IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 97 OF 2020

(Arising from the Judgment of kinondoni District Court in Civil Appeal No. 59 of 2019 dated 12th February, 2020 before Hon. H.M. Hudi, **RM** – Original Civil Case No. 15 of 2019 – Kimara Primary Court)

JOYCE PAUL MNDEME ..... APPELLANT

VERSUS

AKIBA COMMERCIAL BANK ..... RESPONDENT

JUDGMENT

22nd Sept & 09th Oct, 2020.

E. E. KAKOLAKI J

This is the second appeal by the appellant against the decision of Kinondoni District Court in Civil Appeal No. 59 of 2019 which was entered in favour of the respondent. Discontented the appellant has registered his dissatisfaction by way of appeal in this Court canvassed with four grounds of appeal reading as follows:

1. The honourable District Magistrate erred in both law and fact for holding that the subject matter in the dispute (Water Tank) which was

seized by the Respondent (BANK) had no relationship to chattel mortgage.

2. The honourable District Magistrate erred in both law and fact for holding that the issue of contractual relationship between parties was not relevant.
3. The honourable District Magistrate erred in law and fact for holding that always issues are drafted from undisputed facts.
4. The honourable District Magistrate erred in law and fact for holding that the evidence adduced at the trial Primary Court was properly analyzed.

For the foregoing grounds the appellant is praying this court to allow the appeal with costs.

Briefly, facts of the case that gave rise to this appeal may be stated as follows. The appellant (PW1) was running a poultry farm at Makabe area within Ubungo District, Dar es salaam region and had employed one Sauda Philipo Ndogwe as care taker of the farm. The said Sauda S. Ndogwe together with her colleagues had formed an entrepreneurship group, secured loan from the respondent and pledged as security among other collaterals water tanks located in the said farm presenting to the respondent as hers (Sauda Ndogwe's properties). Unfortunately, she defaulted to repay the loan the result of which moved the respondent to repossess one tank as collateral for realisation of its loaned money, the tank which allegedly was handed by the said Sauda and her fellows to Victor Heriel Makange (DW1) the respondent's employee. Following that repossession of the tank, the appellant claimed to have suffered loss as her chicken perished in a large

number following shortage of running water. Further to that, the appellant who disclaims any loan contractual engagement with the respondent, claimed to have suffered loss of trust to her clients as a poultry products supplier. And that, despite of reporting the matter at police and several demands made to the respondent to return back her tank which is not Sauda's property the respondent turned its ears deaf the result of which force appellant to institute a civil suit against respondent claiming both specific and general damages.

During the trial the respondent denied the appellant's claims advancing a defence that it's Sauda and her fellows who disconnected the said tank and handed it over to DW1 which tank was later sold to realize the outstanding loan debt. At the end of the trial, the trial court found that the appellant failed to prove her case as it is Sauda and her fellows who handed over the tank to the respondent and not the respondent who allegedly seized her property and sustained her loss as claimed. Disgruntled the appellant unsuccessfully appealed to the District Court hence the present appeal equipped with four grounds shortly stated above.

The appeal was argued by way of written submission. The appellant has no representation whereas the respondent is enjoying the services of Mr. David B. Wasonga, legal counsel of the respondent. In her submission the appellant though not explicitly stated abandoned the fourth ground and argued the first three grounds only. It is her submission on the first ground that, the trial magistrate erred in fact and law to hold that the water tank had no relationship with chattel mortgage despite of the documents tendered in court to prove the relationship. She mentioned one of the exhibit to be the

client visitation report which was signed by Sauda and DW1 agreeing to seize the said tank should Sauda fail to repay the loaned outstanding balance. Had the appellate court considered the said documents would have appreciated that the same was a mortgage chattel connected to the alleged loan facility in which she was not a party to, thus a proof that her property was wrongly seized by the respondent, the appellant contended. To insist on the existence of the said documents the client visitation report was attached to the submission as annexure.

On the second ground the appellant faulted the appellate court for holding that, the issue of contractual relationship between parties was not relevant, contending that, the respondent never tendered in court any signed instrument by both parties to prove existence of any agreement between the two that pledged the water tank as security. Citing the case of **Hemed Said Vs. Mohamed Mbilu** (1984) TLR 113 (HC) and in absence of documentary evidence from the respondent, she submitted, the appellate court ought to have considered her evidence and decide in her favour. She therefore prayed this court to allow the appeal by quashing the decision of the District Court of Kinondoni and award her specific damages to the tune of Tshs. 15,000,000/=, general damages of Tshs. 8,000,000/= and costs of the case. On the third ground apart from reproducing the ground, the appellant said nothing in its support. In that ground she laments that, the trial magistrate erred in law and fact for failure to hold liable the respondent for its unlawful act of confiscating her water tank as a result suffered her both specific and general damages.

Submitting in opposition of the appeal Mr. Wasonga on the first ground argued that, the appellant was insisting on the issue of mortgaged chattel evidence which did not feature in the preceding courts. That the appellant is trying to introduce new evidence which is contrary to the requirement of the law and conditions as enunciated in the case of **Tarmohaed and Another Vs. Lakhani** & Co. (3) (1958) E.A 567 (CA) cited in the case of **Ismail Rashid Vs. Mariam Msati**, Civil Appeal No. 75 of 2015.

