IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC CIVIL APPEAL NO 31 OF 2020

(Arising from Civil Appeal No 107 of 2019 in the District Court of Musoma the appellate Originating from civil case No 408 of 2019 at Musoma Urban Primary Court)

LAMECK MAGORO LIKU .....APPELLANT

Versus

EMMANUEL A MACHIWA ..... RESPONDENT

JUDGMENT

4th & 20th November, 2020

Kahyoza, J.

The genesis of this second appeal was a business transaction entered between **Lameck Magoro Liku** (the appellant) and **Emmanuel A. Machiwa** (the respondent) in 2017. **Lameck Magoro Liku** (the appellant) advanced money to the respondent who pledged his motor vehicle with the registration **T 659 CVM Mode Ford Escape**. The matter went to the primary court of Musoma District at Urban Musoma (Kitaji) whereby **Emmanuel A. Machiwa, the borrower or pawnor** prayed to the court to order **Lameck Magoro Liku, the lender or pawnee; one,** to receive Tzs 2,800,000/= the amount advanced as loan; **two,** to hand over to him his motor vehicle with registration No T 659CVN Mode Ford Escape valued at Tshs 24,000,000/=.

The parties were not at harmony on the amount borrowed. The respondent, **the pawnor** contended that he borrowed Tzs 2,800,000/=

and the appellant, **the pawnee** contended that he lent Tzs. 8,590,000/= to the respondent. It was not in dispute that the appellant took possession of the respondent's motor vehicle as security for loan.

The trial court decided in favour of the pawnee (**Lameck Magoro Liku**) and awarded him Tzs. 8,590,000/=. Aggrieved, **the pawnor**, **Emmanuel A. Machiwa** appealed to the District Court of Musoma. The **pawnor** won the appeal. The first appellate court ordered the pawner to pay the amount borrowed of Tzs. 2,800,000/= with interest thereon to the pawnee and the pawnee to hand motor vehicle Reg. No. T659 CVM to the pawnor.

Aggrieved **the pawnee, Lameck Magoro Liku** appealed to this court on the following grounds of complaint.

1. That, the first appellate court erred in law and fact for entertaining the appeal basing on new matters which did not transpire during the trial court
2. That, the first appellate court erred in law and fact for deciding an appeal basing on assumption instead of basing on the evidence tendered in court during trial.
3. That the first appellate court erred in law and fact for disregarding the strong evidence tendered by the appellant in the trial court which showed the claim of 8,590,000/= from the respondent.

The appeal was heard orally. Mr. Mligo advocate represented the appellant while the respondent enjoyed the services of Mr. Masoud advocate. I am not going to reproduce the submissions advanced by the parties' advocates not for being discourteous but I will refer to the submissions while answering the issue. The issues arising from grounds of appeal are-

1. Did the first appellate court entertain new matters on appeal?

2. Was the decision of first appellate court based on assumption?
3. Did the first appellate court disregard the appellant's evidence?

I now answer issues raised by the grounds of appeal.

Did the first appellate court entertain new matters on appeal?

The appellant's advocate Mr Mligo submitted that the appellate court based its decision on new matters, which did not transpire in the trial court. He submitted the trial court did not discuss the existence of two contracts involving the parties. He contended that it is a cardinal principle that matters which did not transpire in the trial court should not be raised in the appeal. To support his contention he cited the case **Simon Godson Macha (Administrator of the Estate of the late Godson Macha) V Mary Kimambo (Administrator of the Estate of the late Kesia Zebedayo Tenga),** Civil Appeal No 393 of 2019.

The appellant's advocate added that the first appellate court referred to the document, which was altered. However, the altered document was not tendered before the trial. Referring to the case of **Mwajuma Mbegu V Kitwana Amani** [2004] TLR 260. In that case, it was held that-

> *"Though a first appellate Court has power to re-evaluate the evidence adduced at the trial and make factual findings therefrom, it cannot make such findings based on a document that was not before the Trial Court."*

The respondent's advocate, Mr Masoud, submitted that stated that the appellate court did not introduce new matters. He added that the first appellate court has mandate to enter into the shoes of the trial court and if there was failure of justice to analyze evidence and make its conclusion.

It is trite law that a first appeal is in the form of a re-hearing. The first appellate court has a duty to re-evaluate the entered evidence in an objective manner and arrive at its own findings of fact, if necessary. (See **Siza Ptrice V. R Cr. Appeal No 19/2010.)** Thus, the first appellate court was untiled to reconsider the evidence on record and make its own findings if necessary. I am in total agreement with the appellant's advocate that the *first appellate Court's power to re-evaluate the evidence does entitle it make such findings based on a document that was not before the trial Court.*

I had a cursory look at the judgment and proceedings on both courts. The parties tendered two different contracts and there was a dispute as to how much money the appellant advanced to the respondent. To my dismay, the trial court skipped to determine the issues which document was genuine and how much money did the respondent borrow from the appellant. On one hand the respondent tendered "KIELELEZO A", contract showing that the appellant lent Tzs. 1,300,000/=. This amount was supported by the witness to the contract Pw2, Charles M. Bukura. There evidence that the respondent borrowed Tzs. 500,000/=, then Tzs. 500,000/=and finally, Tzs. 200,000/=, hence making a total amount borrowed to Tzs. 2,800,000/=.

