IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

LAND APPEAL NO. 22 OF 2020

(Arising from District Land and Housing Tribunal Kigoma, Land Application No. 38 of 2016 Before M. Nyaruka, Chairman)

MUUNGANO SACCOS LTD .....1ST APPELLANT

JESCA SIMON DEHEYE .....2ND APPELLANT

YUSUPH REHAN HASSAN.....3RD APPELLANT

VERSUS

LAMECK DAUD LIBELI.....RESPONDENT

JUDGMENT

8TH & 15th March, 2021

A. MATUMA, J.

The parties herein executed a loan agreement of Tshs. 30,000,000/= on the 11th February 2015 whereas the 1st appellant was a borrower, the Respondent a lender, the 2nd and 3rd appellants were guarantors to the loan in which they mortgaged their landed properties namely Plot No. 1045 H.D. Block Q Majengo and Plot No. 1150 H.D. Block Q Majengo.

The loan period was only three months and had to expire on the 11/05/2015. The borrower defaulted the agreement which erupted sour

relationship between them. The respondent at last decided to commence a suit in the District Land and Housing Tribunal which ended in his favour.

It is apparent on record from both the documents filed by the parties during trial, their evidence and their respective submissions before me that a loan of Tshs 30,000,000/= was indeed advanced and obtained respectively as per facts herein serve for whether such amount included a hidden interest or not. The dispute between the parties were thus;-

i. *While the appellants avers that they were advanced as a loan by the respondent to the tune of only Tshs 20,000,000/= with an agreement of interest of Tshs 10,000,000/= but agreed to camouflage the interest and therefore their loan contract was written the borrowed amount to be Tshs 30,000,000/=, the respondent on his party averred that the Tshs 30,000,000/= was borrowed in cash with no any interest.*

ii. *While the Appellants avers to have already paid the loan in part by instalments of Tshs. 4,000,000/=, Tshs. 4,000,000/= and Tshs 3,000,000/= in cash and Tshs 12,000,000/= by check, thereby making a total repayment of the loan to the tune of Tshs. 23,000,000/=, the respondent on his party acknowledge to have received only Tshs. 7,000,000/= as a consideration for him to extend the period of the loan and not as party of the principal loan.*

The trial tribunal having heard the parties on the issue decreed to the respondent against the appellants;

i. *Tshs. 30,000,000/= as the principal loan advanced to the appellants by the respondent.*

ii. *Tshs 12,000,000/= as an interest agreed by the parties for the extension of time by the respondent at three different times.*

iii. *Tshs 15,000,000/= as general damages for the appellants' long stay with the principal amount without repaying it back to the respondent.*

iv. *Cost of the suit*

v. *An order for attachment and sale of the mortgaged houses in case the appellants defaults to execute payment of the decreed sum in 45 days from the date of judgment i.e 03/07/2020.*

The appellant became aggrieved with the herein decree hence this appeal with a total of four (4) grounds of appeal whose essential complaints are:-

i. *That the general damages of fifteen million was granted without any proof.*

ii. *That the Tshs 12,000,000/= was granted to the respondent while he is not a financial institution registered under the Banking and Financial Institutions Act, 2006.*

iii. *That the trial tribunal disregarded the appellants' evidence to the effect that they have already paid Tshs. 23,000,000/= and the outstanding debt is only Tshs 7,000,000/=.*

iv. *That their evidence and exhibits were completely ignored.*

At the hearing of this appeal Mr. Eliuta Kivyiro learned Advocate represented the appellant while Mr. Silvester Damas Sogomba learned Advocate represented the respondent.

Mr. Kivyiro learned advocate arguing on the 1st ground of appeal submitted that the Respondent was awarded Tshs 15,000,000/= against the appellants as general damages on allegations that he was a businessman and the money he advanced to the appellants came from his businesses while there was no evidence to that effect.

Responding on the first ground, Mr. Sogomba learned advocate was of the argument that the general damages awarded was justified because the respondent is a petty trader who expected his advanced money to be returned back to him in three months' time.

Having heard the arguments of the parties on the first ground, I am of the firm view that I should agree with Mr. Kivyiro learned advocate on this complaint. This is because apart from allegations that the respondent was a businessman, the trial tribunal considered the fact that the 1st appellant stayed with the borrowed money for five years. I am of the firm view that it was wrong for the trial tribunal to consider a period of five years in awarding the general damages because from the moment the suit was instituted in court the appellants could in no way pay the respondent his money as the matter was already in court and constituted some claims which were in dispute.

