

IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CIVIL APPEAL NO. 2 OF 2017

(Original Civil Case No. 09 of 2016 of the District Court of Dodoma)

BAYPORT FINANCIAL SERVICES (T) LTD.....APPELLANT

VERSUS

MASURA THOMAS NYAKARUGU.....RESPONDENT

JUDGMENT

05/6/ & 25/7/2017

KWARIKO, J.

The respondent herein filed a suit against the appellant herein before the District Court of Dodoma complaining that he discovered in January, 2012 that the defendant had deducted money from his salary and there was a cash deposit of Tshs. 3,000,000/= in his favour. That, he complained to the appellant to stop deduction as he had never entered into any agreement with them where they promised to investigate the matter. That, when nothing was done he wrote a letter to his employer Kongwa District Council where he worked as Clinical Officer about the matter who contacted the appellant's Zonal Manager and it was said that the said Shs. 3m had been wrongly deposited to the respondent's account by one of

their employee. That, due to the deductions he remained with zero balance in his salary hence had to take two loans from other institutions namely NMB & FINCA to mitigate life's hardships.

For the foregoing the respondent claimed from the appellant the following;

- 1. Payment of the sum of Tshs. 5,637,887.07 which is a difference between the actual amount of Tshs. 3,000,000/= deposited by the appellant and the total deduction of Tshs. 8,636,887.07.*
- 2. The compensation of each suffering day to the respondent at a tune of Shs. 10,000/= per day for nine hundred days hence Tshs. 9,000,000/=.*
- 3. General damages to be assessed by the court.*
- 4. Interest at commercial rate from the date of institution of the suit until the date of judgment and from that date till payment in full.*
- 5. Costs of the suit.*
- 6. Any other relief (s) the court deemed just to grant.*

The respondent claimed that the appellant unlawfully deducted money from his salary for about 45 months whose salary slips were annexed to the plaint were marked during the trial to be part of the court record as they were not disputed. The respondent was the only witness in his case.

On their part the appellant through RAPHAEL KALINGA, DW1 denied the claim and admitted that the loan amount was really Tshs. 3,000,000/= which was deposited with the respondent whereas as per concluded agreement (exhibit D1) the monthly deduction was Tshs. 191,953/= where Tshs. 11,517,183.60 was the expected collection from the respondent. However, the deduction was stopped in 2015 following order from Kongwa Director (sic) to pave way for negotiation which never took place as the respondent had filed the suit.

According to the appellant there was outstanding loan balance of Tshs. 2,879,295 by the respondent. That, the respondent never complained of the deduction from the deposit of loan amount in 2012 to 2015 when he first complained.

DW1 said he once heard complaint concerning one of their employees namely FUMITO but discovered that the same was personal hence directed the respondent to contact him directly.

The trial court in the end found that the respondent had proved his claim hence allowed the same as presented and general damages assessed at a tune of Tshs. 2,000,000/=.

The appellant was aggrieved by the trial courts decision hence he filed this appeal upon the following five grounds of appeal;

- 1. That, the trial magistrate erred in law and facts when declared the loan agreement entered between the parties herein to be void ab initio while the same was genuine and lawfully contracted.*
- 2. That, the trial Magistrate erred in law and facts when made a decision that all the deductions made by the Respondent employer on behalf of the Appellant was unjustified while the Respondent admitted to have received Tzs 3,000,000/= from the Appellant and have never refunded the monies, if at all they were wrongly deposited.*
- 3. That, the trial Magistrate erred in law and fact when awarded the Respondent special damages to the tune of Tzs. 9,000,000/= while the same was not proved.*
- 4. That, the trial Magistrate erred in law and fact when awarded the general damages of Tzs 2,000,000/=*

to the Respondent without any lawful justification and was not prayed to such effect.

5. That the trial Resident Magistrate erred in law and facts when copied the Respondent reliefs (sic) as prayed in the plaint and final submission into judgment of the court.

This appeal was heard where Mr. Mussa learned advocate argued the same on behalf of the appellant. As regards to the first ground of appeal Mr. Mussa argued that during the trial of this case there was no allegation of fraud, coercion, undue influence, misrepresentation and/or mistake regarding the loan agreement that was advanced to the respondent. That only the respondent alleged forgery which he did prove and the trial court ruled out so.

Mr. Mussa continued to argue that however the trial court erred to hold that the contract was *void ab initio* as it referred the respondent as female while he is a male and the same was entered in Arusha while was signed in Kongwa District. That, according to him those are not factors that could vitiate the contract and that factors that can vitiate the contract are provided under section 14 (1) of the Law of Contract Act [CAP 345 R.E. 2002] hereinafter to be referred to as the Act – which factors do not include forgery. And that the issue of gender did not arise during the trial but in the final submission by the respondent hence the same should

not have been relied upon to decide the suit as the appellant did not have opportunity to comment on the same.

