013. He further submitted that, although parties had agreed that the loans be secured by post-dated cheques, those cheques were dishonoured. He added that, in the said documentary account, parties agreed and expressed their intendment on what should be executed by the courts in respect of the said loan and nothing else.

From the contending submissions and the record before us, in disposing the grounds of complaint the major issue for our determination is whether the 1st respondent's claim was proved on the balance of probabilities. It is a cherished principle that generally, in civil cases, the burden of proof lies on a party who alleges anything in his favour and this is embraced in the provisions of section 110 of the

Evidence Act [CAP 6 R.E 2019]. In this regard, in civil proceedings, a party with legal burden also bears the evidential burden and the standard of proof is on the balance of probabilities which in simple terms means that the Court will sustain and believe such evidence which is more credible than the other on a particular fact to be proved. See: **ANTHONY M. MASANGA VS PENINA MAMA MGESI AND ANOTHER**, Civil Appeal No. 118 of 2014, **GODFREY SAYI VS ANNA SIAME AS LEGAL REPRESENTATIVE OF THE LATE MARY MNDOLWA**, Civil Appeal No. 114 of 2012, **PAULINA SAMSON NDAWAVYA VS THERESIA THOMASI MADAHA**, Civil Appeal No. 45 of 2017; **HAMZA BYARUSHENGO VS FULGENCIA MANYA AND 4 OTHERS,** Civil Appeal No. 246 of 2018. (all unreported).

We shall be guided accordingly by the stated principle on the standard of proof in civil proceedings. In the 1st, 2nd, 3rd and 6th grounds of complaint, the learned trial Judge for having decided against the appellants in the absence of proof that the sum of TZS. 150,000,000.00 was disbursed to the 1st appellant and the loan agreement in respect of loan amounting to TZS. 130,000,000.00. Besides, the learned trial judge is as well, faulted for holding that exhibit P1 was security for the loan. At this juncture, it is prudent to

revisit what was pleaded by the claimants in paragraphs 5, 6, 10 and 11 as hereunder:

> *Paragraph 11- That despite the fact that the plaintiff discharged the said principal amount claimed to the 1st defendant and 2nd defendant did utilise the said amount yet they failed and or refused to pay back the loaned amount as per agreement in that up to maturity dated 28th October, 2013 the loan amount was standing unpaid to the tune of Tshs. 385,600,000/= principal sum plus interest".*

The above is a chronology of how parties initially dealt with separate loan transactions which later were consolidated into the executed loan agreement setting out the modality of payment and consequences for default to repay a total sum TZS. 385,600.000.00. This is in terms of Exhibit P2 whereby parties among other things had agreed as hereunder reproduced:

> ***"KWA KUWA*** *mpaka sasa* ***MDAIWA*** *amekwisha limbikiza deni ya jumla ya shilingi za Kitanzania 385,600,000/= ikiwa ni jumla ya deni la kiasi cha Pesa za Kitanzania 150,000,000/= na kiasi cha Pesa za Kitanzania 130,000,000/= ambazo alichukua katika awamu pili tofauti,*

pamoja na riba ya mwezi ya kiasi cha pesa za Kitanzania 26,400,000 ambazo ***MDAIWA*** *kwa kipindl cha miezi mine hajalipa riba yoyote ambayo inafanya deni kuwa TSHS 385,600,000, pesa ambazo zimetumika na* ***MDAIWA*** *kwa ajili ya kuendeshea biashara yake ya uwakala wa bia kupitia biashara yake binafsi yenye jina la* ***EMARI PROVISION STORE,*** *madeni yote kwa ujumla yatajulikana katika Mkataba huu kama* ***'DENI LOTE.***

KWA HIYO PANDE ZOTE MBILI ZINAKUBALINA KAMA IFUATAVYO HAPA CHINI:

1. ***MDAIWA*** *anakiri kudaiwa na* ***MDAI*** *kiasi cha shilingi za Kitanzania 280,000,000/= na anakubali kuzilipa kwa pamoja na riba ya Kiasi cha Pesa za Kitanzania 26,400,000 kila mwezi, ambazo jumla ya deni lote ni Kiasi cha Pesa za Kitanzania 385,600,000. Na MDAIWA anajifunga kulipa deni hili kwa mujibu wa masharti na makubaliano yaliyomo katika Mkataba huu.*

2. ***MDAIWA*** *anajifunga katika Mkataba huu kulipa deni lake lote la kiasi cha pesa za Kitanzania 385,600,000/= ifikapo tarehe 28 ya mwezi 10 mwaka 2013, kwa kumlipa hundi* ***MDAI*** *ya kiasl tajwa hapo juu.*

