

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

CIVIL APPEAL NO. 58 OF 2017

(Arising from District Court of Nyamagana in Civil Case No. 29 of 2016)

JOSEPH GWALUGANO.....APPELLANT

VERSUS

ANNAMARIE EMMANUEL RAYMOND.....RESPONDENT

JUDGMENT

23.3.2020 & 16.4.2020

U. E. Madeha, J

The respondent was the plaintiff and successful litigant in District Court. Civil Case No. 29 of 2016 at Nyamagana District Court Mwanza, against the appellant who was a defendant and a losing party. The District Court's decree is as follows.

- a) A declaration that the defendant is in breach of the agreement stated under paragraph 5 herein above.*
- b) Payment of Tshs 6,000,000 (Six million) only to the plaintiff being the unpaid amount of the principal sum.*
- c) Payment of general damages to be determined by the Court, preferably Tshs 3,000,000 for breach of contract*
- d) Interest at the Court rate from the date of the judgement to the date of full satisfaction.*

e) Costs of the suit.

f) Any other or further reliefs the Court may deem fit.

Dissatisfied with the judgement and decree of the District Court, the appellant has now appealed to the Court.

The facts of the case are as follows. The appellant was a Branch Manager of FBME Bank of Mwanza while respondent was their client operating two accounts, one of which being A/C No. 022109. Sometime in May 2015 the appellant approached the respondent to lend him some money totalling at Six (6) Million Shillings. He claimed that he was going to spend the money in finishing the construction of his house at Nyegezi area in Mwanza.

The respondent issued a cheque for that amount to be withdrawn from her account which at that time had a sum of three hundred million shillings (300,000,000). The two agreed that the appellant will return the said amount after one month. The appellant withdrew the money, but failed to honour the agreement of paying back the said money as agreed between them.

When the case came for hearing in the District Court of Nyamagana the appellant denied to have borrowed some of money from

the respondent but rather the Six (6) Million Shillings were repayment of the of the money, the respondent's husband borrowed from him. However, the trial court was not satisfied by the defence of the appellant. The trial court was of the view that the defence lacked any documented proof and hence decided in favour of the respondent.

In view of the ground of appeal raised, the issue here is whether there was a contract between the appellant and the respondent. Mr. Msafiri Aloyce Henga, the appellant's advocate, submitted that the trial court misdirected itself by holding that there was a contract between the appellant and the respondent. There is no documentary proof supporting the respondent's testimonies that she advanced a soft loan totalling at Tshs 6,000,000 to the appellant. To be enforceable by law an agreement must have elements which are stated in section 10 of the Law of Contract Act. There is thus an agreement if the same is made by free consent of parties competent to contract for a lawful consideration with a lawful object.

Section 110 (1) of the Law of Evidence Act Cap 6 (R. E. 2002) requires one who desires the court to give judgment in his favour as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It was argued that the trial

Court erred in law and facts in failing to properly evaluate the evidence. The case of **Yara Tanzania Limited Versus Charles Aloyce Msemwa**, Commercial Case No. 5 of 2013 was cited in which the court stated that: -

"It is now a very trite principle of law that the parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded by the court."

Mr. Steven K. Cleophas, the appellant's learned advocate, submitted that the respondent tendered the statement of account which was admitted in evidence as Exhibit P2, the money was in his favour. He admitted to have received the said amount, although he never asked for a loan from the appellant, rather, the appellant and her husband were the ones who asked for money from him as their loan was delayed. So he assisted them on agreement that he should be refunded once their loan is released.

Looking at this case, it is clear that Annamaria Emmanuel Raymond (the respondent) transferred Tshs 6,000,000/- on 11.5.2012

to Joseph Elias Gwalugano (the appellant) through Azania Bank cheque book issue charge MZATCKC121320001. It is not clear why the money was deposited into the account, and now she is claiming back her money. In my opinion, the respondent has with her a sufficient proof of the bank statement that she deposited the money Tshs 6,000,000 in the appellant's account. I believe the loan agreement may have been made orally. In the case of **Engen Petroleum (T) Limited v Tanganyika Investment Oil and Transport Limited** (Civil Appeal No. 103 of 2003) [2005] CAT 47, it was observed that:

"Although the learned Judge erroneously held that there was no contract of sale of petroleum products between the parties, a careful scrutiny of the evidence, conduct of the parties and the circumstances of the case established that there was an oral contract of sale of petroleum products by the appellant plaintiff company to the respondent defendant company."

The conduct of the parties and the circumstances of the case established that there was an oral contract between the appellant and the respondent that, the appellant borrowed the respondent money. If the appellant's claims that he was claiming money from the respondent,

there was no evidence showing that the respondent indeed borrowed from him. Since the money deposited in the appellant's account lacks detail, this Court considers it to be the respondent money. There is a transaction between the appellant and the respondent. I find that the respondent has a valid claim, the money has to be returned back to the respondent. Appeal is thus partly allowed with costs. Order accordingly.

DATED and **DELIVERED** at **MWANZA** this 16th day of **April** 2020.