In addition to the foregoing Mr. Mussa argued that DW1 explained that exhibit D1 was standard form contract that is where it showed that it was prepared in Arusha and signed in Kongwa and that signing can be done anywhere hence the same did not affect the respondent's consent.

In relation to the second ground of appeal it was submitted by Mr. Mussa learned advocate that the fact that the respondent admitted receiving Tshs. 3m and never returned it on allegation that the same could be deducted from his salary was proof that there was contractual relationship between the parties. That, the respondent's silence from 2012 to 2016 means that he was part to the agreement and that he was estopped from complaining. The case in reference was that of RASHID JUMA ALLY V PEOPLES BANK OF ZANZIBAR LTD & ANOTHER, CIVIL Appeal No. 15 of 2008, Court of Appeal of Tanzania at Zanzibar (unreported).

The complaint in the third ground of appeal as contended by Mr. Mussa relates to awarded special damages which need to be specifically pleaded and strictly proved. Mr. Mussa referred this court to the case of STANBIC BANK (T) LTD V. ABERCOMBE & KENT (T) LTD Civil Appeal No. 21 of 2001, Court of Appeal of Tanzania at Dar es Salaam (unreported).

Thus, according to Mr. Mussa the respondent did not specifically prove the alleged special damages that was awarded to him at Tshs. 9m.

Further, arguing the fourth ground of appeal Mr. Mussa submitted that there was no basis upon which Tshs. 2m could have been awarded as general damages since the respondent did not pray for it. And if at all the respondent did not suffer any damages.

Lastly, Mr. Mussa complained in relation to the fifth ground of appeal that the trial court ought to have made its own findings on the evidence before it in deciding the case rather than its act of copying respondent's prayers in the plaint and final submission. That, had the trial court made its own analysis it would not have reached to the decision it made.

In his reply Mr. Mwaipopo learned advocate for the respondent argued in respect of the first ground of appeal that the trial court did not decide the matter of forgery as it said that it was a criminal matter, and that it found that the contract was void for reasons of the gender of the respondent and place of concluding and signing the same. Mr. Mwaipopo was of the view that although the contract can be entered anywhere but for the purpose of ascertaining court's jurisdiction any document should specifically state the place of signing. He also argued that the respondent was also forced to sign the contract.

Secondly, it was argued for the respondent that the said Tshs. 3m was refunded but the deduction continued and the principle of estoppel can only apply where the law has been complied with by the parties and in this case there was no free consent from the respondent.

In the third ground of appeal Mr. Mwaipopo submitted that special damages had been proved by the respondent and there was proof that he suffered Tshs. 10,000/= daily and tendered salary slips to show that he had no balance hence necessitated him to take loans from NMB to get relief from the hardship in life. And that Tshs. 9m was just a token.

As regards the award of Tshs. 2m as general damages it was Mr. Mwaipopo's contention that the same was justified to mitigate the respondent's suffering.

In relation to the fifth ground of appeal Mr. Mwaipopo argued that the trial court exercised its discretion in deciding the case and it did not do that outside its jurisdiction. He prayed for the court to uphold the trial court's decision and if it deems fit can enhance what was awarded to the respondent.

In his rejoinder submission Mr. Mussa learned advocate while maintaining his earlier submission he added that the jurisdiction of the

court was not at issue at the trial and the court in deciding the suit ought to do that from its own findings not from parties findings.

Having heard and considered the grounds of appeal and submissions from the counsel for the parties this court is required to decide whether this appeal has merit.

As regards to the first ground of appeal this court is in agreement with the appellant that the respondent alleged forgery which lead to his salary being unlawfully deducted in pretence of contractual relationship between him and the appellant. However, as rightly said by the trial court and the counsel for the parties, if the respondent wanted to succeed in that claim he ought first to start with criminal proceedings to prove forgery before he proceeded to sue those responsible, if at all.

Otherwise, since the respondent's personal details featured in the contract between him and the appellant it cannot be said that he was not privy to it. He did not say where the appellant stole his name, employment details and banking details to be able to enter into the contract and ultimate deductions.

On its part the trial court decided that the contract was *void ab initio* for reason that it referred the respondent as a female while he is a male and that the contract was entered in Arusha but signed in Kongwa District.

As correctly argued by the appellant these matters were not subject of dispute before the trial court. In fact the respondent never pleaded or evidenced that way and thus they came from cross-examination of DW1 by respondent's counsel and the trial court itself. The respondent only complained about the unauthorized deposit of Tshs. 3m and unlawful deductions from his salary.

And if anything, DW1 explained about the contract as being standard form contract which can be signed anywhere a client is found. This court is of the view that even though the details show that the respondent's gender is female while in fact he is a male but the same could not have vitiated the contract. Section 14 of the Act provides thus;

(1) Consent is said to be free when it is not caused by-

- a) coercion, as defined in section 15;*
- b) undue influence, as defined in section 15;*
- c) fraud, as defined in section 17;*
- d) misrepresentation, as defined in section 18; or*
- e) mistake, subject to the provisions of sections 20, 21 and 22.*

Now, of the foregoing factors the gender of a party and place of signing or preparing the contract are not among the factors that vitiates free consent of the contracting party. Mr. Mwaipopo tried to argue that the respondent was forced to sign the contract but there was no any

evidence to prove that assertion and if at all, it shows that the respondent indeed signed the contract with the appellant.

