

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO.35 OF 2021

(Originating from Civil Case No. 170 of 2017, Ilala District Court before Hon. Kanje,
A- RM)

ADILI AUCTION MART LIMITEDAPPLICANT

VERSUS

MKOMBOZI COMMERCIAL BANK PLC.....RESPONDENT

JUDGMENT

MRUMA, J.

The origin of the dispute leading to this appeal is an agreement which was entered into between Adili Auction Mart Limited who is the Appellant before me and Mkombozi Commercial Bank PLC. As per plaint dated 21st December 2017 and filed in the District Court of Ilala at Ilala by the Appellant on 27th December 2017, she entered into an agreement with the Respondent known as " An Agreement for Engagement.

It was the statement of the Appellant that in terms of clause 1: 13 of their agreement whenever a person in the certified list of defaulters submitted to her clears the debt due to the Respondent directly, the

Appellants would recover her commission after launching a formal claim to the Respondent. The Appellant averred that pursuant to that clause she submitted to the Respondent a confirmation of collections from defaulters assigned to her for the year 2016/2017. The Respondent did not pay and according to the Appellant that constituted breach of the agreement which formed the basis of their dispute.

The Respondent denied the Appellant's claims through a defence filed on 31st January 2018, stating at paragraph 6 and 10 as follows:

6. The contents of paragraphs 8 of the Plaintiff are disputed and the defendant states that the invoiced amount is invoiced out of nothing. The Plaintiff's invoiced did not indicate what was the source of the invoiced commission of Tzs 79,844,691.50. The Defendant is not in custody of any record of defaulters who have paid commission amounting to TZS 79,844,691.50. The debt collection agreement does not mandate the Plaintiff to raise invoice out of the certified list of defaulters but

invoices are out of the money that are paid by the defaulters as commission for the plaintiff."

10. *That the contents of paragraphs 12 are disputed and the Defendant states that the Plaintiff could not suffer out of money which is not entitled. That the particulars of both special and general damages are not particulars as are particulars that emanates from payment that the plaintiff is not entitled to be paid. What the plaintiff was entitled to be paid was paid as evidenced by the certificate of sales and bank statements for the commission that the Plaintiff was fully paid. The certificate of sales and plaintiff's bank statement are annexed hereto as MKBI".*

During the trial before the District Court the Appellant brought its executive Directors Mr. Abdallah Hassan Kaswiza to testify in proof of her case. Mr. Abdallah testified as PW1. PW1 reiterated that his company Adili Auction Mart Limited entered into agreement with the Respondent

Bank Mkombozi Commercial Bank PLC in connection with collection of debts and auctioning properties of bank clients who had defaulted on paying back their loans. He tendered copy of the said agreement (exhibit P1) in evidence. He also tendered in evidence a list defaulters (Exhibit P2), and involves raised against the Defendant (exhibit P3). PW1 told the court in the year 2016/2017 the total amount claimed against the Defendant in the invoices raised by his company was Tshs 79, 844, 691.00 which the Defendant refused to pay and hence this suit.

On her part the Respondent testified through Marcus Mkini (DW1) senior relationship manager of the bank who testified that the Appellant used to work with them (ie the bank) as their debts collector. He said that his bank had an agreement with the Appellant to that effect. He told the trial court as per agreement the Appellant was tasked to trace the defaulters and give them default notices and demand payment from them. If a defaulter pays his debt the Appellant was required to take deposit slips from the defaulter and submit them to the Respondent (ie back) for calculations and payment of his commission. Upon submitting paying slips, the Respondent was obliged (under the agreement) to verify them and on being satisfied that a listed defaulter had made payment to the bank it would pay the Appellant, commission. He said that the

Appellant did not perform his part of the contract instead he simply listed the names of defaulters she was supplied by the Respondent and calculated the commission she would be entitled (had he discharge hid duty) and submitted to the Respondent and demanded payments.

In his judgment the learned trial Magistrate identified the main issues for determination as:

1. Whether the Defendant breached the contract
2. Whether there was any outstanding sum for the work done by the plaintiff and:
3. To what reliefs were the parties entitled.

The learned trial Magistrate found that there was no evidence of breach of even a single term of the parties agreement by the Respondent. The court found that because the plaintiff's claim was based on the alleged loan repayment by listed defaulters the Appellant ought to have produced evidence that there were such payments. He therefore found the Respondent not liable and dismissed the Appellant's suit. Thereby giving rise to this appeal.