3. *Pande zote mbili katika Mkataba huu zinakubalina kwamba ili kuondoa usumbufu ambao unaweza kujitokeza hapo mbele,* ***MDAIWA*** *ataweka hundi ya malipo ya baadae (****POSTDATED CHEQUE****) yenye jina la biashara ya* ***MDAIWA*** *kama dhamana ya mkopo huu, pia hundi hiyo itawakilishwa na* ***MDAIWA*** *kwa* ***MDAI*** *siku ya kusaini Mkataba huu.*

4. *Kwamba Mkataba huu unashuudia kwamba ikitokea* ***MDAIWA*** *ameshindwa kulipa deni lake katika tarehe 28 ya mwezi anaotakiwa kulipa,* ***MDAIWA*** *anajifunga kumlipa* ***MDAI*** *deni lake lote pamoja na asilimia 5 ya deni hilo tarehe 28 ya mwezi unaofutata.*

5. *Kwamba Mkataba huu unashuhudia kuwa iwapo itatokea* ***MDAIWA*** *hundi yake imepita katika tarehe 28 ya mwezi wa 10 kama Mkataba huu unavyoshuudia,* ***MDAI*** *atakua huru kumfungulia kesi ya madai pamoja kesi ya jinai dhidi ya* ***MDAIWA****.*

6. *Kwamba Mkataba huu unashuhudia kwamba iwapo* ***MDAI*** *atafungua kesi dhidi ya* ***MDAIWA*** *gharama zote wa uendeshaji wa kesi hizo na gharama za wakili zitalipwa na* ***MDAIWA****.*

In the above quoted excerpt, parties had agreed and TZS. 385,600,000.00 inclusive of interest was a consolidated total loan advanced to be utilised for liquor agency business through the business Emari Provision Store whereas the appellants undertook to pay the entire loan plus interest within the agreed period of four months or else consequences would follow including commencing a court case.

In the joint written statement of defence, averments made as hereunder:

> *"Paragraph 2 - That the contents of the two paragraphs five of the Plaint are vehemently disputed and the Plaintiff is put to strict proof thereof, the 2nd and 3rd Defendants aver that they are not party to the alleged agreement purportedly made on 18th April, 2013 or 8th day of October, 2013 and they were not bound to enforce it or liable on the said contracts whatsoever as they are strangers thereto.*
>
> *Paragraph 5 - That further to the foregoing the 2nd defendant avers that she has no any legal relationship with the 1st defendant and thus she had no any capacity to execute any contract or any Deed for the 1st Defendant and therefore she had executed none, and if she had ever*

executed or signed anything on behalf of the 1st Defendant as alleged in paragraph 5 of the Plaint, the fact which is denied, the same is void for incapacity.

Paragraph 6 - That the contents of paragraph 7 of the Plaint are disputed and the Plaintiff is put to strict proof thereof. As the said Emar Provision Store had no capacity to enter contract 18th day of April, 2013 as alleged or at all, it could not enter into contract for the alleged additional amount of Tshs 130,000,000/= as alleged or at all and the alleged purported agreement date 8th day October, 2013 is void as it was made for the purpose of ratifying the illegal agreement between the Plaintiff and the alleged Emar Provision Store dated 18th day of April, 2013 which was in fact non-existent and the alleged agreement date 8th day of October, 2013, is void for failure of consideration.

Besides, the glaring general denial in the joint written statement of defence, the appellants raised incapacity on the issue to contract and the validity of the loan agreements between the parties.

We are cognisant that sections 63 to 67 of the Evidence Act CAP 6 R.E.2019, govern proof of contents of a document, by primary or

secondary evidence. In this regard, we agree with Mr. Chuwa that, admission of a document is not conclusive proof of its contents. However, it is settled law that the contents of an exhibit which was admitted without any objection from the appellant, were effectually proved on account of failure to raise an objection at the time of its admission in the evidence. See: **EMMANUEL LOHAY AND UDAGENE YATOSHA VS REPUBLIC,** Criminal Appeal No. 278 of 2010, **KILOMBERO SUGAR COMPANY LTD VS COMMISSIONER GENERAL** (TRA), Civil Appeal No. 261 of 2018 and **MAKUBI DOGANI VS NGODONGO MAGANGA**, Civil Appeal No. 78 of 2019 (all unreported). In the latter case the Court emphasised as follows:

> *"It is our further considered view that, even the claim by Mr. Masige under the fourth ground of appeal that the said exhibits are irrelevant in this case is misconceived. It is apparent, at pages 72 to 74 of the record of appeal that during the trial, the appellant did not object to the admissibility of the said exhibits. It is settled law that contents of an exhibit which was admitted without any objection from the appellant, were effectually proved on account of absence of any objection. Therefore, since the appellant did not utilise that opportunity,*

challenging the said exhibits at this stage is nothing but an afterthought...."

