IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CORAM: JUMA, C.J., LEVIRA, J.A. And MAKUNGU, J.A.

CIVIL APPEAL NO. 04 OF 2022

NARCIS RUKYEBESHA MBARARA..... APPELLANT

VERSUS

EQUITY BANK TANZANIA LIMITED ..... 1ST RESPONDENT

ABDALLAH ABDULAH ESTATE AND TRANSPORT

CO. LIMITED .....2ND RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Gwae, J.)

Dated the 12th day of November, 2021

in

Civil Case No. 28 of 2019

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JUDGMENT OF THE COURT

22nd & 24th February, 2023

LEVIRA, J.A.:

The appellant, Narcis Rukyebesha Mbarara though successfully sued the respondents before the High Court of Tanzania at Arusha (the trial court) vide Civil Case No. 28 of 2019, was not fully satisfied with the decision of the trial court. He was allegedly a guarantor for a loan advanced to the second respondent by the first respondent. However things did not go as planned and thus he sued the respondents for a

declaration that, the loan advanced by the first respondent to the second respondent was *null and void*, that his repayment to the first respondent of TZS. 300,000,000.00 as a consequence of the second respondent's default of payment of the loan was caused by coercion or undue influence and for an order that the first respondent refund him the sum of TZS. 300,000,000.00, general damages and interest. The trial court, having heard the evidence from both parties, partly granted the appellant's claims and dismissed others. The appellant was dissatisfied with two things. The first thing is the omission by the trial court to award him interest from the date he paid the first respondent, to the date of judgment. The second thing is the refusal by the trial court to hold that he paid the first respondent a total sum of TZS. 300,000,000.00. He has now come before the Court to challenge the decision of trial court on those two aspects.

Briefly the background to this matter is that the appellant had an agreement with the Managing Director of the second respondent and the Officers of the first respondent to guarantee loan that would be advanced by the first respondent to the second respondent. On 18th March, 2013 he deposited to the 1st Respondent a Certificate of Title No. 20235 L.O. No. 252277, Plot No. 69, Block II corridor Area II in Arusha

City as guarantee to second respondent's loan of TZS. 120,000,000.00. The second respondent repaid the loan in amounts not agreed by the first respondent.

However, later the second respondent was given another loan of TZS. 210,000,000.00 but the respondents did not inform the appellant. The second respondent defaulted again. Later, the first respondent initiated recovery measures by issuing notice (which the appellant disputes) of public auction of the appellant's property. The appellant promptly took action to repay the outstanding loans. According to the first respondent, on various dates from 29th November to 8th December, 2014, the appellant deposited a total of TZS. 193,943,000.00 in the second respondent's account with the first respondent and both loans were cleared. The appellant was given back his certificate of title on 8th December, 2014. On his part the appellant claimed that he paid TZS. 300,000,000.00.

On 9th September, 2019 the appellant filed a suit before the trial court claiming a refund of TZS. 300,000,000.00 allegedly paid to the first respondent in satisfaction of the loan advanced to the second respondent. On 12th November, 2021 the trial court entered judgment and issued a decree in favour of the appellant where it ordered for a

refund by the first respondent of TZS. 193,943,000.00, general damages of TZS, 40,000,000.00, compound interest on the decretal sum at the court rate of 7% from the date of judgment to the date of full satisfaction of the decree and costs of the suit. Dissatisfied, the appellant has preferred the present appeal. The appellant's grounds of appeal are as follows:

1. *That the trial court erred in law and in fact in not awarding interest against the 1st respondent at the commercial rate from the date the first respondent received the appellant's money to the date of judgment.*
2. *That the trial court erred in law and in fact in not holding that the appellant paid to the 1st respondent a sum of TZS. 300,000,000.00.*
3. *That the decision of the trial court is otherwise faulty and wrong in law.*

At the hearing of the appeal, Mr. Melchisedeck Lutema, learned advocate appeared for the appellant, whereas Mr. Edwin Lyaro, learned advocate appeared for the first respondent. Neither the officer of the second respondent nor her advocate entered appearance despite being duly served. However, since the second respondent had filed a reply Written Submissions on 28th March, 2022, we considered that she was heard on the appeal in terms of Rule 106 (12) of the Tanzania Court of

Appeal Rules, 2009 (the Rules) and thus we proceeded with the hearing of the appeal. The counsel for the parties who were present made their oral submissions.

