

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC CIVIL APPEAL NO. 80 OF 2020

(Arising from the judgment of Ukerewe District Court at Nansio Civil Appeal No. 3 of 2020 dated 18/08/2020 originating from Ilangala Primary Court Civil Case No 01 of 2020)

HAJI KIRUKU APPELLANT

VERSUS

BAGAILE KINUNI RESPONDENT

EXPARTE JUDGMENT

17th Febr & 26th March, 2021

RUMANYIKA, J.:

The 2nd appeal emanates from judgment and decree dated 18/08/2020 of Ukerewe district court (the 1st appeal court) with regard to breach of shs. 1,822,000/= loan agreement the later having had upheld decision of Ilangala primary court dated 01/04/2020 against Haji Kiruku (the appellant). Like the appellant, Bugaile Kinuni (the respondent) appeared in person.

The five grounds of appeal revolve around and may boil down only to three (3) points:-

- (1) That the 1st appeal court erred in law and fact in not holding that the appellant had proved his case on balance of probabilities.
- (2) That the first appeal court improperly evaluated the evidence.

When the appeal was, by way of audio teleconferencing called on for hearing on 17/02/2021 and, according to copy of the returned summons the respondent was duly served but defaulted (he was offline), the latter's appearance therefore it was dispensed with hence the ex parte judgment. For avoidance of doubts the appellant was heard through Mobile No. 0764820857.

Having adopted contents of the memorandum of appeal, the appellant submitted that this court be pleased to fault the two courts bellow. That is it.

A summary of the evidence on record reads thus:-

The appellant (Sm1) testified that orally though, he lend the respondent shs. 1,822,000/= on 05/11/2019 the loan repayable on or by 06/11/2019 latest that on default but now before the local Village Executive Officer, in writing the respondent committed himself and promised to pay on 10/12/2019 (Exhibit "P1") but all in vain. That is it.

Su1 Bugaile Kinuni stated that together with the appellant they had a fish business partnership but in the and contrary to agreement the latter denied him the agreed 50% profit only that therein between the respondent fell sick and stopped (copy of the medical chits – Exhibit "D1").

Su2 Machimu Kinuni testified materially the same as Su1 because between the two the latter witnessed the said partnership agreement. That is it.

Like the trial court found and held, the 1st appeal court discounted Exhibit "P1" for not being an agreement to pay but a mere unilateral statement of the appellant only witnessed by the local VEO leave alone impossibilities of such big amount of money having been lend just orally.

The central issue is whether the appellant's case was, on the balance of probabilities proved. The answer is no. In fact if anything, there was only Exhibit "P1". Like the 1st appeal court held, the document wasn't worth the name a loan agreement or some one's commitment to pay much as the appellant did not counter sign it nor was it as such intended by the parties. There is no wonder the respondent denied it all and, in express terms the two courts below discounted it.

Moreover, even when Exhibit "P1" was only for the sake of assumption taken valid and genuine, yet the piece of evidence was unacceptable because it contravened the parole rule of evidence under provisions of Section 101 of the Evidence Act Cap 6 R.E. 2019 much as if at all, parties were agreed that their agreement hadn't been reduced into writing.

Last but not least it is settled law that unless there was, such peculiar circumstances which is not the case here, very seldom than not an appeal court reversed concurrent factual findings of the two courts bellow.

Somewhere somehow one of the parties may have had breached terms and conditions of the partnership agreement yes, therefore some one's attempts to set off or something given the complex nature of human psychology yes, but not breach of loan agreement.

The devoid of merits appeal is dismissed with costs. Decision and orders of the 1st appeal court are upheld. It is ordered accordingly. Right of appeal explained.


S. M. RUMANYIKA
JUDGE
05/03/2021

The judgment is delivered under my hand and seal of the court in chambers this 16/03/2021 in the absence of the parties.




S. M. RUMANYIKA
JUDGE
16/03/2021