On the requirement of the respondent to tender the signed instrument (agreement) as evidence to prove whether the chattel (Tank) was one of the loan security, Mr. Wasonga said, such evidence was irrelevant because the respondent gave its evidence basing on the framed issues during the trial. Therefore the appellate court was justified to hold that contractual relationship between the appellant and respondent was irrelevant as it was not one of the disputed fact in the trial court, he stressed. He therefore invited the court to dismiss the appeal with costs.

In her rejoinder submission while insisting that she never introduced new evidence but rather relying on the already submitted documentary evidence, appellant invited the court to revisit the said evidence and make its findings in her favour. Otherwise she reiterated her earlier submission and prayers.

In considering these rival submissions from both parties, I will start with the first ground where the appellant is lamenting that, despite of submitting documentary evidence during the trial which the respondent is contending to be new evidence, the same was not considered by the appellate court. To insist on the existence of that evidence she attached to her submission the

alleged client visitation report to exhibit the promise by the respondent to attach her tank. The issue for determination now is whether the alleged documents tendered by the appellant during trial formed part of the record of the trial court worth of being considered by this court. It is trite law that, no court can make a decision relying on evidence or document not tendered and admitted in court as exhibit. This position of the law was stated in the Court of Appeal decision in **Mohamed A. Issa Vs. John Machela**, Civil Appeal No. 55 of 2013 (Unreported) when discussing the consequences of courts relying on the documents not tendered and admitted in court by referring to its decision in the case of **Shemsa and Two Others Vs. Seleman Hamed Abdalla**, Civil Appeal No. 82 of 2012 (unreported) where it had the following to say:

> *"At this juncture, we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court . We out-rightly are of considered opinion that,* ***it was improper and substantial error for the High Court and aii other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold that this led to grave miscarriage of justice"*** (emphasis supplied)

In the present matter the alleged documentary evidence by the respondent were attached to her claim form filed in the trial court. A glance of an eye to the proceedings of the trial court has established that the said documents

were never tendered and admitted in court as exhibits. Thus I hold that, both trial court and appellate court were justified not to make any reference to them. It follows therefore that, there is no material evidence to prove the contention by the appellant that there was client visitation report issued to Sauda and signed by DW1 proving that it is the respondent who seized the said tank as claimed. In absence of such evidence, the appellate court remained with no any other option than to believe and rely on the evidence of DW1 to concur with the trial court that, it is Sauda and her fellows who disconnected the said tank and handed over to him for the respondent to sale and realise the outstanding loaned amount. As rightly observed by the trial court the appellant ought to have sued the said Sauda as the co-defendant to the respondent or parade any other person who witnessed the repossession process of the water tank by the respondent, as the appellant and her witnesses' evidence remained a hearsay evidence on that fact. Her failure to so do without any justification, coupled with such wanting evidence, I am inclined to agree with Mr. Wasonga's submission and make a finding that, the appellant failed to prove her claims on the balance of probabilities that, it is the respondent who seized her water tank and not Sauda and her fellow who handed it to the respondent. I have no reason therefore to fault the appellate court finding on this fact. I further hold that, by attaching the client visitation report and insisting on the existence of mortgage chattel evidence which evidence did not feature in both the trial and appellate court, the appellant was introducing new evidence in this court which is contrary to the law. Thus this ground is bound to fail and I so find.

Having so found that the appellant failed to lead evidence to prove that it is the respondent who seized her water tank, her second ground of appeal crumbles too. It is trite law under section 110 of the Evidence Act, [Cap. 6 R.E 2019] that, the one who alleges must prove. The onus of proving in this matter that, it is the respondent who seized the water tank lies on the appellant whom I have found in the first ground to have failed to discharge it. She cannot therefore be heard to shift that onus of proof to the respondent that she (respondent) was required to prove through the signed agreement existence of contractual relationship between them the fact which was not in dispute right from the beginning of the case. I would therefore agree with Mr. Wasonga that, the appellate court was right and justified to hold that contractual relationship was irrelevant as it was not the fact in dispute. This ground is therefore dismissed for want of merit.

As stated earlier the appellant's third ground was just reproduced without more, that the trial magistrate erred in law and fact by holding that the issues are drafted from undisputed facts. Despite of failure to beef it up this ground with arguments, I feel obliged to consider the same. It is true the appellate court in its judgment at page 4 stated that " *it is now settled that issues must come from undisputed fact...*". However, I don't see how this statement affected or changed the decision of the appellate court. Looking at the reasoning of the appellate court, it is clear to me that, it had in mind the fact that issues come from disputed facts, that is why it went further to identify undisputed facts. Before the trial court one of the disputed fact was whether it is the respondent who seized the water tank in dispute. The appellate court also decided on the issue when found that, the trial court rightly framed this

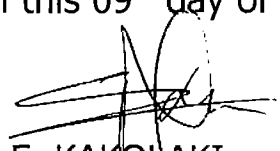
issue as it raised from the disputed fact and therefore found the appellant's ground unmeritorious. On this I concur with findings of the appellate court and for that matter I see no reason to fault its decision on that. I therefore dismiss this ground too.

In the circumstances, and for the foregoing reasons, I am inclined to hold this appeal is devoid of merits. It is hereby dismissed in its entirety.

I order no costs to any party.

It is so ordered.

DATED at DAR ES SALAAM this 09th day of October, 2020.



E. E. KAKOLAKI

JUDGE

09/10/2020

Delivered at Dar es Salaam this 09th day of October, 2020 in the presence appellant, and Ms. **Lulu Masasi**, Court clerk and in the absence of the respondent or her advocate.

Right of appeal explained.

E. E. Kakolaki

JUDGE

09/10/2020