Upon taking the floor, Mr. Lutema preferred to start with the second ground of appeal and he abandoned the third ground.

Submitting in support of the second ground of appeal, Mr. Lutema argued that the trial court erred in law and fact in holding that the appellant paid the first respondent a sum of TZS. 193,943,000,.00 instead of TZS. 272,513,000.00 as per the deposit slips tendered by the appellant, which constitute exhibit PE3 collectively. He faulted the trial judge that he had no justification to hold that the appellant did not prove that he deposited the stated amount of money. This he said, is due to the reason that, **first,** that the deposit slips which were pleaded in paragraphs 17 & 18 of the plaint and tendered in court showed that the sum of TZS 272,513,000.00 was not paid to the bank but to the broker. It was his argument that when the first defendant filed a written statement of defence (WSD) she did not deny or pinpoint any defect in relation to those receipts. **Second**, it was his argument that at the level of tendering the receipts there was no objection from the first defendant. **Third**, that the first respondent did not call any witness,

either a cashier or teller who received the deposits and did not advance reasons for not calling such witness. Instead, he said, they brought a witness whose testimony was manifestly hearsay. He went further arguing that, whatever objections that Francis Muro (DW1) had on the amount that was deposited constituted hearsay.

According to him, the appellant pleaded under paragraph 16 of his plaint and it is as well shown in Exhibit P3 collectively that the account number showing a series of payment, bank statement was mentioned therein. Therefore, refusal, neglect or failure to produce it was meant to hide the payments made by the appellant. He therefore, urged us to draw negative inference against the first respondent for failure to produce the slips. He insisted that banking is a business of the first respondent and not of the appellant. In case of conflict between the bank and the customer, the benefit of the doubt should be accorded to the customer. He cited the case of **Jaluma General Suppliers Limited v. Stanbic Bank (T) Limited**, Civil Appeal No. 11 of 2013 (unreported), where it was held that a person with specialized knowledge or skills owes a greater duty of care.

He thus contended that the onus of proof was on the first respondent, which was disputing the quantum of the sum of monies

deposited as per the deposit slips, to show whether there was any shortcoming associated with any deposit slip or whether there was any deposit slip that was not proper. He insisted that the taking of money by the first respondent was actuated by malice as the second respondent did not default to repay the money. He was a guarantor as pleaded at paragraph 6 of Exhibit PE6. There was no default in relation to that loan.

However, he said, even if there was default, there was noncompliance with section 127 (1) & (2) of the Land Act as submitted at pages 226 to 378 of the record of appeal. Moreover, he contended that there was no notice before auction.

Mr. Lutema concluded on the second ground of appeal by stating that, since the trial court did not identify any defect or shortcoming so far as the receipt was concerned, there was no reason to reduce the amount pleaded. Therefore, he prayed for this ground to be allowed.

Replying on second ground of appeal, Mr. Lyaro stated that the first respondent disputed the appellant's claim that he deposited TZS. 300,000,000.00 because there was no proof to that effect. He elaborated that the bank deposit slips Exhibit PE3 produced by the appellant to prove his claim were deposited in the second respondent's Account Number 3002 2000 03520. The deposited sums of money are

evidenced at page 85 of the record of appeal where, on 29th November, 2014 he deposited TZS. 90,000,000.00, TZS. 75,000,000.00 and TZS. 25,000,000.00. Again, on 5th December, 2014 he deposited TZS. 3,000,000.00 and on 8th December, 2014. He made last deposit of TZS. 943,000.00, bringing the total to TZS. 193,943,000.00. However, he said, the appellant claimed that he paid into the second respondent's account a total of TZS. 272,513,000.00 which is not reflected in the said second respondent's statement. It was his argument that although exhibit PE3 was tendered without any objection, it did not mean that it was not supposed to be subjected to verification through the bank statement.