In her memorandum of appeal the Appellant raised two grounds of as follows:

1. That the trial Magistrate erred in fact and law by failing to evaluate the evidence on record and;
2. That the trial Magistrate erred in law to assume pecuniary jurisdiction by entertaining a commercial case to which the trial Court had no Jurisdiction to entertain.

On 1st November 2021, it was agreed that the appeal be canvassed by way of written submissions. Parties filed their respective submissions and cited a number of authorities. I am grateful to the counsel for the parties for their brilliant submissions on the issues.

For the Appellant it was submitted that in view of the evidence tendered, and particularly exhibit P1, the Appellant's obligation under the agreement was to trace the bank's loan defaulters and make sure that they repay their loans by making deposit in their bank accounts directly. According to the counsel for the Appellant, defaulters deposited as directed but the Respondent concealed the information regarding deposits made thereby denying the Appellant her dues and the learned trial Magistrate therefore erred in failing to analyse such evidence.

Submitting on the second ground counsel for the Appellant contended that the matter before the trial court was a commercial dispute as found by the trial court and that the trial court having found that it was a commercial case it was ought to have gone far and investigate whether that court had pecuniary jurisdiction to entertain it.

On the part of the Respondent it was submitted that on the evidence on record the learned trial Magistrate was correct in finding that the Appellant did not prove any breach of the contract. The counsel contended that PW1 failed to prove that the Appellant discharged her obligations under the contract so as to be entitled to claims in the suit. The learned counsel submitted further that PW1 failed to mention let alone to produce any names of a defaulter to whom he served a 14 days demand notice requiring him/ her to settle his debt with the bank.

Regarding the nature of the case, counsel for the Respondent submitted it is the party who choose to institute a suit either as a commercial case or as an ordinary civil suit. In the present matter, it is the counsel's submissions parties decided to institute and prosecute it as ordinary civil suit.

The appeal before me being a first appeal my mandate is to reconsider and re- evaluate the evidence and come to my own conclusion taking into account that the trial magistrate had the advantage seeing

and assessing the demeanour of the witnesses(see the case of **Settle & Another Vs Associated Motor Boats Company Limited [1986] EA**

123. I am also mindful of the fact that an appellate court will not normally interfere with the finding of the trial Court unless it is based on no evidence or misapprehension of evidence or the trial magistrate is demonstrated to have acted on wrong principles in reaching the findings.

This principle was laid down in an old case of **Chemagong Vs R (1984) KLR 611.**

I have reconsidered and re- evaluated the evidence which was adduced before the trial Magistrate and the submissions as well as the authorities that were cited before me.

Starting with the second ground of appeal I do agree with the counsel of the Respondent that it is the parties and particularly the plaintiff who decides whether to institute his claim as an ordinary civil suit or as a commercial dispute or case. In this particular case the Appellant instituted it as an ordinary civil suit and it was so registered. Thus, the District Court of Ilala had jurisdiction to entertain the matter pursuant to the provisions of section 40(2) (b) of the Magistrates Courts Act [cap 11 RE 2019).

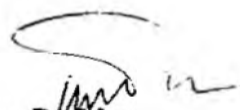
Secondly and while still on the pecuniary Jurisdiction of the Court,

it is common knowledge that the District Court of Ilala like many other District Courts in the country does not maintain a register for commercial cases, thus all civil suits registered in District Courts are registered as ordinary Civil cases. I thus dismiss the 2nd ground for want of merits.

Now reverting to the first ground of appeal, clearly the Appellant was engaged by the bank perform the duties of debts collection from the bank defaulters. It was the assertions of the Appellant that in the exercise of her duties she managed to cause some of the bank defaulters to pay directly to the bank but that assertion was not substantiated. Section 110(1) of the Evidence Act [cap 6 RE2019] requires any person who alleged existence of facts to prove that the fact he alleged do exist. In the case at hand the Appellant alleged that some defaulters paid direct to the bank but he did not lead any evidence to prove those facts. I thus dismiss the 1st ground of appeal.

Having dismissed both grounds, the appeal humbles. Accordingly I dismiss the Appeal with costs to the Respondent.




A. R. Mruma

Judge

20/7/2022


20/7/2022

Coram : Hon. A.R. Mruma,J

For the Appellant : Mr. John Kambo for Aron Rwize for the Appellant

For the Respondent : Mr John Kambo holding brief of Daibu Kambo for
Respondent.

Court: Judgment delivered.



A. R. Mruma

Judge

20/7/2022.