

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

(PC) CIVIL APPEAL NO. 11 OF 2019

*(Arising from the Civil Appeal No. 46/2018 of the Kahama District Court arising from Civil Case
No 162 /2018 of Kahama Urban Primary Court)*

GODWIN TUMSIME.....APPELLANT

VERSUS

PENDO LEORNARD.....RESPONDENT

JUDGMENT

Last order:30-10-2020

Judgement Date: 11-12-2020

MKWIZU J:

Aggrieved by the District Court's decision in Civil appeal No 46 of 2018.

Appellant preferred this appeal based on the following grounds:

1. That, the lower courts erred in law and facts in condemning the appellant to pay the respondent Tshs. 5,000,000/=, a decision which is contrary to the contract signed by the parties, which provides that in default of payment of loan the appellant should hand over his plot to the respondent.
2. That, the trial court erred in law and facts in its failure to consider a documentary evidence tendered before it which substantiate the

amount owed, the amount paid and the balance due, to wit Tshs. 1,000,000/=.

3. That, the lower court erred in law and facts in not considering that the appellant did pay Tshs. 1,000,000/= to respondent through M-PESA, on 25 day of April, 2018.

The prayers attached to the above grounds are that the appeal be allowed and the trial court's proceedings, judgment and order be reversed and any suitable reliefs as the court may deem just.

The background facts leading to the present appeal as gathered from the records can briefly be stated thus: On 18th June 2018 Appellant borrowed money ,5000,000/=from the respondent. The transaction was reduced into writing which both parties signed acknowledging their responsibilities over the said contract. Appellant defaulted payment, therefore respondent, successfully lodged her claims against the appellant for the payment of her money at Urban Primary Court- Kahama vide Civil case No 162 of 2018. Appellant appealed to the District Court. His appeal was dismissed for lacking in merit hence the present matter.

Before this court, the appeal was orally heard. Both parties were in person without legal representation. Arguing the appeal, appellant submitted that, issues of contract should be decided basing on the terms of the contract by the parties and the effect of the breach of the contract should be as per the terms of the contract agreed upon by the parties and not otherwise. He cited the case of **Bank of Africa Tanzania Limited V Rose Miyago Assea**, Commercial case No 138 of 2017 (H/C Unreported) page 6 and the case of **Adam Idd Rugemalila V CRDB PLC and Two Others**, Land Appeal No 92 of 2012 (H/C Mwanza unreported) stressing that the lender has to service the loan by the security agreed by the parties.

Appellant submitted further that, lower courts erred in deciding that he should pay the respondent 5,000,000 contrary to the terms of the contract as agreed by the parties under clause 3 of the Loan agreement. He for that reason prayed to have the appeal allowed.

Respondent submission were brief. She argued that, she went to court after appellant had failed to honour the terms of the contract.

As stated from the outset, this matter originated from the primary court and therefore it is a second appeal. As a general rule, on a second appeal re- evaluation of evidence is restricted. The court is supposed to deal with questions of law unless the court is of the opinion that there is a misapprehension of the substance, nature and quality of the evidence by the two courts below resulting into a miscarriage of justice. This principle will guide the court in this appeal.

Having gone through the lower court's records, the grounds of appeal as well as the submissions from either side above, the issue for my determination is whether the appeal by the appellant is founded.

My perusal of the records reveals that though this appeal was predicated on three grounds of appeal which were adopted to form part of appellants submissions, the first ground of appeal and which was argued by the appellant in extenso, did not form part of the grounds that were presented at the 1st appellate court and therefore formed no part of the impugned decision.

Appellants appeal to the District Court was centered on three grounds appearing at page 2 and 3 of the 1st appellate court's decision. They read:

1. *That, the trial court magistrate grossly erred both in law and fact in dismissing the appellant's claim that he paid for respondent Tsh 1,000,000/= whilst the appellant proved the claim on the preponderance of evidence*
2. *That, the trial magistrate grossly erred both in law and fact for not considering the documentary evidence tendered before the court which specify the actual amount owed by the respondent, the amount paid by him and balance due that is Tshs 1000,000/=*
3. *That , the trial magistrate grossly erred both in law and fact for misinterpreting and misunderstood the evidence alleged by the respondent that the appellant paid nothing to her whilst the appellant already paid her Tsh 1000,000/= through M-PESA on 25th April 2018*

The above grounds do not constitute ground number 1 which is brought before this court for determination. It is therefore clear that first ground was not canvassed by the first appellate court. The Court has repeatedly

held that matters not raised in the first appeal cannot be raised in the second appellate Court unless it relates to a legal issue. This was the position we took in Ramadhani Mohamed Vs Republic, Criminal Appeal No. 112 of 2006 (unreported), where Court of Appeal stated that: -

"We take it to be settled law which we are not inclined to depart from, that this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal."

In view of the position held in the authority cited above, it is evident that the the appellant's first ground have no room for consideration in this appeal.

On his 2nd and 3rd grounds of appeal, the appellant is faulting the two courts below for not considering the documentary evidence tendered before the trial court. In these two grounds appellant claims that he had paid the respondent 1000,000 via M-PESA on 25th April 2018. Both courts below were satisfied that parties signed the contract acknowledging their responsibilities over it and that the allegation that appellant paid

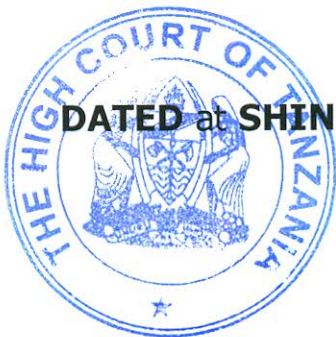
1000,000/= to the respondent was not proved. My perusal of the loan agreement reveals that appellant had borrowed a total sum of 5,000,000/= and nothing is indicated in that contract or any other document that he paid any amount out of the borrowed sum. This is also justified by his own submissions before this court where he complained that having breached the terms of the contract the court ought to have ordered him to comply with Clause Three (3) of the terms of the contract in which he was to hand over the pledged property to the respondent and not to order him pay the amount specified on the loan agreement. He relied on the decision on Bank of Africa Tanzania Limited case (Supra) and that of Adam Idd Rugemalila V CRDB PLC and Two Others (Supra). The above submission contradicts the claims in the two grounds of appeal itemized as ground 2 and 3.

Again, as if that is not enough, while before this court, appellant prayed for time, to comply with clause 3 of the terms of the contract. The prayer which was not objected to by the respondent. For the interest of justice and in facilitation of an amicable settlement of disputes, this court granted the prayer. It adjourned the matter to allow the appellant to do what he

was required to do under the claimed clause 3 of the loan agreement and mark the matter settled once and for all. Unfortunately, appellant misinformed the court, the matter was kept on mention mode for six months to allow him complete the transaction but he could not fulfil his promise.

Under the given circumstances, I find the appeal without merit. It is therefore dismissed on its entirety with costs to the respondent.

It is so ordered.



DATED at SHINYANGA this 11th day of December, 2020.


E.Y. MKWIZU
JUDGE
11/12/2020

COURT: Right of appeal explained.


E.Y. MKWIZU
JUDGE
11/12/2020