The foregoing lead the court to conclude that the contract between the parties was genuine and thus the first ground of appeal has merit.

As regards the second ground of appeal this court is in full agreement with the appellant that had the money deposited with the respondent and deducted from him was unjustified the respondent would not have kept quite for about four years without doing anything and most importantly suing the appellant or whoever was involved. The respondent said he even reported the matter to the PCCB but there was no any supporting evidence to that effect. He did not report to police for the matter to be investigated, if at all. And why the respondent did not refund the Tshs. 3m to the appellant if at all was deposited without his knowledge. This means he was a willing party and was involved into the agreement but for reasons best known to himself decided to be indifferent four years later.

The law is clear that whoever keeps quite when something concerning him is done it means he agrees to it and he is estopped from challenging that particular act.

Section 123 of the Law of Evidence Act [CAP 6 R.E. 2002] provides thus;

When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither her nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing.

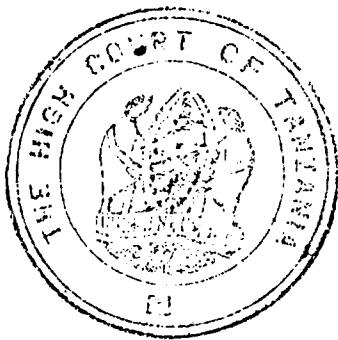
That is the principle of estoppel which was applied with approved in the cited case of RASHID JUMA ALI V. PEOPLES BANK OF ZANZIBAR LTD & ANOTHER (supra). Therefore, in our instant case the respondent's conduct of keeping quiet from January, 2012 when he said to have discovered the deposited money and subsequent deductions it means he acquiesced to it and his act of appropriating the Tshs. 3m shows that he needed it and thus it cannot be said that there was no any agreement between him and the appellant. Thus, consent can also be inferred from the conduct of the parties concerned. The second ground of appeal has merit.

Having been decided the first and second grounds of appeal in the affirmative the issue of special damages complained in the third ground of appeal and general damages raised in the fourth grounds of appeal lacks base within which to stand as they could have been discussed if this court found that there was no contract between the parties and thus deposit and

deductions of money in respect of the respondent were unjustified. The fifth ground of appeal is of no difference.

Finally, this court is settled that the appeal has merit and it is hereby allowed and the trial court's decision is quashed and all orders thereto set aside. I order no costs here and below due to the nature of the parties as the winning party has deep pocket.

Order accordingly.



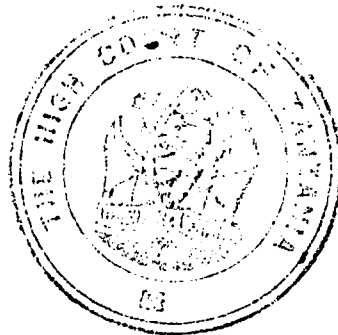
A handwritten signature in black ink, appearing to be "M.A. Kwariiko".

M.A. KWARIKO

JUDGE

25/7/2017

DATED at DODOMA this 25th day of July, 2017



A handwritten signature in black ink, appearing to be "M.A. Kwariiko".

M.A. KWARIKO

JUDGE

25/7/2017

Date : 25/07/2017

Coram : Hon. M.A. Kwariko, J.

Appellant : Representative present -Mr. Elibariki Foya

Respondent – Present/Mr. Mwaipopo Advocate

C/c : Judith

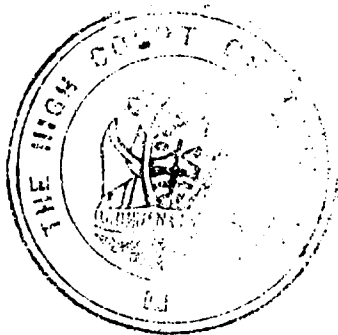
Mr. Mwaipopo Advocate

We are ready for judgment.

Appellant:

We are ready and our advocate is indisposed.

Court: Judgment delivered in Court today in the presence of the Respondent and Mr. Elibariki Foya Officer of the Appellant and Mr. Mwaipopo learned Advocate for the Respondent. Ms. Judith Court Clerk present.

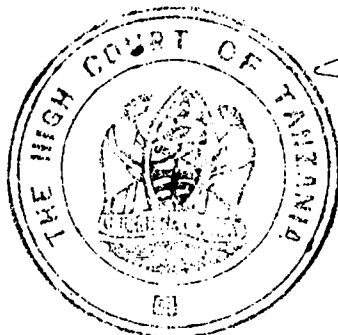



M.A. KWARIKO

JUDGE

25/7/2017

Court: Right of Appeal Explained.




M.A. KWARIKO

JUDGE

25/7/2017