In this matter, the suit was instituted in court on the 19th April, 2016. The loan was to be repaid by May, 2015 but according to the respondent himself he extended the period to June, then to July, then to August and lastly, he extended three months, which no doubt was at the end of November, 2015. According to the respondent he extended the period for the repayment of the loan as they paid him some considerations for the said extension and the last three months he extended were yet to be paid which formed the claim of Tshs 12,000,000/=. The appellants did not dispute to have been extended time for the repayment of the loan but they denied to have agreed any consideration for the extension.

Be it that the extension was for any consideration or not as shall be discussed in the other ground, for the purposes of determining this first ground of appeal my concern is that the respondent extended the period for the repayment of his money. In that respect, a breach cannot be alleged to include the period so extended. The respondent is estopped under section 123 of the Evidence Act, Cap. 6 R.E. 2019 to deny the fact that the period he extended does not fall within the alleged breach as he condoned it by his own extension of the loan period. In the circumstances the breach if any was from December, 2015 to 19th April, 2016 when the respondent finally instituted the suit. That is hardly a period of four months and 19 days. The institution of the suit automatically stayed the obligations between the parties pending its determination by the court.

The trial tribunal did not adjudicate the matter within a reasonable time as from April, 2016 to 3/7/2020 when it finally decided it. That is almost a period of four years and three months. It was quite unfair for the trial tribunal to stay with the matter unadjudicated for four years and use the same period to punish the appellants. Had the matter been adjudicated within a reasonable time in just months (Speed track one), or a year (Speed track two), or a period not exceeding 14 months (Speed track three), or even the maximum period of 24 months (Speed track four),

the trial court would have not awarded the said amount as general damage for the period of five years which the appellants had no control as the matter was pending in the tribunal. General damages if any ought to have considered only the period between the alleged breach and that of the institution of the suit.

The period which the matter had been pending in court can only be considered if the judgment debtor had at all times denied the debt but finally the same is proved and only if the court adjudicated the matter within a reasonable time frame set by law. Although the Land Disputes Courts Act does not specify the maximum period for determination of disputes, the Civil Procedure Code which is applicable to the trial tribunal sets the maximum period to be speed track four which is hardly 24 months.

In this case, the matter was unnecessarily stayed in court because the appellants did not deny the principal date of Tshs. 30,000,000/= even if they alleged to have included a camouflaged interest. Therefore, the mischief by the trial court was wrongly shouldered to the appellants.

On the allegations that such money came from the business of the respondent and was as well taken from the bank as a loan, the trial court found that the fact required proof which was missing. I also find as such.

The respondent apart from averring that he was a businessman he did not positively establish that such money came from his business. But again, the loan contract is very clear that the loan was advanced without any interest. With that fact and the fact that the respondent extended time at different occasions, the said money cannot be argued to have been affecting the respondent's businesses.

In that respect I do away with the general damages and quash the decree of Tshs 15,000,000/= passed by the trial tribunal. I will later consider whether the respondent was entitled to general damages within the real period of the breach if any, when dealing with the other ground.

On the 2nd ground of appeal the learned advocate argued that the trial court erred to allow interest to the respondent to the tune of Tshs. 12,000,000/= as he was not a financial institution to be entitled to interests on the loan he advanced to the appellants.

He further argued that even through the check of Tshs 12,000,000/= which the appellants issued to the respondent was part payment of the principal loan and not interest. He thus argued that the trial court ought to have considered that amount as part payment of the outstanding loan.

Mr. Sogomba learned Advocate for the respondent responding to the 2nd ground of appeal submitted that in the first instance, the Tshs

12,000,000/= was not an interest in its real sense but was an amount accrued from the loan just as consideration for the extension of the period of its repayment. That the check was issued to the respondent just for him to buy time. He added that even the receipts to that effect were titled '*faida*' which did not mean that they were forming part payment of the principal loan.

He thus argued that the Banking and Financial Institutions Act is inapplicable in the circumstances of this case.

On being probed by the court, the learned advocate for the respondent admitted that going by the principle that ***a document must speak by itself***, a check of Tshs. 12,000,000/= dated 02/11/2015 does not reflect the allegations of the respondent that it was issued for the respondent to be patient for the delay of the appellants to pay him his money. Rather it indicates to have been payment by the 1st appellant to the Respondent and may justifiably be argued to have been part payment of the principal loan.