Guided by the stated principle, it is glaring that at page 216 of the record of appeal, the admission of exhibit P2 was not objected by the appellants. This was indeed acceptance or rather acknowledgement that they had obtained a total loan sum of TZS. 385,600,00.00 and committed themselves to repay within four months or else consequences would follow. In the circumstances, the 1st appellant is estopped from denying to be aware of the agreement which was dully executed by the respective parties. This is regardless of the alleged contradictory account which in our considered view, cannot supersede a documented agreement in terms of what is embraced in the provisions of sections 100(1) and 102(1) of the Evidence Act, Cap 6 R.E. 2022 which stipulate as follows:

"100. (1) When the terms of a contract, grant, or any other disposition of property, ***have been reduced to the form of a document****, and in all cases in which any matter is required by law to be reduced to the form of a document,* ***no evidence shall be given in proof of the terms of such contract,*** *grant, or other disposition of property,* ***or of such matter except the document itself,*** *or secondary*

evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

101. *When the terms of a* ***contract,*** *grant or other disposition of property, or any matter* ***required by law to be reduced to the form of a document, have been proved according to section 100, no evidence of any oral agreement or statement shall be admitted, as between the parties to that instrument*** *or their representatives in interest,* ***for the purpose of contradicting, varying, adding to or subtracting from its terms:***

Provided that–

(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law;

(b) the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved and in considering whether or not this paragraph of this provision

applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under the contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement to rescind or modify the contract, grant or disposition of property may be proved, except in cases in which the contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts."

In the light of the cited provisions, Exhibit P2, a written agreement constituted proof of what was agreed upon by the parties in respect of sums advanced, modality of payment and consequences in case of default. Thus, besides the agreement not being disputed at the trial, in the absence of any clause indicating that oral account would be a substitute to the terms of the agreement, Exhibit P2 (**MKATABA WA KULIPA DENI)** cannot be superseded by oral evidence for the purpose of contradiction, variation, addition or subtraction from its terms. That apart, none of the circumstances stated in the proviso arose in the present matter so as to necessitate entertaining oral account in order to contradict or vary (Exhibit P2).

Next for consideration is the allegation that Exhibit P2 was forged. This cropped up at the trial but does not feature in what was pleaded in the joint written statement of defence. **Mulla,** The Code of Civil Procedure 17th Edition, at pages 267 to 268 has emphasised on the importance and the underlying objective of parties' adherence to the pleadings as follows:

> *".... the normal rule is that the parties should adhere to the allegations and grounds set out in their pleadings unless an amendment permissible on certain established ground is allowed by the Court. The whole object of*

pleadings is to bring the parties to an issue, and the meaning of the rules (relating to pleading) was to prevent the issue being enlarged, which could prevent either party from knowing when the cause came for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing".

Yet, in the case of **THE REGISTERED TRUSTEES OF ROMAN CATHOLIC ARCHDIOSCESE OF DAR-ES-SALAAM VS SOPHIA KAMANI,** Civil Appeal No. 158 of 2015 (unreported) the Court emphasised as follows:

"In civil litigation, it is through the pleadings where parties establish their cases they intend to prove. So, it is the duty of the parties to the case to clearly and categorically establish their cases before adjudication. In that context therefore, pleadings are a road map so to say to any given civil litigation which should show the destination the parties to the case intended to reach".

Therefore, since it is settled law that parties are bound by the pleadings, in the matter under scrutiny, the issue of forgery which cropped up at the trial is not rooted in the pleadings and it ought to have been disregarded by the trial court. Without prejudice to the aforesaid, even if the signatures were forged as alleged, it was incumbent on the appellants to act promptly, invoke other remedies by reporting the matter to the Police because all along, and before filing the joint written statement of defence the appellants had knowledge on the existence of exhibit P2 which was annexed to the plaint. In the circumstances, the appellants' inaction to invoke remedies under criminal justice leaves a lot to be desired as correctly found by the learned trial Judge. That said, the complaint that the learned trial Judge held Exhibit P1 (the 12 post-dated cheques in relation to the TZS. 150,000,000.00) was security for the loan is neither here nor there as it did not impeach Exhibit P2 which was a consolidation of a total loan sum of TZS. 385,600,000.00 in respect of TZS. 150,000,000.00, TZS. 130,000,000.00, the initial and second loan respectively plus interest thereon, payable within four months from 8/10/2013. As this was not heeded to by the appellants who defaulted to pay, we are satisfied that the 1st respondent proved his case on the balance of probabilities that the appellants are indebted and defaulted

to pay the advanced total loan plus interest resulting to a breach of contract. This renders the 1st, 2nd 3rd and 6th grounds of appeal not merited.

In the 4th ground of appeal the appellants fault the trial judge in holding that PW2 Thadeo Teddy Karua who witnessed Exhibit P2 was a credible witness and that the exhibit P2 was authentic. Having revisited the evidence and contending submissions, this need not detain us. It is glaring on the record that, PW2 attested (Exhibit P2) in accordance with the provisions of section 3 of the Notaries Public and Commissioners for Oaths Act Cap 12 R.E. 2019. Therefore, PW2's failure to witness disbursements of the consolidated loan, did not disqualify him from attesting what was agreed by the parties as documented. That apart, the complaint that PW2 was an advocate representing the 1st respondent is misconceived because it was not initially pleaded and as such, it deserves to be ignored as we so do having failed the test of either being deliberated upon by this Court or the trial court. We thus find the complaint in ground 4 not merited.

In the 5th ground of appeal, the appellants fault the trial court in holding that the 2nd appellant was guarantor without there being any evidence on the record. It was submitted for the appellants that the post-dated cheques were written in May 2013 before exhibit P2 was

executed on 8/10/2013 and as such, it was argued that, the loan was not in existence and could not be secured. It was further argued that, the 2nd appellant being a separate legal entity was not a party to the alleged contract dated 8/10/2013 and could not suffer or gain benefit thereof. On the other hand, it was the 1st respondent's submission that, the 2nd appellant was liable having issued dishonoured cheques. As earlier stated, it is settled that according to exhibit P2, the appellants had agreed among other things, that TZS. 385,600,000.00 was a consolidation of what was advanced to the appellants and that it was for the purposes of being utilised for liquor agency business operated by Emari Provision Store. Thus, trading as Emari Provision Store confirms that, being owner of the 2nd appellant, he had obtained the loan in furtherance of the business which make the appellants jointly and severally liable as they owe the 1st respondent the unpaid loan amount of TZS. 385,600,000.00. In the premises, the 5th ground is not merited.

Pertaining to the 7th ground of complaint, the learned trial Judge is faulted in holding that, the 1st respondent was eligible to advance loans on interest. It was the appellants' counsel submission that as the first respondent had no licence to lend money on the interest charged

was illegal and the contract should be nullified under the provisions of section 23(2) (c) of the law of Contract Cap 345 R.E. 2019.

It is our considered view that, this complaint should have been raised by the appellants in the alternative, because it is solely dependent on whether the money was lent which has been partially denied by the appellants. The complaint sounds as the appellants' acknowledgement on having obtained the loan but they are now seeking refuge to the transaction being outlawed. We found this wanting because it is settled law that, a court of law cannot rewrite a contract between the parties. Instead, it is incumbent on the court to enforce what has been agreed by the parties provided that it is not against the law. This is what underlies the cardinal principle of law that parties are bound by their agreement freely entered into because there should be a sanctity of the contract See: **SIMON KICHELE CHACHA VS AVELINE M. KILAWE**, Civil Appeal No. 160 of 2018 (unreported).

Yet, in the case of **ABUALY ALIBHAI AZIZ VS BHATIA BROTHERS LTD** [2000] TLR 288 the Court stated that: -

> *"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."

In the case at hand, it is our considered view that, Exhibit P2 **'MKATABA WA KULIPA DENI'** was freely executed by the respective parties and we have no doubt that there was a consensus between the parties in respect of the loan advanced, interest thereon, modality of repayment and consequences in case of default. That apart, in the wake of undisputed loan agreement whose admission in evidence was not objected to, the appellants are obliged to comply with the terms and conditions contained in the loan agreement and pay the sum TZS. 385,600,000.00 to the 1st respondent.

The fact that the 1st respondent issued money on interest without having licence need not detain us. We have no doubt that, having held that the 1st respondent suffered and was entitled to be awarded damages as the debt of TZS. 385,600,000.00 remained withheld for four years which justifies an award of damages, the learned trial Judge had in mind that the interest imposed on the loan was justified. We agree and this is cemented by the fact that, the interest of TZS. 26, 400,000. 00 is far below the 7% rate interest on the principal sum considering that the 1st respondent is neither a

Financial or Banking Institution. Thus, the 7th ground of appeal fails for lack of merit.

In view of what we have endeavoured to discuss we are satisfied that the 1st respondent did prove the claims on the balance of probabilities and find no cogent reasons to fault the impugned judgment. Thus, we find the appeal not merited and it is hereby dismissed in entirety with costs.

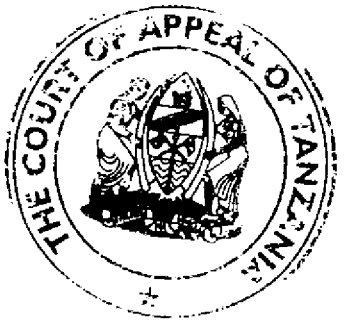
DATED at **DAR ES SALAAM** this 7th day of March, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 13th day of March, 2023 in the presence of both Appellants, 1st and 2nd Respondents appeared in person is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL