

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

AT DAR ES SALAAM.

CIVIL APPEAL NO. 134 OF 2016

MARTIN OCHOLLA NDIRA APPELLANT

VERSUS

LAWI MATIKURESPONDENT

19/4/2018 & 5/6/2018

JUDGMENT

I.P.KITUSI,J.

The respondent Lawi Matiku successfully sued Martin Ocholla N Ndira the appellant, at Temeke District Court, where he had sought recovery of Shs 11,500,000/= being money he had advanced to the said appellant as a loan. He also prayed for payment of general damages and the District court awarded him Shs 5000,000/= The trial court ordered parties to bear their own costs.

The background of the matter was a written agreement in which the respondent advanced to the appellant monies on diverse dates the total of which came to Shs 11, 500,000/= which loan was secured by the appellant's Residential Licence NO TMK 040967. The appellant allegedly defaulted in payment of the loan as per the terms of the Agreement, so the respondent sued for breach claiming the amount of Shs 11, 550,000/= as specific claim and general damages for the breach.

In his written statement of Defence the appellant did not dispute receiving the total amount of Shs 11, 550,000/= under the contract but raised a counter claim. According to the appellant, the loan had been secured by a motorvehicle belonging to one Jared Nyakila Mariwa which the respondent had physical possession of. Appellant's case was that the vehicle, a TATA lorry, was worth Shs 25,000,000/= so he (appellant) was entitled to payment of shs 13, 450,000/= after the respondent deducted the unpaid sum of Shs 11, 550,000. Thus the appellant raised a counter claim for the sum of Shs 13, 450,000/= against the respondent.

In reply to the counter claim the respondent denied to be in possession of Jared Nyakila Mariwa's motorvehicle which he stated was a subject of another contract that ended on 17 September 2010. The respondent further stated that the appellant has never been the owner of that motorvehicle.

The case for the respondent was told by Mr. Lawi Matiku (PW1) who stated that his agreement with the appellant was signed before Mr. Mbonamasabo (PW3) whose story supported it. Then one Jane Frank Leo (Pw2) testified that on PW1's instructions she handed Shs 7, 200,000/= to the appellant who in turn surrendered to her a Residential Licence for his house as security.

In defence the appellant who testified as DW4 and his wife Magreth Martin Ndila (DW3) testified on how they obtained money from PW1 and PW2 who are husband and wife and placed their

motorvehicle Reg. No. T. 603 AAH, Tata make as security. Jaledi Nyakila (DW1) stated that he was the original owner of that vehicle but he gave it to DW4 who was working for his company known as Nyakila Transporters and General supplies Limited.

Four issues were agreed upon by the parties which were;

1. Whether there was a loan agreement between the defendant and the plaintiff.
2. If the 1st issue is answered in the affirmative whether the plaintiff is entitled to payment of Tshs 11, 550,000/=
3. Whether the said loan agreement was secured.
4. What reliefs are the parties entitled to.

The trial court's conclusion was that there was a loan agreement between the parties and that it was secured by a Residential Licence for the appellant's house. It entered judgment for the respondent as earlier indicated.

The appeal expresses the appellant's dissatisfaction with that decision on eight grounds which I reproduce below;

1. The trial court erred in proceeding with the hearing of the case without recording the scheduling order and thereby proceeded with case without road map at the prejudice of the Defendant.
2. The learned trial Magistrate erred in law in admitting exhibits prior to being paid for exhibit fees.

3. The learned trial magistrate erred in law in not ordering set-off of the plaintiff's claim against the defendant's security Tata Truck Reg.No T. 603 AAH valued at Tshs 25, 000,000/=.
4. The learned trial magistrate erred in law and fact in not properly evaluating the evidence and testimonies of witnesses and thereby arrived at a wrong conclusion.
5. The learned trial magistrate erred in law in admitting Exhibit 'P1' and P3' without being paid for stamp duty.
6. The learned trial magistrate erred in law in striking out the Defendant's counter claim.
7. The learned trial magistrate erred in law in proceeding with the hearing of the suit while the same was incompetent in court for contravening order VI Rule 14 of the Civil Procedure Code Cap. 33 R.E 2002.
8. The learned trial Magistrate erred in law in proceeding with the hearing of the suit against the wrong Defendant and without there being amendment on the name of the Defendant.

Both at the trial and before me the parties were represented by the same learned advocates, Mr.Mathew Revocatus for the plaintiff (Respondent) and Mr. Kobas for the defendant (appellant). By an order of the court the appeal was argued by way of written submissions. The learned counsel duly filed their respective written submissions, but I will not address each and every aspect of the grounds of appeal and submissions for reasons that I shall show shortly.

The first reason is that it is trite law that parties are bound by their pleadings. See the cases of **James Funke Gwagilo V. Attorney General** [2004] TLR 161; **Mohamed Shomari V. Principal Secretary Ministry of Defence & National Service and 2 others**, Civil Case No. 37 of 2009, High Court (unreported). In this case both parties pleaded the fact that there was a loan agreement in which the appellant received money from the respondent and that the former had surrendered his Residential Licence which was subsequently returned to him. Both annexed to their pleadings a deed signed before PW3 acting in his capacity as Commissioner for oaths. Nowhere does the appellant allege that he paid the loan, but only raised a Counter claim, and this fact is consistent with ground No. 3 of the appeal which faults the trials court for not setting - off the claim against the alleged appellant's truck.

Accordingly it is my considered view that only grounds 3 and 6 of the appeal merit consideration by this court. However I shall make some observations, in passing on grounds No. 1, 2.,5,7 and 8.

On the omission to hold a scheduling conference, the appellant stated that the court order was not read over to the parties. The respondent submitted that the court complied with the law regarding scheduling conferences. With respect I think the appellant is trying to make a storm in a tea cup here because the proceedings are clear that the court held the conferences and drew issues. In any event I think the following holding in **Kigula and others V. Attorney General** [2005]1 EA 132 cited with approval in **Ruvu Gemstone**

Mining Co. Limited V. Reliance Insurance Company, Commercial No. 128 of 2014, High Court Commercial Division (unreported) may put matters in proper perspective;

" The purpose of a scheduling conference is to save time of the court by sorting out points of agreement and disagreement so as to expedite disposal of cases. Like any other rule of procedure, it is a hand maiden of justice not intended to be an obstacle in the path of justice"

As regards grounds No. 2 and 5 related to non – payment of court fees and stamp duty, the appellant cited Rule 3 and 7 (1) read together with item 18(a) of the First Scheduled to the Court Fees Rules 2015 which require payment of Shs 20,000/= for exhibits. He also cited the case of **Inter Best Investment Company Limited V. Qingdad Foreign Economic Relations and Trade Company**, Civil Appeal No. 95 of 2001, CAT it Dar es Salaam (unreported) where it was held that documents for which stamp duty has not been paid should not be considered.

The respondent's submissions on the two grounds were that the court was correct in admitting the documents and that payment of fees for them would not have been effected before the admission. On the omission to pay for stamp duty the respondent's counsel was that the documents were admitted without any objection from the appellant

and complained for being taken by surprise. He cited the case of **Tanzania - China Friendship Textile CO. Limited V. Our Lady of Usambara Sisters** [2006] TLR 70 which held that points of preliminary objection except points of jurisdiction and limitation may not be raised on appeal.

With respect there cannot be a valid agreement against the law, and I am bound by the case of **Interbest Investment** (supra) that I should not consider the documents for which no stamp duty was paid. Therefore I uphold the appellant's fifth ground of appeal.

Under ground No. 7 the appellant's complaint is that the plaint was not signed by the respondent's counsel. This objection was raised at the trial but dismissed subsequently for the appellant's failure to file written submissions in its support. The respondent has submitted that failure to file written submissions is failure to prosecute, and cited the case of **Twaha Songoro & 20 others V. ANLD Kato** Pc Civil Appeal No. 18 of 2003, High Court at Dar es Salaam (unreported).

It is further submitted that the appellant has misinterpreted the provision of order VI Rule 14 of the CPC because the plaintiff signed the plaint. The advocate signed at the bottom of the plaint and that is enough according to the learned counsel citing the case of **A/S Noremco Construction Vs Dar es Salaam Water and Sewage Authority (DAWASA)**, Commercial Case No. 47 of 2009, High Court Commercial Division (unreported).

The appellant's advocate submitted that Rule 14 of Order VI of the CPC requires that where a party is represented the plaint must be signed by both the plaintiff and the advocate.

The appellant does not dispute the fact that the respondent's counsel signed the plaint but the signature is located at the place where it is written "*Drawn by*"

With respect I share the views of Hon. Makaramba, J in the **Noremco case** that the Rule does not specify the exact area for an advocate to sign. In addition my reading of Rules 14 and 15 of order VI of the CPC satisfies me that the Rule as to the signing of the plaint is less sacred than Rule 15 which provides for verification. Rule 14 provides;

"Every pleading shall be signed by the party and his advocate (if any); provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf."

Rule 15(1) Order VI of the CPC provide;

" Save as otherwise provided by any law for the time being in force every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case"

I think the rule as to verification is more particular than the one regarding signing of pleadings and I take the appellant's objection to be mere splitting of hairs and dismiss it. Similarly I find no merits in the complaint that the respondent sued a wrong person. This is not consistent with the fact that the appellant raised a counter claim and does not dispute receiving money from the said respondent . I think it is meet to remind counsel of the duty of this court as stated in **Benja Properties Limited Vs Savings & Loans Kenya Limited** , High Court Kenya, Mlimani Commercial Courts Civil Case No. 173 of 2004 cited with approval by this court in **Ruvu Gamestone** (supra);

" A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it ."

I now turn to ground 3 of the appeal whether the court erred in not setting off the debt. The appellant raised a counter claim which was strongly disputed by the respondent. In the counter claim the

appellant alleged existence of another contract between him and the respondent in which the loan was secured by the Truck. In his statement of Defence the respondent stated that he had a contract with DW1 in which the Truck was placed as a security but that the contract was discharged. He further stated that the Residential Licences was returned to the appellant for him to correct certain errors but it was re submitted.

The evidence on record shows that the respondent had a contract with DW1 who accepted money from the former as a loan and placed the Truck as a security. The truck became the property of the respondent when DW1 defaulted in paying the loan.

Employing my powers of re- evaluation of the evidence I accept the respondent 's story as cogent. For one the contract between the parties reflecting the appellant's story that it is the Truck that was placed as a security was not tendered in exhibit. For another, the respondent is version that the Truck had secured DW1'S loan has not been challenged. If the appellant accepted from DW1 the Truck as a gift it was an ineffectual agreement whereby DW1 purported to transfer the Truck that did not then belong to him.

My conclusion is that the counter claim had no legs on which to stand so it was correctly dismissed. This answers the question raised on ground No. 3 whether the court should have ordered a set off.

I upheld the appellant on ground No. 5 regarding non- payment of stamp duty but this does not affect the appeal either way. The

appellant's pleadings did not dispute his indebtedness to the respondent and he is bound by them.

This appeal is therefore dismissed in its entirety with costs.



A handwritten signature in black ink, appearing to read "I.P. Kitusi", is written over the printed name.

I.P.KITUSI

JUDGE

5.6.2018