Alternatively, the learned advocate argued that even if the Tshs 12,000,000/= and other payments as per receipts would have to be considered as interests on the principal loan, there is currently in place a decided case by the Court of Appeal of Tanzania; ***Simoni Kichele***

Chacha versus Aveline M. Kilawe, Civil Appeal No. 160 of 2018 (CAT) at Mwanza, which has allowed a loan contract on interest basis by individuals other than Banks and financial institutions to be executed as agreed by the parties in their respective contract.

Mr. Kivyiro in rejoinder thereto argued that Simoni Kichele Chacha's Case is distinguishable as the same was talking on the interest as a clause on the loan contract in the case of default.

I would start by agreeing with Mr. Kivyiro that Simoni Kichele Chacha's case has been misconstrued. The same did not condone unlicensed people to advance loans on interest basis. In it the Court of Appeal considered the principle of sanctity to contracts as it was well decided in ***Abualy Alibhai Azizi v. Bhatia Brothers Ltd [2000] TLR 288*** that;

> *'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, nor fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement.'*

From such holding it is very clear that the highest court of the land was of a decision that an agreement prohibited by principles of Public Policy are not enforceable.

Now do we have in place principles of Public Policy prohibiting enforcement of loan contracts on interest basis by unlicensed individuals? The answer is yes. In terms of section 23 (1) (a) (b) and (2) of the Law of Contract Act, Cap. 345 R.E. 2019 any agreement forbidden by law or an agreement which is of a nature that if permitted would defeat the provisions of the law is unlawful and not enforceable. That carries us to the provisions of section 3 (1) (a) of the Business Licencing Act, Cap. 208 R.E. 2002 which prohibits any person to carry on business without having a valid business license. The same provides;

> *'3(1) No person shall carry on in Tanzania, whether as a principal or agent, any business unless*
>
> *(a) he is the holder of* ***a valid business license*** *issued to him in relation to such business'.*

In that respect, lending money on interest basis is nothing but a business transaction which is forbidden unless the lender is licensed as such. Lending money on interest basis without a valid business license is actually a violation of the provisions of the Banking and Financial Institutions Act, Cap. 242 R.E. 2002 in which only Banks and Financial Institutions can run business in the nature of financial transactions like lending money on interest basis. That law under section 4 (1) and (2) restricts business in the nature of financial transactions to Banks and

Financial Institutions subject to application and grant of license to that effect.

With the herein provisions of the laws it is quite clear that we have in place the laws and general principles of Public Policy forbidding transactions of a business nature without a valid license. I am far away to purchase the arguments of the learned advocate for the respondent that the Court of Appeal in Simoni Kichele Chacha's case meant to do away with these provisions.

In fact, in Simoni Kichele Chacha's case, the contract in issue was not for the loan on interest basis. But rather the parties to the contract thereon agreed some penal measures in the case of default in the performance of the terms therein. One of the penal measures agreed was that in case the borrower defaults to repay the loan within the agreed period, he will suffer interest of 30% of the principle loan on each month.

Therefore, the contention in the matter and which was decided by the Court of Appeal was not whether loans on interest basis by unlicensed individuals are enforceable or not, but on whether penal measures agreed by the parties on default of their agreements are enforceable or not. It decided that the same are enforceable provided that it is not forbidden by law or general principle of Public Policy. To cut a story short, Simoni

Kichele Chacha's case did not condone unlicensed individuals to carry on business transactions because;

i. *The contract under scrutiny in that case was not relating to a loan on interest basis but rather it was clear that it was a loan free of any chargeable interest. The court could thus not discuss what was not before it.*

ii. *The chargeable interest of 30% in the contract which was under determination by the court was not an interest to the principal loan but an agreed sanctions or penalty in the case of default by the borrower to repay the principal loan within time. Therefore, it was not an amount to be executed if the loan was to be repaid in time.*

iii. *Penal sanctions of 30% agreed by the parties to the contract was enforceable provided that they were not prohibited by law or any general principle of Public Policy as they acted as a mere forcing agent that the borrowed money be repaid in time.*

iv. *The Court of Appeal in Simoni Kichele Chacha's case, did not talk anything in relation to the provisions of the Business Licensing Act, or those of the Banking and Financial Institutions Act in relation to loan on interest basis by unlicensed individuals.*

Now back to the issue at hand, the parties on the stated amount of Tshs. 12,000,000/= and other payments of Tshs 4,000,000/=, Tshs. 4,000,000/= and Tshs. 3,000,000/= did not agree as to what exactly they were for, part payment of the principal loan or considerations for extension of time for the repayment of loan.

While the appellants contended that the amounts were part payment of the principal loan, the respondent argued that they were amounts agreed out of the contract itself for cooling him for the delay of the appellants to repay back the loan and extension of time for the loan period. The issue therefore isn't whether the money was interests on the principal loan but whether they formed part of the repayment of the principal loan or were merely considerations for the extension of the contract period.

My finding on the issue is that the same formed part of the repayment of the loan by the appellants to the respondent and not as a coolant to the respondent for him to extend the contract period.

I am of this finding because as rightly observed by the respondent's advocate himself, going by the doctrine of a document must speak by itself; the check of Tshs. 12,000,000/= by the appellants to the respondent does not indicate or disclose the respondent's version. It is merely indicated that the appellants were paying the respondent Tshs.

12,000,000/=. As there is no any transaction between the parties but the loan in question, the check meant nothing but repayment of the loan in part.

Also, payments which were in cash as per receipts cannot be argued to be a mere consideration for the extension of a loan period. This is because they do not speak as such. They are titled '*faida*'. As they were cash payments for unwritten agreement, there was no necessity to issue the receipts. Receipts meant records of payment. The appellants aver that they were written '*faida*' because despite the principal loan to indicate that it was Tshs 30,000,000/= the real loan was only Tshs. 20,000,000/= and an interest of Tshs 10,000,000/=. Therefore, they decided to start repaying the interest (*faida)* and the receipts were to reflect as such for their official records and or use.

I agree with the appellants to the extent that the cash paid to the respondent by them was part of the repayment of the principal loan because its does not click in any mind of a reasonable man that a person indebted Tshs. 30,000,000/= can pay or initiate payments of a total of Tshs. 23,000,000/= just as coolant to seek extension of time to repay the principal sum and remain indebted with the whole advanced amount. Only clazy people can do that. Nothing on record suggests that the 1st

Appellant's officers were crazy to such extent, and thus I am entitled to believe them that they could not execute such unjust agreement shouldering their office. Otherwise the agreement would be held illegal for being unfair to one party.

Not only that but also the respondent's averment is not authenticated anyhow. The contract between them which is subject to this suit do not bear any clause for its extension and the manner in which extension could have been sought and granted if need arises. Instead it provides that in case of any default the lender would be entitled to take legal actions including selling the mortgaged properties;

> *'4 **Kwamba**, endapo mkopaji atashindwa kurejesha mkopo katika tarehe iliyokubaliwa katika mkataba huu (i.e. tarehe 11/05/2015) mkopeshaji atakuwa na haki ya kuchukua hatua za kisheria zaidi ikiwa ni pamoja na kuuza nyumba za dhamana ili aweze kukomboa pesa yake pamoja na gharama zingine zitakazojitokeza'*

The extension clause was not there and if in any case the parties thought it was important to execute onother agreement altering the contract period, they were obliged to do so in winding as per ***Edwin Simoni Mamuya v. Adam Jonas Mbala (1983) TLR 410*** which was also quoted by the trial tribunal that;

'Where the contract is in writing its terms can only be varied in writing'

I therefore find that the Tshs 12,000,000/= was intended to be part payment of the principal loan and not interest nor a consideration for the alleged extended period. But since it is in evidence that the check of that amount was dishonored by the Bank, the amount remained unpaid to the respondent. I quash therefore the decision of the trial tribunal which decreed that amount as interest agreed by the parties for extension of the loan period.

The 3rd and 4th grounds of appeal are all intending to challenge the decision of the trial tribunal to the effect that it did not consider the appellants' evidence that they had already paid a total of Tshs 23,000,000/= to the respondent and the only outstanding debt is Tshs 7,000,000/=.

On this the respondent admitted to have been paid only Tshs 7,000,000/=. He stated that a check of Tshs 4,000,000/= and that of Tshs 12,000,000/= which would make a total payment of Tshs. 23,000,000/= were dishonored. He even though contended that all such amount was merely consideration for the extension of time as I have already reflected herein. But I have as were herein above ruled out that

the same formed part payment of the principal loan. The question now is was all these payments effected accordingly?

As earlier on said and according to the evidence on record there is no doubt that the Tshs. 12,000,000/= were not effected or dully paid. That Check was not paid. According to the respondent it was due to insufficient fund in the 1st appellant's account but the check itself does not bear any endorsement by the bank to that effect. It is like it was never presented to the bank for payment. The same has even expired and ca no longer be executed.

About other payments of Tshs. 11,000,000/= (cash payments), the respondent admitted only Tshs 7,000,000/= stating that the other Tshs. 4,000,000/= was attempted to be paid to him by check which again was dishonored by the bank.

On my perusal of court records, I have come across with exhibit 'PM' which are three receipts which were tendered by the respondent himself to establish that he was paid Tshs. 4,000,000/= Tshs. 4,000,000/= and Tshs 3,000,000/= whose total is Tshs 11,000,000/=. In his sworn evidence at the trial at page 10 of the proceedings, the respondent clearly testified that;

'Your honour there is receipts of respondents (now appellants) which were being issued to me once they were paying me so as to continue to extend that time of paying the loan. I pray to tender it'.

The receipts were then tendered without any objection. Therefore, the receipts tendered by the respondent were prima-facie evidence that he received such amount. I thus find that the respondent was paid a total of Tshs. 11,000,000/= by the appellants as evidenced by his own receipts and not Tshs. 7,000,000/= as he alleges.

That having so found, it is thus clear that the respondent has already been paid a total of Tshs 11,000,000/= out of Tshs 30,000,000/= the principal loan. The outstanding balance of the loan is therefore Tshs 19,000,000/= only.

The appellants contended that the principal loan camouflaged an interest of Tshs 10,000,000/=. That might be true as it has on occasions before this court transpired that parties to loan agreements had camouflaged interests for the purposes of circumventing the provisions of the Business Licensing Act and the Banking and Financial Institutions Act supra. This was clearly seen in the case of ***Gasto Sabas Nyongo versus Bombo Johnstone Nyamweru, (PC) Civil Appeal No. 13 of 2020 (HC-Kigoma)*** in which the parties executed a loan deed of Tshs. 4,530,000/=

before Mr. Silvester Damas Sogomba learned advocate with a clause purporting that;

'Mkopo umetolewa Kindungu na hakuna riba itakayotozwa'

On appeal to this court and after I probed the parties revealed the reality of their loan contract. The respondent (lender) conceded that the real amount of the loan was only Tshs 1,500,000/= but they decided to falsify the contract to include interests.

Therefore, the possibilities that the loan in the instant matter was only Tshs 20,000,000/= but the loan agreement executed at a tune of Tshs 30,000,000/= to include an agreed interest of Tshs 10,000,000/= in a camouflaged manner cannot be ignored completely.

But in this suit where the parties are at issue as to whether the loan included a camouflaged interest and none of them is willing to disclose the truth and true status of the contract, the court cannot rely on speculations to decide the matter. The doctrine of a document must speak by itself would come into play to rescue the dispute. The contract at hand as herein above quoted is very clear that it was a loan of Tshs 30,000,000/= free of any interest. I will stick there as by doing otherwise would amount to nothing other

than speculations which is bad in law as it has been decided in a number of cases including that of ***Materu Leison and J. Foya versus R. Sospeter (1998) TLR 102 (HC).***

I had also time to rule out in the case of ***Denis Elias Nduhiye versus Lemina Wilbad, Juvevile Civil Appeal No. 1 of 2019 (HC)*** at Kigoma that;

'Speculative views have no room in Civil trials'

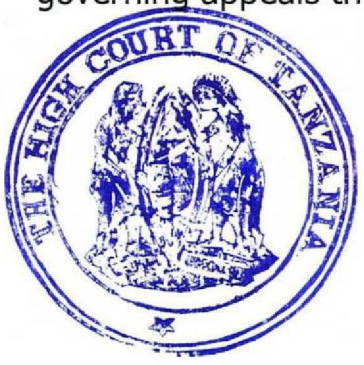
In the final analysis I am of a firm decision that the outstanding debt is Tshs 19,000,000/= which the appellants should pay to the respondent within a period of one month from the date of this judgment.

In the circumstances of this matter as herein above stated the respondent is also entitled to general damages of Tshs 1,000,000/= for the breach of contract from the maturity date of the debt on 11/05/2015 to 19/04/2016 when the respondent finally filed the suit.

That after the expiration of one-month period as herein above stated, if the appellants won't have paid the outstanding debt herein above decreed together with the general damages as herein

above decreed, the respondent shall be at liberty to execute the decree by attachment and sale of the mortgaged properties. Taking into consideration the circumstances of this case whereas each party is not real open to what exactly happened between them necessitating this court to scrutiny the evidence on record party for and partly against each party, I award no costs to either party.

This appeal is therefore partly allowed to the extent herein above explained without any costs. Right of further appeal to the Court of Appeal of Tanzania subject to the requirements of relevant laws governing appeals thereto is explained.



A. Matuma

Judge

15/03/2021

Court: Judgment delivered in chambers in the absence of the appellants and in the presence of the Respondent and his Advocate Mr. Damas Sogomba.

Sgd: A. Matuma

Judge

15/03/2021