IN THE HIGH COURT OF TANZANIA
AT MWANZA

PC CIVIL APPEAL NO 37 OF 2006

(Arising Nyamagana District Court Civil Appeal No. 1/2006
(Original Mwanza Urban Primary Court Civ.Case No. 35/2005)

VERONICA WAMBURA ..... APPELLANT

Versus

SENI MANUMBU .....RESPONDENT

JUDGMENT

RWEYEMAMU, J.

I found the facts of the case giving rise to this appeal interesting. The evidence adduced in the Primary Court (PC) was that; the respondent *Seni Manumbu* gave a loan of shs 250.000/= to the husband of the appellant *Veronica Wambura.* The latter was not part of the loan agreement between them but was sued under the following circumstances:

There was an attempt to settle the matter out of court before the village leadership. The parties meaning the respondent, the appellant and the latter's husband attended an amicable settlement meeting before the village leader on 28/2/2005. At the meeting it

was agreed that the husband would pay the debt by 2/3/2005 and if he failed, his wife the appellant would pay the same. The promise was not met so the respondent reported again to the village leader who called another meeting on 10/3/2005. The husband/ debtor did not attend but the appellant did and prayed for one more week to get the debt settled, which was granted.

That time expired and the husband had not settled the debt so the respondent decided to sue the appellant in the PC claiming the loan amount of shs. 250.000/= *plus Shs. 360.000/= as interest accrued thereon.* I hasten to point out now that it curious, that the respondent chose not to sue the husband/debtor or even sue him jointly with the appellant/wife.

The PC found the case against the appellant proved based on the agreement made before the village leadership, despite the appellant's protestation that she never borrowed money from the respondent; that it was the husband who did. The PC granted the whole amount claimed of shs. 610.000/=. Dissatisfied, she appealed that decision to the District Court (DC).

The DC concurred with the PC decision finding that the agreement made by the parties before the village leadership

amounted to a *contract of guarantee* of the husband's loan by the appellant.

Dissatisfied, the appellant made a second appeal to this court. She filed a Memorandum of Appeal on four grounds. Under the 1st and 2nd grounds she faulted the lower courts decision for finding that she was liable under a contract of guarantee when she *"the appellant had not been involved by any means to enable her husband secure the loan from the respondent"*. In ground three, (included on a without prejudice basis) she faulted the two courts conclusion on the aspect of interest accrued on the loan. Under the last ground, she submitted that the PC trial was a nullity for failure to comply with mandatory procedural requirements of the law.

I shall begin with ground 1 and 2 of the MA. I state without hesitation that I do not agree with the conclusion reached by the two courts below. Why? A contract of guarantee which the DC properly described as "*an agreement in which the guarantor agrees to satisfy the debt of another ...only if and when the debtor fails to repay*" would have been properly found to exist if the appellant had made it before the respondent entered into the loan agreement with the appellant's husband. On the facts agreed, the appellant was not part of the loan agreement.

It is for that reason I differ with the concurrent findings of the two courts below and find the appellant not liable for the loan advanced by the respondent to her husband without her consent. In view of my conclusion, I will not deal with the appellant's complaint regarding the award of interest. If these were the only grounds, I would have found the appeal successful and ended there, but there is the 4th ground.

The appellant stated therein that the PC judgment was a nullity for reason of departure from the compulsory requirement of Rule 3 of the *Magistrates courts (Primary Courts) (Judgment of Court)* Rules, GN 2/1988. In support of her interpretation of the law, she referred to and attached this court's decision in **Phares Mayunga v. Christina Mayunga,** (PC) Civil appeal 91/2000 (MZA registry –unreported).

I have checked the PC proceedings and found out that after recording the assessors opinion, the PC magistrate "*wrote a decision to confirm those opinions*". That was "a clear departure' from the mandatory provisions of the law as concluded by Mackanja J. with whom I concur, in the cited case of **Phares Mayunga** where the Hon. Judge cited with approval the decision by the late Mkude J. in

Mohamed s amiri v Ngapwela (1992) TLR 342 and the late Lugakingira J. as he then was in **Susana Joseph v. W. Ihembe** 1992 (TLR) 375. He concluded as I also do that failure to comply with that provision made the PC trial and subsequent appeal to the DC a nullity. *For that reason, I quash both subordinate courts' proceedings and judgment and make no orders as to costs.*

I should point out that the appellant's attempt to have the subordinate court's decree stayed pending this appeal was dismissed by this court on 2/5/2007. The consequence of the decision in this appeal is to invalidate the execution of decree that might have already been made. It is so ordered.

R M Rweyemamu
Judge
29/5/2008

Order: Case file and judgment forwarded to the District Registrar HC Mwanza, for delivery of the judgment to the parties and subsequent necessary action.

R M Rweyemamu
Judge
29/5/2008
AT Mtwara HC