

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

APPELLATE JURISDICTION

(PC) CIVIL APPEAL NO. 5 OF 2021

(Arising from Civil Appeal No. 07/2020 at Kigoma District Court, before Hon. K. Mutembei - SRM, Original Civil Case No. 38 of 2019 of Mwandiga Primary Court, before Hon. F. P. Ikorongo - RM)

DANIEL S/O MIRASHI..... APPELLANT

VERSUS

WILSON S/O KAKO.....RESPONDENT

JUDGMENT

4th March & 19th April, 2021

A. MATUMA, J

In the Primary Court of Mwandiga at Kigoma, the Appellant Daniel Mirashi sued the respondent Wilson Kako for recovery of a debt amounting to **Tshs 24,882,000/=** which were alleged to have been borrowed by the respondent on 16/01/2018 with expectation to be refunded back on 30/04/2019. The respondent denied the claim and after a full trial, the trial court Hon. F.P. Ikorongo (RM) dismissed the claim for having not been sufficiently established.

The appellant was aggrieved with the decision of the trial court. He unsuccessfully appealed to the District Court whereas Hon. K. Mutembei

(SRM) dismissed the appeal after he observed that the same was without any merit hence this second appeal.

In this appeal the appellant has advanced five grounds of appeal whose major complaints can be summarized as follows;

- i. That the decision of the lower courts did not consider the contract between the parties which was binding them.*
- ii. That the appellant's cogent evidence was not scrutinized well as against that of the Respondent which was flimsy.*
- iii. That there was a breach of the principle of natural justice when the magistrate held that the loan contract was on interest basis without hearing the parties thereof.*
- iv. That the drawn issues were not determining the dispute between the parties.*
- v. That the drawn issues by the District Court were not put to the parties for them to address on them.*

At the hearing of this appeal, the appellant was present in person while the respondent was present in person and had the service of Mr. Daniel Rumenyela learned advocate.



The appellant adopted his grounds of appeal and added that while the respondent completely denied to have borrowed the money from him the magistrate found that the contract was on interest basis. That the District Court despite of contradicting the Primary Court yet upheld its decision.

The appellant further submitted that his evidence at the trial was corroborated by that of his witnesses who saw the respondent executing the contract by his own handwriting. He further submitted that the contradictions between him and his witnesses were immaterial and ought not to have been considered.

Mr. Rumenyela learned advocate for the Respondent in opposition to the appeal supported the concurrent findings of the two courts below. The learned advocate further argued that under normal circumstances, it is impossible for the appellant particularly in the village circumstances as in this case to have advanced the respondent **Tshs. 24,882,000/=** without any benefit. He also doubted why the appellant did not bring in evidence some people he alleged to have sent him such money so that they could authenticate that they really sent him such money and explain what was it for.



The learned Advocate further argued that the two lower courts properly found that the contract between the parties had all indicators of interests which is contrary to the Business Licensing Act. He was of the further view that the target by the appellant was the retirement benefits of the respondent as the alleged contract between the parties bears a clause that the repayment of the loan would be after the retirement of the respondent who is a teacher.

The learned advocate also submitted on the contradictions between the appellant and his witnesses that they damaged his case and therefore called this court to dismiss the appeal with costs.

In his rejoinder submission, the appellant maintained that it was not necessary to call the people who sent him the money as they did not witness the execution of the loan contract between him and the respondent and that there was no contradiction in his case.

I will now address the grounds of appeal on the strength or otherwise of the arguments of the parties before me and the evidence on record.

In the first ground of appeal as reflected above, the appellant blames the lower courts to have not considered that the loan contract was binding to the parties. I agree with the appellant that once the contract is executed; the parties thereon are bound by its terms and conditions.

That is a principle of sanctity to contract as it was held in the case of ***Simoni Kichele Chacha versus Aveline M. Kilawe***, Civil Appeal No. 160 of 2018 (CAT) at Mwanza. It has also been held in various cases that where a party to the contract has no good reason not to fulfill an agreement, he must be forced to perform his part, for an agreement must be adhered to and fulfilled. See; ***Mohamed Iddrisa Mohamed v. Hashim Ayoub Jaku*** (1993) TLR 250.

But the law is very clear that for a part to the contract to be forced to fulfill the terms of the contract, such contract must be the one enforceable in law as illegal contracts are unenforceable. The contract must be free of any fraud be it actual or constructive. See; ***Abualy Alibhai Azizi v. Bhatia Brothers Ltd*** (2000) TLR 288.

In the instant matter both the lower courts doubted the loan contract at hand. They observed that the contract despite of being denied by the respondent, bears all indicators of fraud and misrepresentation of the true facts. They considered for instance *'how could a normal person afford to stay in the village with such a big amount of money'*, how could the appellant and his witnesses contradict on the denominations of the advanced money to the respondent if truly such agreement was executed in their presence.