Regarding the second complaint in this ground, Mr. Lyaro submitted that in any financial institution there are two actions, debit and credit. Exhibit PE3 shows the credit of the financial transaction done by the appellant. He clarified that the deposit slips are not the sole proof of the transactions. The same have to be verified against the statement of the account into which the money was deposited which amounted to TZS. 193,943,000.00.

Responding to the third complaint in this ground of appeal which questioned why the cashiers or tellers were not called to testify, he

submitted that it was not necessary to call any teller to verify if there was any shortcoming or discrepancy in relation to the deposit slips, Exhibit PE3 collectively. He added that, the deposit slips point to the bank statement into which the money was deposited. DW1 (the first respondent) tendered the said statement to show the amount received from the appellant which is TZS. 193,943,000.00 only and not TZS. 272,513,000.00 claimed by the appellant.

As regard the fourth complaint in the second ground of appeal, Mr. Lyaro submitted that the first respondent produced a bank statement of the second respondent's account. The same was filed in the list of documents to be relied upon by the first respondent on 6th October, 2020 and served on the appellant on 7th October, 2020. He added that, during the trial the first respondent's witness tendered affidavit to verify the accuracy of the bank statement since the same are electronic documents (exhibit DE9) and the disputed bank statement was admitted as exhibit DE 10 during trial. The appellant neither objected to the said affidavit nor to the bank statement when were tendered in court. He cited the case of **Jaluma General Suppliers Ltd** *(supra)*.

Mr. Lyaro went on to state that the appellant did not question the first respondent's witness on the entries that were pinpointed to be the

money he deposited as to why the appellant's name is not reflected in the statement. The date of deposit and the amount credited into the second respondent's account corresponded to some of the deposit slips in exhibit PE3. In the circumstances, he submitted, the issue of specialized knowledge on the part of the first respondent does not arise.

He thus insisted that after the first respondent had done the reconciliation, it transpired that the appellant deposited TZS. 193,943,000.00 only and not TZS. 272,513,000.00 or TZS. 300,000,000.00 as he alleged. Therefore, he urged us to find this ground of appeal unmerited.

The second respondent indicated in her reply written submissions that she supports the appeal. According to her, the delivery of the second loan to the second respondent by the first respondent was procedurally and legally null and void, as the first respondent did not adhere to the required procedure in providing the second respondent with the second loan; there were no spouse consent, no official search report and thus the advancement of the second loan was illegal.

It was her argument that the appellant did not guarantee the first and second loans advanced by the first respondent to the second respondent. Besides, she argued, the notice of auctioning the third-party

collateral was unprocedural and illegal and thus the payment of TZS. 300,000,000.00 to the first respondent by the appellant was unjustifiable.

She argued further that the first respondent cannot benefit from her own wrong, had she issued the required statutory notices to the second respondent and to the appellant of the sum of money that had been deposited by the appellant to the first respondent would have been settled as the amount to be paid would also have been stated in the notice – see: Section 127 (1) and (2) of the Land Act, Cap 113 R.E 133 R.E 2019. She went on to submit that, the failure to serve the second respondent and the appellant with the notice resulted into making the appellant repay uncertain amounts and hence misunderstanding of the amount that was deposited to the first respondent by the appellant. She cited the case of **Said Kibwana and General Tyre E.A. Ltd v. Rose Jumbe [1993]** T.L.R 1759 arguing that the first respondent deprived the appellant the use of monies since the appellant deposited the same to date. Therefore, she said since the appellant was deprived of the right to use the monies, she is entitled to be compensated for such deprivation by being awarded interests.

According to her, the burden of proof that the appellant did not repay that amount (TZS 300,000,000.00) lies upon the first respondent who alleges that it was not repaid in terms of section 110 (1) of the Evidence Act, Cap. 6 R.E 2019 (the Evidence Act).

