

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**HC. CIVIL APPEAL NO 06 OF 2016**

*(Arising from the judgment of the Resident Magistrate Court of Arusha as per Hon.Ndaweka (RM) dated 27 / 11/ 2015 in Civil Case No23 of 2015)*

**LUVI COMPANY LIMITED .....APPELLANT**

**VERSUS**

**TEDY PRISCUS SHAO ..... 1<sup>ST</sup> RESPONDENT**

**SARA MARTIN SHAO .....2<sup>ND</sup> RESPONDENT**

**PERPERTUA EMANUEL SARAKIKYA .....3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

**BEFORE: MAIGE, J**

This is an appeal against the judgment and decree of the Resident Magistrate Court of Arusha in Civil Case No. 23 of 2015 dismissing the suit by the appellant herein. In the said suit, the appellant was claiming against the respondents and each of them for the following reliefs. **First**, for payment of **TZS 26,683,200/=** as outstanding principle loan and interests

accruing there from. **Two**, an order enforcing personal guarantees of the second and third respondents.

The claim by the appellant at the **trial court** was that; sometime in 2008, it advanced a loan of **TZS 8,000,000/=** to the first respondent which was to be paid within four months from the date thereof with an interest at the rate of 10 percent per month. As a security for repayment of the loan, the first respondent executed a deed of mortgage on his unregistered landed property at Madukani area. As additional security, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents executed personal guarantee for repayment of the loan should there be any event of default. The respondents failed to pay the loan despite being served with a notice of default.

Neither of the respondents filed a written statement of defense to contest the suit. They did not enter appearance throughout the proceedings at the **trial court** despite being duly served as well. The **trial court** allowed the appellant to proceed *ex parte*.

Through its sole witness one LEONARD DICKSON LYATUU (PW1), its General Manager, the appellant produced the loan agreement, mortgage deed and personal guarantees of the second and third respondents to establish the advancement of the loan of **TZS 8,000,000/=** to the first

respondent (exhibit **P-7** collectively).**PW1** further testified on the effect of the exhibited documents as well as on the default of the respondents to service the loan. The trial magistrate did not examine the witness howsoever. Neither the counsel.

After the closure of the prosecution case, the trial magistrate placed the matter for judgment. The disposal of the suit was solely based on the illegality of the loan agreement. The opinion of the trial magistrate was that, as the appellant was not in possession of a license, he was not entitled to issue the loan in question and as such the transaction in question amounted to a criminal offence punishable under section 6 of the Banking and Financial Institutions Act.

In the instant appeal, the trial magistrate is faulted in two respects. **First**, in holding that the appellant was not in possession of a legal license to conduct the business. **Two**, in not properly assessing the evidence. Just as in the trial, the respondents had never entered appearance in this proceeding in spite of being served by way of publication in pursuance of the order of my predecessor judge. Therefore, this appeal proceeded *ex parte*.

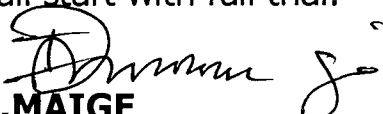
In his submissions, Mr. Ngemela, learned advocate for the appellant contends that the loan agreement was enforceable to the extent of the principle amount. This submissions is however coming for the first time in this appeal. It was not raised during trial and therefore it was not part of the decision of the **trial court**. For the reason of not being adjudicated upon by the **trial court**, it cannot constitute a valid ground of appeal.

On this however the counsel cannot be blamed. The issue of whether the appellant was in possession of a license would ordinarily have been raised by way of written statement of defense. For the reasons better known to themselves, the respondents did not file a written statement of defense. They are deemed in law to have admitted to the factual allegations in the plaint. That aside, the **trial court** was not wrong in raising the issue on its own motion since there is no estoppel on the points of law. The problem with the trial magistrate is that; he did not afford the appellant an opportunity to be heard<sup>2</sup> on the issue of illegality of the loan agreement for want of license. This was in itself a curtailment of the appellant's right to be heard on the issue notwithstanding its adverse implication in its claim. That was fatal to the judgment and proceedings of the **trial court**, in my firm opinion.

Though enforceability of the loan agreement was framed into issue , the trial magistrate could have not fairly and legally deal with the new issue of

business license without the appellant being afforded an opportunity to remark thereon.

For those reasons therefore, I am inclined to agree with the appellant that the trial magistrate was wrong in dismissing the suit on illegality of the contract without the appellant being afforded an opportunity to be heard. The appeal is thus allowed. The judgment of the **trial court** is hereby set aside and the proceedings subsequent to 7<sup>th</sup> day of October 2015 quashed with costs. The file is hereby remitted to the trial court for retrial *denovo* before another magistrate who shall start with full trial.

  
**I. MAIGE**  
**JUDGE**  
**12/11/2018**

**Date:** 12/11/2018

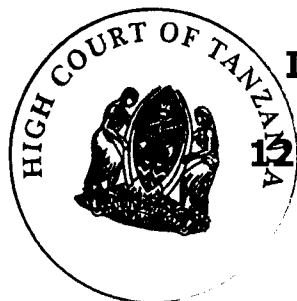
**Coram:** Hon. Maige, J

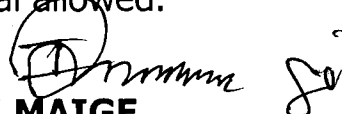
**Appellant:** Mr. Yoshua Mambo/ Mr. Ngemela for the appellant

**Appellants:** Absent

**B/C:** Mariam

**Court:** Judgment delivered, appeal allowed.



  
**I. MAIGE**  
**JUDGE**  
**12/11/2018**