

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF KIGOMA)**

**AT KIGOMA**

**(APPELLATE JURISDICTION)**

**(PC) CIVIL APPEAL NO. 17 OF 2020**

(Arising from Civil Appeal No. 01/2020 of the District Court of Kigoma before Hon. K. V. Mwakitalu, Original Civil Case No. 128 of 2018 at Ujiji Primary Court before Hon. E.B. Mushi, RM)

**SIFUNI S/O BITANTEYE..... APPELLANT**

**VERSUS**

**JACKSON S/O ABEL YOSIA.....RESPONDENT**

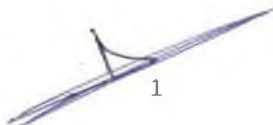
**JUDGMENT**

17<sup>th</sup> & 18<sup>th</sup> May, 2021

**A. MATUMA, J**

The appellant was sued by the Respondent in the Primary Court of Ujiji at Kigoma for recovery of debt amounting to Tshs 12,600,000/=.

The Respondent during trial alleged that he landed Tshs 12,600,000/= to the appellant and they dully executed a loan contract which was witnessed by witnesses of both parties on 22/04/2018. On the other hand, the appellant disputed the claim and stated that he only borrowed Tshs. 5,000,000/= from the respondent without any writings as they were friends and used to lend money to each other and that the loan contract exhibit 'A' was a forgery document.

  
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The trial court after a full trial was satisfied with the respondent's evidence and therefore decreed the sum of Tshs 12,600,000/= to the Respondent against the appellant.

The appellant was aggrieved with such decision hence appealed to the District Court which again confirmed the trial court's judgment on the strength of the loan contract exhibit 'A' although the appellant disputed it along with the oral evidence on record.

The appellant was further aggrieved hence this appeal with three grounds which were however argued into only two major complaints namely;

- i. That the loan contract exhibit 'A' having been admitted in evidence and not read loud to the parties, it was wrongly relied by the appellate magistrate to reach in his decision.*
- ii. That the evidence on record was not scrutinized in which case the appellant's evidence was stronger than that of the respondent.*

At the hearing of this appeal, Mr. Eliuta Kiviyiro learned advocate represented the appellant while the respondent was absent.



I would like to state a bit something unusual on the side of the Respondent as he did not enter appearance both in the District Court during the first appeal against him and in this court in this second appeal.

According to the proceedings of the District Court, the respondent was dully served with both the petition of appeal and the summons to appear for hearing. He did not however make any reply nor entered appearance. The appeal was thus heard ex parte but in a good luck, in his favour.

When this appeal came before me for hearing, it transpired that the respondent refused service as per affidavit of one Dickson P. Honya (Process Server);

*'Amekataa kupokea na kusema mahakama itakavyoamua ni  
hivyo hivyo'*

I adjourned the hearing of the appeal and ordered the re-service to the respondent. The appellant through another process server Job John Gwassa re-tried to effect re-service to the respondent but the respondent was once again reported to refuse service. In my absolute discretion I adjourned the hearing again and ordered personal appearance of the said Process Server to clarify whether he really knew

the respondent and tried to serve him. On 23/04/2021, Mr. Job John Gwassa entered appearance and explained before me that he knows well the respondent as he once worked with him in attachment of a certain vehicle in execution of the Decree which was in his favour. After such explanation I ordered another summons to be issued and be effected by the Process Server. This time the process server has sworn affidavit to the effect that the respondent has refused service once again;

*'Mdaiwa amepatikana na amekataa kupokea (0768919064)  
anasema hataki kesi, pili anamuuguza mama yake, na  
mwisho anamwachia Mungu.'*

In the circumstances, I was satisfied that all efforts to procure the attendance of the respondent has been made but fruitlessly. I thus heard this appeal exparte.

Back to the appeal, Mr. Kiviyro submitted on the first ground that, the hon. Appellate magistrate erred to have relied on the exhibit "A" the loan contract which was not read to the parties after its admission in evidence. He relied on the case of ***Samwel Kabonga Maulid versus UFK North West***, Land Appeal No. 21 of 2019, High Court at Kigoma in which this court held;



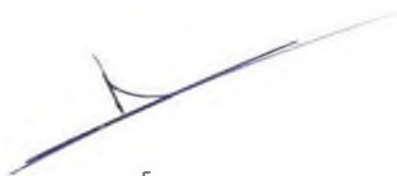
*'It has been clearly settled that whenever a documentary exhibit is tendered in evidence, the same must be read loud in the presence of the parties to accord them opportunity to hear its contents for their guard in defence against the document. This is both in Civil and Criminal trials.'*

The learned advocate thus faulted the appellate magistrate who was satisfied that the appellant knew the contents of the document exhibit "A" and that is why he even objected it disputing his signature after he was given to read it.

Admittedly exhibit "A" the loan agreement was not read to the appellant nor given to him to read it himself as purportedly by the learned appellate magistrate that the appellant was given it to read by himself.

The objection by the appellant of his signature in the said exhibit was just at the preliminary stages when the document was being cleared for its admission. The objection did not base on the contents of the document but its authenticity. The appellant did not object the admissibility on a single ground that the signature in it was not his but also that the said loan contract was altered the date;

*'Siufahamu Mkataba huo na hiyo saini sio yangu na mkataba huo umefutwa tarehe'*



Unfortunately, the learned trial magistrate did not make a ruling and or reason for the rejection of the objection. He merely and immediate after the objection admitted the exhibit without stating whether the objection had any merit or not;

*'Mahakama: Inapokea Kielelezo hicho cha mkataba na kukipa alama "A" Mdai.'*

After the admission of such exhibit SM1 who tendered it stepped out of the witness dock and SM2 stepped in.

In that regard, the appellant was not even given opportunity to cross examine on the document provided that he has attempted to object its admissibility by faulting the authenticity of it.

As rightly argued by Mr. Kiviyro learned advocate, exhibit "A" was wrongly relied on, not only by the appellate magistrate but also by the trial court as it was arbitrarily admitted in evidence, after its admission it was not read out to the appellant as per the principle in Samwel Kabonga Maulidi's case supra, and that; after its admission the appellant was not accorded opportunity to cross examine on it.

I am aware that Primary Courts have their own guidelines for the rules of evidence and are not strictly tied to the rules of evidence applicable in other courts such as District Courts, Resident Magistrates' Courts and

High Court. But even the Rules of Evidence in Primary Courts needs thorough explanation of the document in connection to the case after its admission in evidence. Thus, for instance paragraph 11 (2) of the Schedule to the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, G.N 22 of 1964 provides clearly that;

*"Where documentary evidence is produced, oral evidence must be given to connect it with the case"*

Reading from that paragraph of the rules of evidence in Primary Courts, the oral evidence required to be given connecting the documentary exhibit with the case can justifiably be inferred to be revealing the contents of the document and how such contents are relevant to the fact in issue in the case. In that regard, the rules of evidence in primary courts in relation to documentary evidence, are not that much far to the rules applicable in other courts serve for soften procedure in primary courts. What is all necessary, is that the contents of the document must be communicated to the party against whom the document has been tendered for him or her to prepare a well informed defence against such document and even for thorough cross examination.



To that extent, exhibit "A" is liable to be expunged and I accordingly expunge it from the record. The first ground of appeal is thus allowed.

On the second ground of appeal, the learned advocate for the appellant submitted that on the evidence on record, it was the appellant who had heavier evidence as against that of the respondent. He submitted that the appellant admitted to have borrowed only Tshs 5,000,000/= from the respondent and that he was given that amount at Mwembetogwa area and not at Exim Bank as alleged by the Respondent and his witness. That this evidence ought to have been believed than that of the respondent who alleged to have withdrawn Tshs. 12,600,000/= from the Exim bank on the alleged date and gave it to the appellant at Exim Bank area without any bank document corroborating the alleged fact. I agree with the appellant's counsel that in the circumstances of this case, where the parties are in dispute on the sum landed, the bank statement of the respondent was a vital document to corroborate the respondent's allegation that he went with the appellant at Exim Bank, withdrew such amount and gave it to the appellant.

In fact, the appellant cross examined on that fact bitterly not only against the respondent but also against the respondent's witness.



For instance, when the respondent was cross examined on the bank documents he replied;

*'Pay slip sina kwani sikumbuki ilipo'*

And his witness SM2 Mr. Athumani Ramadhani Madidi;

*'Stakabadhi za benki mdai anahusika. Fedha zilitolewa kwa pamoja. Hela zilitolewa mida ya saa 7 mchana'*

Such kind of cross examination indicated that the appellant was impeaching the evidence that Tshs 12,600,000/= was withdrawn from the bank on the material date and handled to him.

The trial court and the first appellate court ought to have accorded weight on such impeachment and require the respondent to clear the doubts and or the court itself call for the banker's book to satisfy itself on the authenticity of the allegation that Tshs 12,600,000/= was in fact withdrawn from Exim Bank on 22/04/2018 at 13.00 hours.

With the herein deficiencies in the respondent's case and the fact that exhibit "A" which was the subject matter of the dispute between the parties has been expunged, I find the second ground of appeal with merit as well and accordingly allow it.

Before I rest my judgment, I would like to remind the trial subordinate courts to avoid releasing exhibits when the case is about to go on

appeal as the appellate court is enjoined a duty to scrutinize the exhibits as well.

In the instant matter, had I not expunged exhibit "A" from the record, it would still be difficult for me to make my findings on it as it is not within the records. The document has been complained of, to have been altered but the same is not within the court record for scrutiny. Instead it is on record that on 30/01/2019, the respondent wrote a letter requesting for such exhibit on the so termed; '*Kwa ajili ya kumbukumbu zangu.*' On the same date the magistrate endorsed; '*Apatiwe.*' I don't know what transpired thereafter as on 05/04/2019, there is another letter by the respondent with the same contents to the Resident Magistrate of the trial court and on the same very date the respondent was given back exhibit "A" as per the handling note dated 5/4/2019 between the court officer one Agness Bushaje and the respondent.

The respondent did not enter appearance and it is him in custody of such document and therefore this court has been denied opportunity to see the exhibit and scrutinize it for its own verdict on it.

With the herein observations, this appeal is allowed with costs. The Judgment and Decree of the District Court as well as that of the trial primary court are all quashed.

Since the appellant did not pray for an order against him to pay Tshs. 5,000,000/= to the Respondent which he admitted during trial, and since the respondent did not plead that amount, nor pressed for judgment on admission of such amount and the fact that he did not enter appearance on this appeal to state anything on such amount, I do not decree the same against the appellant as it did not form the basis of the claim under the impugned contract. The appellant stated that such was an amount landed to him by the respondent on February, 2018 while the respondent's claim is that of 22/04/2018. In the circumstances, the two might be two different cause of actions. I therefore leave it for either the appellant to repay the same amicably or the respondent to commence the suit on it for determination by the court of competent jurisdiction. This is due to the fact that the appellant admits what the respondent denies.

It is so ordered.



  
**A. Matuma**

**Judge**

**18/05/2021**

**Court:** Judgment delivered in Chambers this 18<sup>th</sup> day of May, 2021 in the presence of Mr. Eliuta Kiviyiro learned advocate for the Appellant and in the absence of the respondent.

**Sgd: A. Matuma**

**Judge**

**18/05/2021**