IN THE HIGH COURT OF TANZANIA

[MTWARA REGISTRY]

AT MTWARA

PC CIVIL APPEALNO.37OF 2012

(From Nachingwea District Court in Civil Appeal No. 17 of 2013, Original Nachingwea Urban Primary Court in Civil Case No. 27 of 2013)

MOHAMEDI HAMISI MINGAULA .... APPELLANT

Versus

IDDI SEIF LIHONGE .... RESPONDENT

Date of last Order: *16/04/2015*

Date of Judgment: *05/05/2015*

JUDGMENT

F. Twaib, J:

The respondent Iddi Seif Lihonge, a shop owner at Nachingwea, was the claimant in Civil Case No. 27 of 2013 at Nachingwea Urban Primary Court where he unsuccessfully sued the appellant Mohamedi Hamisi Mingaula for payment of Tshs. 4,500,000/= being compensation for loss of income as a result of the appellant's act of closing his (the respondent's) shop. On his appeal to the District Court of Nachingwea, the Primary Court decision was reversed and the respondent was awarded Tshs. 4,500,000/= as compensation for the alleged loss. The appellant was aggrieved, hence this appeal.

He respondent's version of the story is that in 2012, he took a loan of Tshs. 5,000,000/= from NMB Bank. The appellant agreed to act as his guarantor and offered his house as security. In May 2013, he had to travel to Newala to attend to his sick father. On 20th May 2013, the appellant called to remind him about repaying the loan. The respondent asked him to repay the loan with his money and that he would refund him once he returned from Newala. The appellant called him again, but he (appellant) was not available. The appellant then went to his (the respondent's) child and told him not to sell good from the shop until he (appellant) got his money. The appellant then reported the matter to the Police Station. He then took the keys to the respondent's shop and told the respondent's child that he would sell all the goods.

When he returned from Newala, the respondent asked the appellant for his shop keys. The appellant reported the matter to the Police, but the respondent refused to release the keys. He was advised to file a civil suit, which he did.

The appellant's version differs slightly but significantly from the respondent's. He told the trial court that in May 2013, he was notified by NMB management that the respondent had stopped repaying the loan for which he stood as guarantor. Fearing that his mortgaged house would be sold, he phoned the respondent on 20th May 2013, informing him on the need to repay the loan. The respondent, who claimed to have been at Newala at that time to attend to his sick father, a story that the appellant apparently did not believe. However, the respondent told the appellant to go to his (respondent's) shop and sell the trade goods in order to repay the loan.

The Primary Court believed the testimony of the appellant and dismissed the respondent's claim. The trial Magistrate at page 3 of the typed Judgment partly reasoned as follows:

> "...mdai yeye mwenyewe alikubali kuwa mdaiwa achukue vitu na aviuze ili arudishe mkopo huo baada ya yeye kushindwa na ushahidi huu uliungwa mkono na mtoto wa mdai SM2 aliyeijulisha mahakama kuwa yeye alipigiwa simu na mdaiwa achukue vitu na kuanza alifanya kama alivyoambiwa na baba yake na mdaiwa alifunguliwa duka yeye akiwepo na akafunga kweli kufuri lingine. Mdai yeye mwenyewe alidai kuwa mdaiwa alifunga duka bila ruhusa lakini SM2 amesema kuwa yeye alifungua duka baada ya kuruhusiwa na baba yake..."

On appeal by the respondent to the District Court, one of his arguments was that the appellant sold his goods and denied him the shop keys, and that he went to NMB manager who denied about the situation and his shop was closed without reasonable cause. The District Court agreed with him and held as follows:

> "He told the court that he had been reminded twice by the bank authority about the appellant's failure to pay the loan. But he failed to produce the reminders from NMB to court as evidence. This court is of the settled mind that the step taken by the respondent to take the appellant's goods and close the shop in his absence was not proper. I think the proper procedures of which he should have followed could be to file an application before the court of law, that he want to take the appellant's trade goods to sale and pay for loan and not to do so in his absence and locally."

In his memorandum of appeal against the above decision, the appellant has set out three grounds, as follows:

1. That the Honourable Court gravely erred in law and in fact by failure to ascertain that the appellant acted under the bonafide claim of right.

2. That the Honourable Court erred in law and in fact for failure to consider that, the appellant was only guarantor who handled over his dwelling house to the guarantee (Respondent) for facilitating loan from National Microfinance Bank (NMB) Nachingwea branch but ended up to pay the loan after the respondent failed to do the same to rescue his property.

3. That the Honourable Court erred in law and fact by failure to recognise the lawful procedure taken by the appellant which involved the police Department and Village Executive Officer to close and dispose off the shop.

At the hearing, the appellant was represented by Mr Kasian Mkali learned advocate. The respondent on the other hand had no legal representation.

Elaborating on the first ground, Mr. Mkali reiterated what was testified before the Primary Court, and by emphasis, he submitted that while the trial court considered the testimony of DW2 Police Officer No. E.1808 Det. Cpl. Logato and PW2, the respondent's son, to hold in favour of the appellant, the District court on the other hand did not consider this evidence.

On the second ground, Mr. Mkali submitted that the District Court did not consider the fact that the appellant was the respondent's only guarantor who agreed to pledge his own house for the respondent's loan. He also lamented

that the appellant was not heard before the District Court. He claimed that as his client was about to make his submissions, the Resident Magistrate intervened and told him that what was submitted by the respondent was enough.

On the last ground, Mr. Mkali submitted that the District Court did not consider the handing over of the shop and the items therein to the appellants, as was done before the Police Officer who was the respondent's relative (a brother in law) and the respondent's son.

Mr. Mkali concluded his submissions with the following prayers: first that the District Court's decision be quashed and set aside; second, that the respondent be ordered to refund the appellant the money he paid to NMB, and lastly, the respondent be ordered to pay costs of the case.

In his brief response, the respondent submitted that he does not owe the appellant anything. Instead, the appellant's act of going to his shop and closing it down was unlawful. He also submitted that it was not true that he defaulted in payment of the loan because the bank would have taken the security (the appellant's house). Further, that there was no Police Officer or a local authority leader during the handing over of the properties and closure the shop. He finally prayed for the District Court's decision to be confirmed and the appellant's appeal to be dismissed with costs.

The issues to be decided in this appeal are diverse, but more significantly is whether there is merit in the appeal. But let me first address the issue of the

right of a party to be heard on appeal which Mr. Mkali, learned advocate, raised in the course of his submissions.

Mr. Mkali complained that the appellant was not heard before the District Court. He said that while he was about to make his submissions, the District Magistrate intervened and told him that what was submitted by the respondent was enough.

However, Mr. Mkali' argument on the point is not supported by the record of the District Court. The record shows that both parties made their submissions before the District Court, which submissions were recorded. There is nothing suggesting that the District Magistrate denied the appellant his right to argue the appeal, unless Mr. Mkali wants to tell the court that the District court record is false and does not represent what truly transpired during the hearing of the appeal. If that was the case, Mr. Mkali would have had to seek to impeach the court record. This would be a tall order, because it is a settled principle that a court record is a serious document, it should not be lightly impeached and there is always a presumption that a court record accurately represents what happened: see the case of *Halfani Sudi vs. Abieza Chichili* [1998] TLR 57. There being not even an attempt at impeaching the court record, the learned advocate's arguments on the point cannot stand. They are overruled.

On the merits of the appeal, there are two issues falling for consideration: First whether the respondent defaulted to pay the loan; and second, whether the respondent authorized the appellant to sell his shop items in order to repay the loan.

In his submissions before this court, the appellant claimed that he did not default in paying the loan. He made a similar submission before the District Court when he said that he checked with the NMB manager and was told that there was no problem.

In his testimony before the trial primary court the appellant stated that the respondent travelled to Newala and failed to repay the loan and he as a guarantor was informed by the bank and took some initiative to ensure that the loan is paid in order to rescue his property which he had offered as security. His testimony was supported by DW2, the Police Officer who told the trial Court that they confirmed with the Bank and were told that the appellant himself started paying the loan.

The respondent did not challenge that testimony either by way of cross examination or in his testimony before the Primary Court. In fact, in his testimony, he did not deny the fact that he failed to repay the loan. He only testified that having been called by the appellant about the outstanding loan, he told him to use his own money to repay the loan. The relevant part of the respondent's testimony before the trial court reads:

> "...mdaiwa alinipigia simu mimi nilimjibu wewe lipa kwa fedha zako mimi nitakulipa wewe, siku nyingine akanipigia simu sikupatikana..."

That was the only testimony given by the respondent on the issue. His averment to the effect that he did not default in repayments only cropped

to in his submissions on appeal. It began in the District Court when he submitted that the NMB manager told him that there was no such problem, and in this court when he said that he did not default. It is a settled principle that submissions are not evidence and they cannot be used to introduce something which was not made available to the trial court. Such complaint, therefore, ought to have been part of his testimony during trial in the Primary Court. The District Court thus erred in holding that the appellant ought to have produce evidence of loan reminders while the issue of failure to settle the loan was not challenged by the respondent before the Primary Court.

On the second issue, Mr. Mkali submitted that the District Court did not consider the testimony of PW2 Abdul Idd, the respondent's son, which was relied on by the Primary Court in its findings. Also it did not consider the handover of the items which was done in front of the Police Officer and the respondent's son. On his part, the respondent submitted that there was no Police Officer or local authority during the handing over of the shop items.

I entirely agree with the appellant's advocate that the testimony of PW2 Abdul Iddi and DW2, Det. Cpl. Logato, were not considered by the District Court. The trial court found PW2's testimony credible and was satisfied that the respondent himself told his son to give the appellant the shop items, which was done, according to PW2 and DW2, in front of other witnesses. For instance the relevant part of PW2 testimony reads:

> "Mdai ni baba yangu mzazi mdaiwa ni rafiki wa baba yangu. Mdai alisafiri kwenda Newala aliniachia duka lake akaja mdaiwa akaniambia yeye ni mzamini wa mkopo...**tarehe 20/5/2013**

alinipigia simu baba akanijulisha kuwa nimfungulie duka mdaiwa kwani kuna vitu anataka kuchukua yeye, mimi nilimfungulia..." [Emphasis mine]

With the above evidence from the respondent's own son, and DW2, a Police Officer but who was also an in law of the respondent and a defence witness, the appellant's case was sealed. The Primary Court rightly held in favour of the appellant. It was a clear error on the part of the learned Resident Magistrate on appeal to overturn the trial court's findings.

As for reliefs, Mr. Mkali has prayed for the court to order the respondent to refund the appellant the money he paid to the bank. However, this is a new claim which is not reflected in the record of the Primary Court by way of counter claim. It is a principle of law that matters which were not taken before the trial court cannot be raised on appeal: see the cases of *Hotel Travertine Limited vs NBC and 2 others* [2006] TLR 133 and *Tanzania Marketing Board vs Cogecot Coton Company S.A* [2004] TLR 132.

In the upshot, I allow the appeal, quash and set aside the decision of the District Court. The Primary Court decision is hereby restored. The appellant shall have his costs of this appeal and of the proceedings in the courts below.

DATED and DELIVERED at Mtwara this 5th day of May 2015.

F. Twaib

Judge