On my party, I agree with Mr. Rumenyela learned advocate for the respondent and also concur with the two lower courts in their concurrent findings that the contract at hand was incapable of being executed as it bears indicators of fraud. The indicators are;

One, the appellant did not establish to the satisfaction of the court that he had in actual possession of the alleged amount of **Tshs 24,882,000/=** on the material date. Since he alleged to have been sent such amount by his two children that;

'Fedha hizo zilikuwa zinachanganyika na fedha za mtoto wangu ambaye alituma fedha ili akija huku aweze kujenga nyumba uwanja ambao alipewa na shangazi yake, palikuwa na Tshs 4,500,000/= nilizokuwa nimetumiwa na kijana wangu wa Dar es Salaam ili nimnunulie kahawa ya biashara lakini nikawa sijanunua kahawa hiyo',

and since there was doubt that he possessed such huge amount in his village life, the appellant was necessitated to bring those two children as material witnesses to assist establishing the existence of the money to the appellant before proving the second part that he advanced them to the respondent. It has been held in various cases including that of

Angelina Reubeni Samsoni and Another v. Waysafi Investment

Company, DC Civil Appeal No. 4 of 2020, High Court at Kigoma that failure of a party to the suit to bring a material witness entitle the court to draw adverse inference against him and that had he called the said witness, he would have testified against his favour.

In the instant matter the two sons were very important to support the appellant's case because the appellant alleged to have received the money from them for different purposes. He was in fact cross examined at page 11 of the proceedings as to where did he got such money or his ability to have in possession of such huge amount of money in his normal village life. He ought to have realized that his ability to possess such huge amount was questionable and thus duty bound to establish the same.

Two, Contradictions between the appellant and his witnesses. The appellant contradicted very much with his witnesses on various aspects. First, he contradicted them on the denominations whereas on being cross examined he replied; **'Fedha zote zilikuwa noti za Tshs 10,000/= kasoro hiyo ya Tshs 2,000/='**. On the other hand, his witness SM2 on cross examination stated;

'Fedha hizo zilikuwa na mchanganyika wa noti za elfu kumi na elfu tano'.

This witness purported to have counted the money by his hands; ***'Fedha hiyo mimi ndiye nilikuwa wa kwanza kuzihesabu'***. In the circumstances SM1 being a lender of the money and SM2 being a person who counted them before handing to the respondent could have not differ on the denominations as counting the value of the money cannot be done without looking precisely the denominations of which its value thereof is what exactly counted to get the total value. This indicates that the contract is not real. It bears some indicators of fraud. SM3 also contradicted the appellant on the denominations, and I can see no reason to reiterate my observations supra.

The appellant as well contradicted his witness as to who brought the money from his house for handling the same to the respondent. While he himself at page 11 stated that it was his wife who brought the money;

*'mke wangu ndiye aliyeleta hizo fedha na kunikabidhi
nikazihesabu na kumpa shahidi wako',*

His witness SM3 at page 13 of the proceedings stated that it was the appellant himself who got into and brought the money; ***'SM1 ndiye aliyeingia chumbani na kuleta hela'***.



The contradictions herein cannot be ignored as minor one. This is because it relates to the act of bringing the money and handling the same to the respondent, an act which is the subject matter of the claim in contention between the parties. Not only that but also, they contradicted on the carriage of the money by the respondent. The appellant stated that;

*'pesa hizo ulizibeba **kwenye mfuko wa Rambo** wakati huo haijakatazwa'.*

SM2 on his party;

*'Fedha hizo baadhi aliziweka **kwenye mfuko wa suruali** nyingine **kwenye begi** ambalo huwa anaenda nalo shule'.*

SM3;

'Fedha hizo uliweka kwenye begi ulilokuwa umetoka nalo shule'

The three witnesses seem to have been witnessed different things; *mfuko wa Rambo, mifuko ya suruali na begi la shule, and begi la shule* alone. Mfuko wa Rambo cannot be said to be the same as mfuko wa suruali nor to be begi la shule. All these contradictions are clear indicators that the contract even if it would have been established to have been executed, the same does not reflect the true status. The parties to it might have decided deliberately to hide the truth behind. It

in the circumstances the two lower courts ruled that the alleged contract might have been executed on interest basis. With such anomalies, the contract cannot therefore be executed/enforceable.

I therefore, rule out that the two lower courts properly found that the contract was not enforceable against the respondent even if it would have been sufficiently established to have been executed by the parties. The first ground of appeal is thus dismissed.

In the second ground of appeal, the appellant laments that his evidence was cogent but not well scrutinized. Instead that the respondent's flimsy evidence was relied. With the herein above observations in the first ground of appeal, the appellant's evidence cannot be said to have been cogent. Rather it was flimsy. I find that the two lower courts properly analyzed the evidence as they considered whether the appellant had in fact the alleged huge amount and whether he advanced them to the respondent. They determined the issue by considering the contradictions in the appellant's case.

I agree with Mr. Daniel Rumenyela learned advocate for the respondent that the appellant was duty bound to prove his claims and it was not for the respondent to disprove them. The appellant ought to have independent evidence establishing the claims even if the respondent

would have entered no defence. The second ground of appeal is as well dismissed.

On the 3rd ground of appeal, the appellant is complaining that the two lower courts raised issues of interest in the loan which was not raised by either party nor parties were heard on it.

I find this ground unfounded as it transpires in the proceedings when the appellant was asked at page 11 whether the said money included interests in which he replied;

*'Fedha hizo nilimkabidhi taslimu **haikuwa na riba yoyote** ile'.*

In the circumstances, the two lower courts were entitled to determine whether the alleged contract was free from interest, particularly when the respondent questioned for what consideration did the appellant advanced him such huge amount of money;

*'Mimi nipo tayari kushika biblia kama nilikabidhiwa fedha hizo leo hii nife kwani hakuna mtu atatoa Tshs 24,882,000/= halafu awe analipwa kidogo kidogo **kwa maslahi yapi aliyonayo kwa hao anaowakopesha'**.*

From the herein quotations from both the appellant and the respondent, it is obvious the question of interest arose in the course of trial and the

two lower courts were entitled to address it in their respective decisions. The parties were accordingly heard and no breach of the principle of natural justice to be heard. In the case of ***Stella Temu Vs Tanzania Revenue Authority (2005) TLR 178-179*** it was held that the trial court is entitled to make a finding on the issue even if it was not among the framed issues so long as the facts relating to it was contained in the pleadings and some evidence by the parties thereof was given. I accordingly dismiss the 3rd ground of appeal as well.

The 4th ground is that the District Court erred to uphold the decision of the trial primary court which based on drawn issues which were not determining the dispute between the parties.

At page 5 of the proceedings, the trial court recorded the brief statements of both the appellant and the respondent for and against the suit. It is from their own brief statements for and against the claim, the trial court drew two issues for determination upon which the parties were required to bring evidence. The issues were;

1. Je mdai amejisajili na ana kibali cha kisheria kufanya shughuli hii ya kukopesha fedha?

2. Je ni kweli kwamba mdai alimkopesha mdaiwa hizo Tshs 24,882,000/=?

With the herein above issues I don't see the gist of the complaint in ground four. The Dispute between the parties was whether the appellant advanced a loan of Tshs. 24,882,000/= to the respondent and whether it was free of any interest. The two drawn issues were properly drawn for thorough and proper determination of the real question in controversy between the parties. I therefore dismiss this fourth ground of appeal.

The last ground of appeal is that the District Court on appeal framed an issue but the parties were not called to address it hence unfounded judgment.

I find this ground to have been misconceived. The District Court did not frame an issue for determination of the appeal. It rather heard the grounds of appeal before it by way of written submissions. In composing its judgment, the District Court condensed the grounds of appeal into one that;

'the trial magistrate did not consider that the matter was proved on the balance of probability'

To determine such a ground which carried the complaints of all the grounds of appeal before him, the learned Senior Resident Magistrate of

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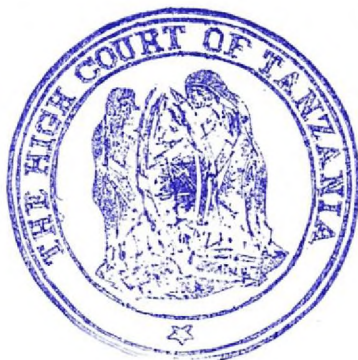
the District Court reiterated the two issues previously draw by the trial court;

'Whether contract was valid/ if the answer is yes, then the question to ask myself is that; whether there was a breach of such contract'.

There were thus no new issues drawn by the appellate District Court but rhetorical questions for determination of the grounds of appeal basing on the drawn issues at the trial court. The parties were fully accorded opportunity to address for and against the grounds of appeal by their respective written submissions and therefore this fifth ground of appeal is without any substance. The same is hereby dismissed.

In the final analysis, this appeal has been brought without any sufficient cause and it is hereby dismissed in its entirety with costs. Right of further appeal to the Court of Appeal of Tanzania subject to the governing laws and Rules is hereby explained to the parties.

It is so ordered.




A. Matuma

Judge

19/04/2021

Court: Judgment delivered in Chambers this 19th day of April, 2021 in the presence of the parties in person and Mr. Daniel Rumenyela learned advocate for the respondent.

Sgd: A. Matuma

Judge

19/04/2021