She concluded that the second respondent had never defaulted, and there was no any notice of default served on her by the first respondent upon default. In support of her argument, she cited the case of **Manager, NBC Tarime v. Enock M. Chacha** [1993] T.L.R 288. She prayed for the appeal to be allowed as it has merit.

In rejoinder, Mr. Lutema urged that since Mr. Lyaro is an advocate of the Bank, he would have shown the court whether the claim was higher and offer any alternative rate.

He insisted that the trial court did not give reasons for refusing to award interests to the appellant, and that the taking of the money by the first respondent was not lawful. Finally, he urged us to allow the appeal.

The controversy in this ground of appeal is the sum of money (TZS. 300,000,000.00) allegedly paid by the appellant to the first respondent. It is settled position of law that he who alleges must prove. This is in accordance to section 110 of the Evidence Act. See also the

case of **Paulina Samson Ndawavya v. Theresia Madaha**, Civil Appeal No. 54 of 2017 (unreported). Applying the above principle in the circumstances of the current case, the appellant was the one who claimed that he deposited the sum of TZS. 300,000,000.00 into the second respondent's account (Account No. 300220003520) in various installments and produced deposit slips which were admitted during trial as exhibit PE3. However, some of the attached deposit slips in exhibit PE3 did not have a bearing with the first respondent's statement (Exhibit DE 10) which shows that the total amount deposited by the appellant was TZS. 193,943,000.00.

We agree with Mr. Lyaro that even though Exhibit PE 3 was admitted without being objected by the first respondent, it could not in itself be taken as conclusive proof of payment. The law is settled as far as documentary evidence is concerned. It provides that admission of documentary evidence is one thing and the weight to be accorded on it is another thing - see: **Kilombero Sugar Company Ltd v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 261 of 2018 (unreported).

Therefore, we find that although the appellant might have submitted deposit slips which its total value when computed was

TZS.300,000,000.00 which he claimed, the same could not be considered blindly without being scrutinized for the trial court to determine the weight to be attached to them as against the counter evidence produced by the first respondent. In the circumstances therefore, we find that the trial court was justified for not relying on deposit slips which did not tally with the second respondent's bank statement as the payments were paid into her account as intimated above. We find this ground of appeal lacking in merit.

Mr. Lutema submitted in respect of the first ground of appeal to the effect that, it is not in dispute that monies were taken by the first respondent. He added that since the monies were taken unlawfully by the first respondent as said by the trial court, then the first respondent has to pay interest. Referring to pages 377 and 378 of the record of appeal, Mr. Lutema argued that the trial judge did not give reason as to why he refused interest.

He went on arguing that the first respondent did not dispute a rate of interest pleaded by the appellant, therefore it was improper for the trial court to exercise discretion not to award the interest pleaded by the appellant. Mr. Lutema concluded by stating that the first respondent took the money from the appellant without justification and thus

depriving him from using the said money. Therefore, she has to pay interest. He cited the case of **Prem Lata v. Peter Musa Mbiyu**, (1965) 1 E. A 592.

In reply, having adopted the contents of the written submissions by the first respondent, Mr. Lyaro submitted that the first respondent is satisfied with the judgment of the trial court. He could not see the reason to fault that decision because, he said, all circumstances were considered and adjudicated upon. He stated further that his client was willing and ready to settle the decretal sum stated therein but was deterred and threatened to do so upon being served with a notice of appeal from the appellant.

He argued that the amount of interest claimed by the appellant of compound interest of commercial rate of 21% per annum is very unreasonable and it cannot be realized from any legally registered business.

Mr. Lyaro submitted in respect of the case of **Prem Lata** *(supra)* cited by the counsel for the appellant that, it is distinguishable from the current case. This he said, is because that case is founded on tort while the current case is based on contract. According to him, there is no

doubt that when the appellant paid the disputed sum of money to the first respondent, he was fulfilling his contract of guarantee for the second respondent's money. On the other hand, he said, the first respondent when she received the money from the appellant, it was recovering overdue and defaulted loan. Therefore, there was no negligence, fraud or misrepresentation.

