



**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

(PC) CIVIL APPEAL NO. 9 OF 2019

(Arising from Bukoba District Court in Civil Appeal No. 28 of 2018 and originating in Civil Case No. 125 of 2018 of Bukoba Urban Primary Court)

DENIS DANIEL.....1ST APPELLANT
WILLIMINA PHILLIPO.....2ND APPELLANT
VERSUS
KIKUNDI CHA BRAC.....RESPONDENT

JUDGMENT

Date of last order 22/02/2021

Date of judgment 05/03/2021

Kilekamajenga, J.

On 25th April 2018, Kikundi cha Brac Kashabo, filed a civil case No. 125 of 2018 before Bukoba Urban Primary Court against Abela Kasimbazi and the appellants. The essence of filing the suit was to recover the loan which was advanced to Abela Kasimbazi. After failing to pay the loan, Abela Kasimbazi disappeared to an unknown place. Therefore, the respondent (Kikundi cha Brac) sued Abela Kazimbazi together with the appellants. The appellants were included in this suit because they were guarantors to the loan advanced to Abela Kasimbazi. The trial court decided in favour of the respondent. Being dissatisfied with the decision of the trial primary court,

the appellants appealed to the District Court of Bukoba. Their appeal was not successful hence this second appeal. The appeal before this court is against the decisions the two subordinate courts which ordered the appellants to pay the loan because Abela Kasimbazi was nowhere to be found.


In their Memorandum of Appeal which was filed on 28th December 2018, the appellants raised five grounds of appeal. However, on 2nd March, 2020 they filed an additional memorandum of appeal containing ten grounds of appeal. In the memorandum which was filed on 28th December 2018, their appeal centred on two grounds thus the lower courts had no jurisdiction to adjudicate this matter. They contended that the proper court was the District Land and Housing Tribunal. They further disputed the order to pay the loan while they were not the party to the loan agreement.

In their additional memorandum of appeal the appellants argued that, **first**, Kikundi cha Brac had no mandate to sue the appellant because the respondent did not lend money to Abela Kasimbazi; the lender was Brac Tanzania Finance Limited. **Second**, the loan form was signed between Abela Kasimbazi and Brac Tanzania Financial Limited and not by Kikundi



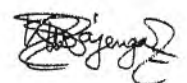
cha Brac. **Third**, Kikundi cha Brac is not a registered entity to advance loans; therefore, it has no power to sue because it is not registered to do loan businesses.

Before delving into the contents of this appeal, I would be appropriate to narrate the brief facts that gave rise to this appeal. Abela Kasimbazi was a member of Kikundi cha Brac at Kashabo. On 5th December 2017, she approached the respondent (Kikundi cha Brac) for the loan. About ten members of the Kikundi cha Brac approved the proposal for the loan. After the approval, Abela Kasimbazi was allowed to get money under the approval of the members of Kikundi cha Brac (respondent). On 08th December 2017, the loan was finally granted with the approval of two members from Kikundi cha Brac. Based on the agreement, Abela Kasimbazi was given a loan of Tshs. 2,500,000/= at the interest of 10 percent. It was agreed in the agreement that Abela Kasimbazi would pay 2,750,000/= including the interest. In order to be advanced the loan, Abela Kasimbazi was required to have two guarantors hence the appellants appeared to guarantee the loan.



According to the loan agreement, in case Abela Kasimbazi failed to pay back the loan and interest, the appellants were supposed to pay it because they were guarantors. Abela Kasimbazi failed to pay back the loan and disappeared to an unknown place. Kikundi cha Brac paid Tshs. 894,400/= before turning the demand to the guarantors (appellants). Therefore, the respondent sued Abela Kasimbazi together with the appellants in order to recover the money they paid to BRAC Tanzania Finance Limited. Also, the respondent claimed for the outstanding loan balance.

When the matter was called on for hearing before this Court, the appellants appeared in person but the respondent did not appear despite being served with the summons. The court proceeded ex-parte on the reason that the respondent had wilfully defaulted appearance. During the oral submission, the 1st appellant argued that the respondent was not the person who advanced the loan to Abela Kasimbazi. The respondent was also the guarantor of the borrower. He demanded proof to show that the respondent lend money to Abela Kasimbazi and vehemently insisted that, he does not recognise the respondent in this matter. He further demanded the respondent to show the properties which secured the loan of Abela

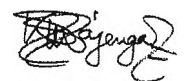


Kazimbazi. He objected the act of the respondent using the umbrella of Brac Finance Limited to claim for the unpaid loan.

The 1st appellant further confirmed that Abela Kasimbazi borrowed money from Brac Tanzania Finance Limited which is an institution different from the respondent. He argued further that the respondent is an organisation which guarantees its members whenever they want to borrow money from Brac Finance Limited. In this case, Brac Finance Limited has not claimed the unpaid loan from them (appellants). He insisted that the respondent's claim was baseless but they only recognise Brac Tanzania Finance Limited which may have a cause of action against them.

On the other hand, the 2nd respondent only supported the submission made by the 1st appellant.

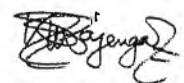
In determining this appeal, I have carefully gone through the documents contained in the court file and discovered the following information: BRAC Tanzania Finance Limited is an institution which deals with lending small loans to groups. However, for a person to benefit from the loan, he/she must be a member of a group operating under BRAC Tanzania Finance



Limited. Because payment of the loan is normally done weekly, where a borrower fails to pay the loan within the week, group members must contribute for him/her. This procedure or process is meant to ensure that the payment of the loan is constant and the borrower does not miss paying back the loan.

Furthermore, the borrower must have two guarantors who are not necessarily members of the small group. The guarantors must ensure that the loan is fully paid in case the borrower fails to do so. For that reason therefore, the small group must have an interest in the loan because if the loan is not paid by the guarantors, members of the group may be forced to pay it. In addition, according to the information gleaned from the court file and evidence adduced before the trial court, the small group has no money to lend to the borrower. But, the loan cannot be released to the borrower unless the members have approved it.

In this case, the respondent was a small group of women operation under BRAC Tanzania Finance Limited. As stated earlier, Abela Kasimbazi was a group member of the respondent; she took a loan under the approval of the members of the respondent and the appellants were guarantors. Abela

A handwritten signature in black ink, appearing to be 'Abela Kasimbazi', located in the bottom right corner of the page.

Kasimbazi paid part of the loan but finally disappeared to an unknown place. The members within the group of the respondent attempted to do the payment on weekly basis but later realised that Abela was not where to be found. The respondent decided to recover the unpaid loan and the amount of money that they paid to BRAC Tanzania Finance Limited from the appellants because they were guarantors. In the appellant's grounds of appeal before this Court, they argued that the respondent never advanced the loan to Abela and therefore cannot sue for the unpaid loan from them. However, this sounds to be an interesting point though was not raised in the first appellate court. In the case of **Raphael Enea Mngazija v. Abdallah Kalonjo Juma, Civil Appeal No. 240 of 2018**, the Court of Appeal of Tanzania quoted with approval, the case of **Galus Kitaya v. Republic, Criminal Appeal No. 196 of 2015** (unreported) where the court stated that:

'...the court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts.'

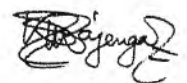
In the case of **Raphael Enea** (supra), the Court of Appeal insisted that:

'It is therefore settled 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...this ground being a new ground for having not been raised and decided by the first appellate court, we cannot look at it and determine the same. In other words, we have no jurisdiction to entertain it. We would have entertained it if was a point of law.'

In the instant case, the appellant came up with a new ground which they did not raise in the first appellate court and neither was it raised during the hearing. But, due to the fact that this is an important point, I wish to address it. Throughout the trial, the appellants did not object that Abela borrowed money from BRAC Tanzania Finance Limited. Also, they do not object the fact that Abela was a member of Kikundi cha Brac. They do not dispute the fact that they were guarantors to Abela's loan and that the loan has not been fully paid. Their major contention is who is the right person to sue for the unpaid loan between BRAC Tanzania Finance Limited and the respondent? Their argument sounds promising but, in my view, it may be devoid of merit because the loan has not been paid and them being guarantors, they are responsible to ensure its full payment. In this case, the respondent has an interest in this matter and has unqualified cause of action against the appellants. If the loan is not paid, according to the operations of the group, members of Kikundi cha Brac may be held responsible because their member never paid the loan that the respondent



approved. Without the approval of the members of Kikundi cha Brac, Abela could not have received the loan. The appellants also stood in a position to secure the loan in case she failed to pay it. In my view, the respondent was the right person to claim for the unpaid loan. This ground though seems to be an afterthought it is devoid of merit.

On the other hand, the appellants argued that the respondent was also a guarantor to Abela's loan. I have perused the records in the court file and did not find any document suggesting that the respondent guaranteed to repay the loan in case Abela failed. But, I saw two appellants' guarantee forms in the file; each of them agreeing to fully pay the loan in case Abela failed to do so. The forms are in Swahili and for clarity, I take the discretion to reproduce and excerpt from one of the guarantee form thus:


'...iwapo tatizo lolote litatokea kama mkopaji atatoroka, ataugua, atafilisika, atashindwa kulipa na mengineyo nitawajibika kulipa mpaka deni liishe.'

Signing on these conditions signified that the appellants would cover the unpaid loan in case of any default. During the trial, they never disputed paying the loan but they raised the concern that they had no financial

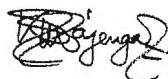
capacity to fulfil their guarantee. In my view, the appellants cannot escape the obligation they entered with their free consent and sobriety.

In the their memorandum of appeal, they alleged that Abela mortgaged a real property to secure the loan hence the case was supposed to be determined by the District Land and Housing Tribunal instead of ordinary courts. I have carefully gone through the records and failed to find information that the loan was secured by an immovable property to invite the intervention of the District Land and Housing Tribunal. In my view, this was just an ordinary contractual obligation which falls within the jurisdiction of the courts. Therefore, the Primary Court had jurisdiction to determine the matter. In conclusion, I find the appeal devoid of merit and I hereby dismiss it with costs. I further uphold the decision of the District Court and that of the Primary Court. Order accordingly.

DATED at **BUKOBA** this 12th Day of March, 2021.


Ntemi N. Kilekamajenga
JUDGE
12/03/2021





Court:

Judgment delivered in the presence of the appellants and Flaviana Faustine appearing for the respondent. Right of appeal explained.


Ntemi N. Kilekamajenga.
JUDGE
12/03/2021



