

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

PC CIVIL APPEAL NO.76 OF 2017

*[Arising from the Decision of Kilosa District Court in Civil Appeal No.02 of 2017
Original from Kimamba Primary Court in Civil Case 68 of 2017)*

SEPH ADO.....APPELLANT

VERSUS

STIVIN SALUKELE.....RESPONDENT

JUDGEMENT

Date of the last Order 13th March, 2018

Date of the Judgement 06th April 2018

SAMEJI, K. R. J

This is the second appeal. Initially the respondent successfully instituted a civil suit before Kimamba Primary Court for specific performance of the agreement entered between him and the appellant. After a full trial the Kimamba Primary Court entered Judgement in favour of the respondent. Dissatisfied with that decision the appellant unsuccessfully appealed to the Kilosa District Court. Still dissatisfied, the appellant decided to file this appeal with the following four (4) grounds that:-

- (a) *That, the court erred in law when ordered, eviction against the appellant on his lawful house without duly considered the terms to the loan agreement entered by the parties who agreed that upon default to pay the loan by the appellant in time the respondent, shall issue notice against the appellant requiring him to pay the loan;*
- (b) *That, the trial court erred in law and facts for its failure to observe that the appellant had not failed defaulted (sic) to pay the loan secured from the respondent as the appellant noticed (sic) the respondent earlier that he has been countered (sic) with problems hence be given more time to pay the loan;*
- (c) *That, the trial court erred in law to conclude that the appellant should move away from the house and leave the house (sic) to the respondent despite to the fact given to the court that the appellant had not failed defaulted (sic) to pay the loan secured by him but he required more time to settle the debt; and*
- (d) *That, the court did not evaluate and analyze the loan agreement entered by the parties instead it rush (sic) to give irrational judgement.*

The facts of the case as obtained in the record indicates that, on 27th January, 2014 the appellant approached the respondent and asked for a loan of Tshs 550,000/= whereby with interest he will pay back Tshs. 865,000/=. Then again on 27th January 2014 he took Tshs. 150,000 from , the same respondent to pay back Tshs 230,000/= to make a total loan of Tshs. 1,095,000/=. The appellant and the respondent signed an agreement whereby the appellant promised that, on 25th February 2014 he will pay the respondent a total amount of Tshs. 1,095,000/= to clear the entire loan. That, if he will not pay the said money by that date, then his *two rooms house, with grass and partly iron sheet roof*, located at Kimamba 'B' Village in Kigamboni Division should be handled over to the respondent. The Written Agreement to this effect was prepared, signed by the parties and witnessed by one Eliena Fuime, the Chairperson of Uhindini Division (Kitongoji) and one member of the Kitongoji Mr. Abdallah Maina. Then, on 25th March 2014 a sale agreement of the said house between the parties was signed witnessed by the same Chairperson and one Rashidi Beho. Due to the fact that the appellant was adamant to surrender the said house on 26th May 2015 and 5th January 2016 another Agreement was signed

between the parties witnessed by the Kimamba Primary Court Magistrate and the Court Clerk, respectively, where in both instances the appellant promised and reaffirmed his promise of surrendering his house to the respondent. However the appellant never fulfilled that promise hence the suit.

At the hearing of the appeal both parties appeared in their personal capacities and fended for themselves, (unrepresented).

The appellant admitted before the Court that all what is claimed by the respondent is true. He said, he obtained a loan from the respondent and promised to pay him, but failed to fulfill that promise as he encountered problems. The appellant insisted that, he did not refuse to pay, but only requested for more time, which he was given, but he again failed to pay and hence saw the respondent constructing a house on his plot. He thus prayed the Court to consider the grounds of the Appeal.

In response the respondent resisted the appeal and argued that, the appellant is the one who approached him for a loan and because he did not know him he asked him to bring the Chairperson of his street to witness the loan agreement. He said the loan agreement was duly signed with

specific dates for him to pay the loan, but he never fulfilled. The respondent said the time was extended to him, but the appellant never kept his promises. The respondent said due to that fact they have signed series of other agreements, (*Sale and Lease Agreements*), which were tendered before the trial court and are all in the record of the case. He said, in all those instances, the appellant promised to implement his promises, but in vain. He said what the appellant is claiming for has no merit and the appeal should be dismissed.

In rejoinder submission, the appellant said, he has not sold his house and requested the people who witnessed the Loan Agreement to be summoned and testify.

I have given due consideration to the grounds of the appeal and the submissions by the parties together with the record of the case. It is my considered view that, there is only one issue *whether the appeal before me is meritorious.*

In the course of determining the above issues, I will be guided by the canon of civil justice which suggests that, **one** "*he who alleges must prove the*

allegation”, **two** “*the person whose evidence is heavier than that of the other is the one who must win*” - **Hemedi Said Vs. Mohamedi Mbilu** (1984) TLR 113 and **three**, “*where doubts are created in evidence, the same should be resolved in favour of the opposite party*” - **Jeremiah Shemweta Vs. Republic** (1985) TLR 228.

It is also an acceptable practice that, a second appellate Court should very sparingly depart from the concurrent findings of the trial and first appellate court, as was rightly said by Sir Kenneth O’Connor, P. of the defunct Court of Appeal for Eastern Africa in the case of **Peters V. Sunday Post Limited [1958] EA 424** at page 429. Borrowing from that authority and considering the record and facts of the case at hand, the 1st appellate court, in principle concurred with the findings of the trial court. As such, this Court may interfere with such findings, if it is evident that, the two courts below misapprehended the evidence or omitted to consider the available evidences or have drawn a wrong conclusion from the facts, or if there has been misdirection or non- direction on the evidence.

I wish also to point out that, while perusing the record of this case and all the documents thereto, I have observed that the names of the parties

herein are reflected and written differently in several documents. For instance, the name of the appellant is written as, *Seth Ado, Seif Adoo, Seeph Ado, Seeph Addo, Sefu Ado* and the name of the respondent as *Steven Salukele, Stivin Salukele, and Stephano Salukele*. When parties were asked to address the Court on this matter they all confirmed that all those names referred to them, as being English names, some people write the same in Swahili and others in English languages, hence end up mixing the spellings. All parties recognized their signatures in all the agreements they have once entered to and signed.

Now to start with the **first** issue, I have carefully perused the proceedings and two Judgments of the subordinate courts in *Civil Case No. 68 of 2017* and *Civil Appeal No. 02 of 2017*, respectively. I wish to note that all courts below have well analyzed the issues; evidence tendered and considered the matter in accordance with the law.

I however find that, it is imperative for me to point at the outset that the relationship between the appellant and the respondent is regulated by the law of contract of Tanzania which has been codified in the Law of Contract Act, Cap 345 [R.E 2002]. Section 2(1) (b) (h) of the Act, defines a contract

as an agreement enforceable by law. Section 10 provides that all agreements are contract if they are made by the free consent of the parties competent to contract for a *lawful consideration* and with a *lawful object*. Free consent is further defined under Section 14 of the same Act.

In the case at hand, there are series of agreements entered by the parties and both parties including the appellant himself is not disputing to have entered and signed those agreements in front of his witnesses and leadership of his street. The said agreements are self explanatory and unambiguous. Now, in his first ground the appellant is bringing the issue of notice that upon failure to pay the loan, he was supposed to first issue the notice to the respondent. I have perused the agreement which I also showed the appellant to recognize it and his signature and he affirmed that *'yes he entered into that agreement and he is the one who signed therein'*.

The said agreement read that:-

"Mimi Seifu Adoo nimekopa pesa toka kwa ndugu Stephano Salukele kwa kurudisha kwa riba. Pesa niyokopa Tshs 550,000/= Laki Tano kwa kurudisha 865,000/= Laki Nane na Sitini na Tano. Leo hii tarehe 27/01/2014 nimekopa tena pesa Tshs 150,000/= Laki Moja

na Nusu kwa riba ya Tshs 230,000/= Laki Mbili na nusun(sic). Kwa jumla Tshs. 1,095,000/= Million Moja na Elfu Tisini na Tano tu. Pesa hiyo inatakiwa kurudishwa ifikapo tarehe 25/02/2014. Endapo ifikapo hiyo tarehe 25/02/2014 pesa hazikurudishwa kwa Bwana Stephano Selukele nyumba yangu atakabidhiwa Bwana S. Selukele. Mapatano hayo yamefanyika mbele ya Mwenyekiti wa Kitongoji wa eneo husika”.

From the terms and conditions indicated above I do not see anywhere the requirement of notice as claimed by the appellant. However, it is on record that after the failure on the part of the appellant to implement the terms and conditions of the said agreement the respondent did not right away execute the agreement, but the appellant was given more time to implement the same, but he failed. Then, other agreements were entered but again the appellant was not in a position to implement the same.

I must say that, all the grounds of appeal raised by the appellant in the two appellate courts are the same and I see this to be an abuse of court process. There is ample evidence that, before the trial court all witnesses who appeared for both sides including the witnesses of the respondent and

the appellant himself all admitted that the appellant has obtained the loan and mortgaged his two room house to the respondent. All relevant agreements and documentation to prove these facts were submitted before the trial court and are part of the record of this case.

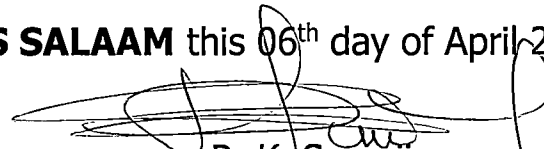
It is therefore my firm finding that, the trial Magistrate properly found that the appellant had not adduced concrete and tangible evidence to substantiate his claim. The first ground of appeal fails absolutely for lack of merit.

In respect of the 2nd 3rd and 4th grounds of the appeal, I am convinced that the trial Magistrate did assess the evidence adduced before the court fairly well to reach to the conclusion that the appellant had failed to establish the case to the required standard to warrant the decision of the court to be entered in his favour. See Sections 110(1) and 111 of the Evidence Act, Cap. 6 [R.E 2002].

In the final analysis and as I have painstakingly considered all issues and totality of the evidence on record and carefully analyzed the two Judgments of the subordinate courts based on the evidence of the parties in the scales

of justice and principles of civil justice, it is my finding that *the Civil Appeal No. 137 of 2016* filed before this Court lacks merit and is hereby dismissed in its entirety with costs. It is so ordered.

DATED at **DAR ES SALAAM** this 06th day of April 2018.


R. K. Sameji.
JUDGE
06/04/2018

COURT- Judgement delivered in Court Chambers in the presence of the appellant and the respondent who appeared in their personal capacities.

A right of appeal explained.




R. K. Sameji
JUDGE
06/04/2018