He submitted further that the trial judge did not exercise his discretion to award interest from the date of cause of action to the date of judgment because the appellant could not prove that he paid the first respondent a total of TZS. 300,000,000/=. He recited the case of **Prem Lata** *(supra)* where it was held that, interest should normally be awarded on special damages if the amount claimed has been actually expended or incurred at the date of filing suit. At the end, he urged us to find this ground of appeal without merit.

We have carefully followed the parties' submissions in respect of this ground of appeal and thoroughly perused the record of appeal. It is quite clear from the record of appeal that upon default of the second respondent to service the loan advanced to her by the first respondent as per their agreement (Exhibit D1), the first respondent initiated recovery measures which eventually necessitated the appellant, as the

supposed guarantor to pay the first respondent so as to salvage his certificate of title which he had deposited as security.

We have considered various factors surrounding this matter and we find that the first respondent had probable cause of taking the appellant's money. Being an ostensible guarantor, the appellant stood in a position of the second respondent in case of default. We agree that there were procedural flaws as determined by the trial judge at page 379 of the record of appeal. The appellant was awarded some reliefs including compound interest at the court rate of 7% from the date of judgment to the date of full satisfaction of the decretal sum. The issue that follows is whether the appellant is entitled to interest for the period prior to the delivery of judgment.

In **Anthony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported), it was held that:

> *"The rate of interest to be awarded for the period prior to the delivery of judgment is set at the discretion of the court."*

[See also: **Engen Petroleum (T) Limited v. Tanganyika Investment Oil and Transport Limited**, Civil Appeal No. 103 of 2003

and **Ashraf Akber Khan v. Ravji Govind Varsan**, Civil Appeal No. 5 of 2017 (both unreported].

However, the discretion of the court is only exercised in case of special damages incurred or expended at the rate the court thinks reasonable - see: **Said Kibwana and General Tyre E. A** *(supra).*

We have examined exhibit DE1 unfortunately we could not find a clause where the first respondent was subjected for payment of commercial interest in case of default. We gather from that exhibit that only the second respondent is subjected to commercial rate interest in case of default. However, we note that the appellant sought in his plaint among other reliefs to be paid compound interest at the commercial rate of 21% per annum from the 29th November, 2014 to the date of judgment.

It is common knowledge that parties are bound by the terms of their contract. Since the parties freely decided not to put such a clause in the contract they entered, certainly, it cannot be inserted by the court during enforcement of the contract. In **Unilever Tanzania Ltd v. Benedict Mkasa t/a BEMA Enterprises**, Civil Appeal No. 41 of 2009 (unreported), it was held as follows:

"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the court to change those clauses which the parties have agreed between themselves... It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."

The above apart, certainly the trial court could not award interest from the date of the deposit of the money to the date of judgment based on the claimed amount of TZS. 300,000,000.00 which it reduced to TZS. 193,943,000.00.

Having considered the circumstances of this case and the fact that the sum of the money deposited proved after the scrutiny of the documentary evidence from both sides is TZS. 193,943,000.00, in our considered opinion, justice of the case demanded the interest to be calculated on that amount and not the initial amount claimed by the appellant. As we have already indicated that interest rate is set at court's discretion, we think, it was an oversight on the part of trial judge not to grant interest prior to the delivery of the judgment on the basis of the awarded amount. However, we think that the prescribed commercial rate of 21% for the certified sum of money is on the high side.

In the upshot, we partly allow the appeal. For the interest of justice, having considered the nature and circumstances pertaining to this matter we award the appellant a simple interest on the awarded amount (TZS. 193,943,000.00) at the commercial rate of 15% per annum from 29th December, 2014 to the date of judgment. The appellant shall have his costs.

DATED at **ARUSHA** this 24th day of February, 2023.

I. H. JUMA
CHIEF JUSTICE

M. C. LEVIRA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2023 in the absence of the parties despite being informed, is hereby certified as a true copy of the original.

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL