IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC Civil Appeal No. 1 of 2019

(Arising from the Civil Appeal No. 19 of 2018 delivered by District Court of Temeke, Hon. Batulaine, RM. originally from Civil Case No. 310 of 2018 in Temeke Primary Court.

MOHAMED MAKARANI.....APPLICANT

Versus

ADILI ABDALLAH LARHDHY.....RESPONDENT

JUDGMENT

7/11/ - 26/11/2019

J. A. DE-MELLO J;

The **Temeke Primary Court** decided in favor of the Respondent against **Mohamed Makarani** now the Appellant for a claim of principal sum of **TShs. 18,000,000,** but ordered to pay **TShs. 17,000,000/=.** Dissatisfied, he knocked the doors of **District Court** at **Temeke**, which similarly upheld o the findings of Primary Court. This being a second appeal, I am alive and, akin of the principles of law that bars Court to entertain the Appeal unless satisfied of the existence of misapprehension of evidence, miscarriage of justice and or violation of law. See the case of **Director Public Prosecution** vs. **Jaffari Mfaume Kawawa [1981 TLR 149 at page 153** stating the position as follows;

"The next important point for consideration and decision in this case is whether it is proper for this Court to evaluate the evidence afresh and come to its own conclusion on matters of facts. This is a second Appeal...Obviuosly this position applies only when there are no misdirection or no direction on the evidence by the first Appellate Court. In cases where there are misdirection or non-directions on the evidence a Court is entitled to look at the relevant evidence and make its own findings".

Two grounds of Appeal are lodged as hereunder;

1. **That, the first appellate court erred in law and in fact by determining the appeal by relying on the document signed under the police threat without ordering for more witness to be called by the primary court to testify what was witnessed in the contract relied upon in arriving to the decision.**
2. **That, the first appellate court erred in law and in fact by determining appeal based on respondent's statement and without taking regard to the appellant statement as the nature of claim originated from their business transaction in which no document was tendered as to how the debt accrued.**

Counsel Erick Kelvin fends for the Appellant whereas the Respondent appeared in person but filed his written submissions probably outsourcing legal aid from a provider. They both are in compliance.

Abandoning the second ground of appeal, **Counsel Kelvin** submitted on the first ground alone challenging the admission and reliance of document that

was secured under Police threat. In the absence of corroboration, its admission was illegal he observed. He asserted that, it is a principle of law, that a party should not be able to enforce an obligation obtained by a wrong doing and once it is established that the threat was made, the onus lies on a person who made the threat to prove that, the threat made no contribution to the Appellant's decision to enter the agreement, he draws his contention. Notwithstanding the Appellant pleading that, he truly owed the Respondent **TShs. 5,00,000/=** only, the rest of the amount and signed under duress with the supervision of **Police from Chang'ombe Police** Post, the Appellate Court without analyzing and determining the validity of **exhibit P1,** went further that it was the Appellant's duty to prove all those allegations. It is Counsel's further submissions that in absence of free will the contract became illegal and in contravention with **section 14 (1) (a), (2)** and, **15 (1)** of the **Law of Contract Act Cap. 345,** on which the Court ought to consider the extent of illegitimacy of the scope of threat. He went on narrating as depicted under his submissions, **item (viii) & (ix)** as to how after being arrested and handi-cuffed he was lured to make things easier by agreeing with the demands of the Respondent with a view of sorting out it later. But this not forthcoming they in-turned pressure to detain him in remand in the event he refuse to sign the illegal contract. All this summed up to legal maxim of **"ex turpi causa non oritor action** meaning that "**no action arises from unworthy cause".** Expounding on the threat pleaded by the Appellant he referred the case of **Madhupaper International Limited & Another** vs. **Kenya Commercial Bank Ltd & Another (2003) 2 E.A 562 (HCK), Woolwich Equitable Building Society** vs.

IRC (1992) 3 All ER 737 at page 753, **Barton** vs. **Armstrong (1973); (1976) AC 104 at page 121** explaining the core categories of duress**.** Not taking into account all the above, the Court faulted in its approach, he concluded.

Rebutting the Appeal and, on that only one ground, the Respondent stresses that neither duress nor undue influence had been imposed on the Appellant as he was quite aware of the debt and hence submitting himself to its signing. In that and disregarding the need to call further witnesses, Counsel refreshed the Court and parties of **section 143** of the **Evidence Act Cap. 6, R.E 2002)** of the particular number of witnesses are required to prove a case of any act. As rightly observed by the Court the allegations for threat, duress and, or undue influence if at all, had to be proved by the Appellant himself as was pointed out in the case of **Masolele General Agencies** vs **African Inland Church Tanzania (1994) TLR 192**. The document tendered and, admitted as it was marked **exhibit P1** proved Parties free will to that effect hence in order with **section 10** of the **Law of Contract Act Cap. 345,** as opposed to together with **section 14 (1), (2)** and section (**15)** that the Appellant cited based on **section 13** that reads; **'two or more person are said to consent when they agree upon the same thing'.** In conclusion, he submitted that the Appeal has no legs to stand considering the free will that was drawn from both.

Inorder to appreciate this Appeal, I found it worth perusing what transpired from since when Parties once business partners ended up in Court for a claim of **TShs. 18,000,000/=** allegedly lent by the Respondent to the Appellant then. It is exhibit P1 the agreement that the Primary Court based upon and

relied to in determining the case in the Respondents favour. That the Appellant admitted to be in default and out of the sum he parted with **TShs. 5,000,000/=** and, nothing more. Other than the principal sum owed, the Primary Court **awarded TShs. 3,000,000/=** as opposed to **TShs. 17,000,000/=** and **TShs. 6,000,000/=** that, the Respondent prayed for. Addressing the issue of threat, the Court observed and, I would prefer to import as hereunder;

"Utetezi kuwa alilazimishwa kusiani hati ya makubaliano na Polisi sikweli kwa sababu kesho yake alilipa TShs. 5,000,000/= kama walivyoanisha katika hati hiyo na hakuwahi kulalamika popote kuwa amelazimishwa kusain hati hiyompaka sasa alipoletwa mahakama ni zaidi ya miaka mine tangu isainiwe hati hiyo".

This alone clears the air as to the allegations by the Appellant that, the **1st Appellate Court ought** to take this into account, disregarding the principle of law that, the Appellate Court could not open up on a matter that was duly dealt and addressed by the Trial Court. It was at that stage that, the Appellant ought to prove and, as rightly stated, him whom alleges had to prove. **Section 11...of the Evidence Act Cap. 6** supported by an English case of **Jeremy Woods & Another** vs. **Robert Choundry & Another [2008] 1 EA 147** makes it so as it states;

"Since the law of evidence demands that he who alleges should prove, it was incumbent for the Defendant to prove the fact".

In fact and to differ from the Appellant's assertion, if at all and whether true then, this duty lied with him the Appellant and corroborated with evidence,

documentary and witnesses if any. Logic would expect the Appellant to submit to Court, **Police RB** and even **summon the Police** who dealt with the matter, for proof. This was not forthcoming and Courts cannot base its finding from mere allegations and, or rather fabrication. The standard in Civil suit will always prevail that of balance of probabilities and which from the Trial it is the Respondent's who weighed more. This has been all time stance as was held in the case of **Abdul Karim Haji** vs. **Rayond Nchimbi Alois & Another [2006] TLR 419**.

Having taken this view, I am of the settled mind that, this Appeal has no merits as I too, uphold the findings from both the Trial as well as the District Court. Costs to follow event.

It is so ordered.

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J. A. DE-MELLO

JUDGE

26/11/ 2019