On the other hand, the appellant tendered "KIELELEZO UT1", depicting that the amount borrowed was Tzs. 8,590,000/=. It was pertinent for the trial court to determine the validity of the two documents. The trial court avoided to determine that issue. Thus, the first appellate was duty bound to consider the evidence on record and make its finding. Its finding was based on the evidence on record. The

trial court derogated from analyzing the evidence. I find no merit in the appellant's first ground of complaint. I dismiss it.

Was the decision of first appellate court based on assumptions?

The appellant complained that the first appellate court erred to base its decision on the assumptions. In support of the ground of appeal, Mr Mligo the appellant's advocate submitted that the appellate court decided the case basing on the assumptions and not on evidence on record. The learned advocate stated further, that it is trite law that the court must decide cases based on evidence and not otherwise. He referred this Court to the case of **Deodatus Rutagwerela V Deograsia Ramadhan Mtego** Matrimonial Appeal No 05 of 2020. The appellant's advocate contention was based on the following words in the judgment of the district court-

> " *From that point of view I do agree with the appellant's advocate that the two contracts are the same but only that the letter is altered by filling the blank space to verify the new claims,* ***actually this is what is done by most of the people who are giving loans to others, they give you just a space to sign and other things will be written later and if the borrower fail to return the loan on the agreed date they just fill what they like, that is why one may take a loan of Tsh. 1,000,000/= but after one month or two he is required to return 5,000,000/= and you will find that he even. Signed the purported agreement, when you ask him what happened, you will be amazed. They actually what they did as they don't have a license to issue loans to people so they use that loophole to obtain a huge***

interest rate which is difficult to pay as a result the property which stood as a mortgage is forfeited."

The respondent's advocate contended that the first appellate court did not make assumptions. He averred that nexus of the dispute was the **genuineness** of two documents tendered as exhibit. Each party was of the view that the document he tendered was genuine. The appellate compared the two exhibits and came out with the answer as to which one was genuine.

I totally agree with the respondents advocate that the first appellate court was entitled to re-evaluate the evidence. In that regard, he had to analyze the evidence to determine which one of the document was genuine. However, like the appellant's advocate I am not comfortable with the certain phases in his analysis. I did not find anywhere in the record of evidence where the first appellate court obtained the following

"actually this is what is done by most of the people who are giving loans to others, they give you just a space to sign and other things will be written later and if the borrower fails to return the loan on the agreed date they just fill what they like, that is why one may take a loan of Tsh. 1,000,000/= but after one month or two he is required to return 5,000,000/= and you will find that he even. Signed the purported agreement, when you ask him what happened, you will be amazed. They actually what they did as they don't have a license to issue loans to people so they use that loophole to obtain a huge

interest rate which is difficult to pay as a result the property which stood as a mortgage is forfeited."

I examined at the record and found that the above words where not supported by evidence. I will expunge those words from the judgment. Reading the judgment the without expunged words, it still makes sense, the expunged words do not affected the findings of the district court. The second ground of appeal partly succeeds.

Did the first appellate court disregard the appellant's evidence?

The appellant contended in the third ground of appeal that the first appellate court disregarded the strong evidence tendered by the appellant in the trial court which showed that the claim was for [Tzs.] 8,590,000/=. The appellant's advocate submitting regarding the third ground of appeal that appellant tendered water tight evidence. he referred this Court to the proceedings dated 9/10/2020 and that dated 19/10/2020. He cited the case of **Hemed Said V Mohamed Mbiu** [1984] TLR 113 to support his contention.

The respondent's advocate opposed the appellant's advocate's submission that the appellant tendered watertight evidence. He submitted that the fact that the appellant failed to call the commissioner for oaths and the fact that the trial court summoned the commissioner for oaths and labeled him as the second defence witness was an express favour to the appellant. He added that act was irregular and impracticable. The respondent's advocate summed up that the weight the trial court accorded the appellant's testimony was faulty.

I scrutinized the evidence on record especially the two documents ("KIELELEZO A"and "KIELELEZO UT1) tendered by the respondent and

the appellant respectively and realized that; **one,** the parties singed "**KIELELEZO A"** on 17/03/2017, the commissioner of oaths did not attest "**KIELELEZO A"**. Furthermore, the same blue ink pen was used throughout the document and without claiming to be an expert, I presume the same pen was used; **two,** the parties signed "**KIELELEZO UT1**" on 25/06/201, which is similar in contents with "**KIELELEZO A"**. The differences are the amount lent to the respondent and the fact that commissioner of oaths also attested **KIELELEZO UT1**.

In addition to the above, the author endorsed the contents in "**KIELELEZO UT1**" using a blue ink pen and black ink pen. The name and address on the first page were endorsed using **a blue ink pen** while the amount borrowed on the same page was endorsed using **a black ink pen**. The same thing happed on the second page, the names and signatures of the borrower, the borrower's guarantor and the lender were endorsed using a blue ink pen whereas the commissioner oath's name and signature are written using a black ink pen. Had the author endorsed the information on the first using a pen black or blue ink pen, which different from that used on the second page, I would have thought the pen went out of ink after finishing the first page so they hard to change. Why on earth would a person endorsed information on the same day, using with a black ink pen and a with blue ink pen? Worse still, why would a similar encounter occur to the second page of the same document? It is barred by law but when done raises eyebrows.

I was unable to find any reasonable explanation from the appellant. I am of the firm view that the information was endorsed on different dates and for the purpose best known to the bearer, the lender and pawnee. In the circumstances of the case, the conclusion reached by the first appellate court that the information regarding the amount

borrowed in "**KIELELEZO UT1**" tendered by the appellant was endorsed at a later stage is inescapable.

The appellant did not dispute the genuineness of "**KIELELEZO A"** tendered by the respondent rather he contended that the respondent repaid that loan and took a second loan. This fact was disputed by the appellant and his guarantor. I am unable to find in favour of the appellant. The appellant did not explain how the respondent repaid the loan. The respondent explained how he got money from the appellant. I find the respondent's evidence more probable than the appellant's evidence.

In addition to the above, "**KIELELEZO A"** was not attested by the commissioner for oaths. Why was **KIELELEZO UT1** a contract entered after the parties had been familiar to each other, be attested? I suspect the appellant manufactured **KIELELEZO UT1** to achieve a certain objective best known to him. **KIELELEZO UT1** was no authentic. The district court was justified to reject it and to find that the appellant lent Tzs. 2,800,000/= to the respondent and not more than that.

The appellant deposed that the respondent came to court after he learned that the appellant had sold the pledged motor vehicle. The appellant deposed that-

> *"Baada ya kuwa nimeuza gari mdai alipata taarifa kuwa gari limekwisha uzwa ndipo akaenda kwa mwanasheria..."*

I agree with the findings of the first appellate district court that the appellant had no mandate to sell the pledged motor vehicle though on different ground. The district court was of the view that the appellant had no right to dispose the pledged property without first referring the matter to a court. On my part, I am of the view that the appellant had

no right to sell the pledged property for failure to give the respondent a reasonable notice.

The law of contract is clear on this issue. I will not determine at this stage whether it applies to the primary court or not. I will assume it applies and if not, I will borrow a leaf from it. Section 128 of the Law of states that-

> *"128.-(1) Where the pawnor makes default in payment of the debt or performance, at the stipulated time of the promise, in respect of which the goods were pledged,* ***the pawnee may bring a suit against the pawnor upon the debt*** *or promise, and retain the goods pledged as a collateral security; or* ***he may sell the thing pledged, on giving the pawnor reasonable notice of the sale."***

There is no dispute that the appellant sold the motor vehicle retained as security. It is his evidence that the respondent got notice that he had sold the collateral and decided to write a demand letter. Thus, the district court was justified to hold that the appellant had no right to sell the pawned property.

I was unable to appreciate why did the primary court award the appellant Tzs. 8,590,000/= while there was evidence on record that the appellant had already sold the pawned property, the respondent's evidence. For that reason, he had no claim against the respondent. No district court worthy its name would have approved such an award. To approve such an award or decree would have been no more than perpetuating injustices. Courts exist to do justice and not otherwise.

In fine, I find the respondent's evidence heavier than that of the appellant. I uphold the conclusion by the district court. I dismiss the appellant's complaint that district court disregarded his evidence.

The first appellate court ordered the respondent to repay the loan of Tzs. 2,800,000/= plus the interest. It failed to determine the rate of interest. No court would have executed that award without raising other court wrangles. Even if, the first appellate court determined the interest rate, that would have not rescued the award of interest, it was illegal *ab initio*. Section 7 of the **Banking and Financial Institution Act** [Cap. 342] bars institutions not licenced to charge interest on loans. There is no proof that the appellant had a licence to conduct financial business transactions. Thus, he is not entitled to charge interest on the lent money. I set aside the award of interest.

In the upshot, I uphold the decision of the first appellate court except for the award of interest. The appeal is dismissed. I order the appellant to return the respondent's vehicle or its value and the respondent to repay the loan to the tune of Tzs. **2,800,000/=** immediately. The respondent is entitled to costs.

It is ordered accordingly.

J.R. Kahyoza
JUDGE
20/11/2020

Court: Judgment delivered in the presence of the respondent and in the absence of the appellant. B/C Catherine

THE HIGH COURT OF TANZANIA
MUSOMA

J.R. Kahyoza
JUDGE
20/11/2020