

IN THE HIGH COURT OF TANZANIA

AT MWANZA

HC CIVIL APPEAL NO. 06 OF 2021

*(Arising from Exparte judgment in RM Civil Case No. 70 of 2019, in the
Resident Magistrate's Court of Mwanza at Mwanza)*

BAHATI KIPILI LWAMA APPELLANT

VERSUS

TUJIJENGE TANZANIA LIMITED RESPONDENT

JUDGMENT

17 & 31/05/2021

RUMANYIKA, J

The appeal is against exparte judgment and decree dated 30.11.2020 of Mwanza Resident Magistrate Court (the trial court) with respect to claims on breach of loan agreement presented by Bahati Kipili Lwama (the appellant) against Tujijenge Tanzania Ltd (the respondent) the trial court having had ruled that entirely the latter did not on balance of probabilities prove it. When, by way of audio teleconferencing the matter was called on 05/05/021 for hearing Messrs Samwel Kazenga and Olivia Merchior learned

counsel appeared for the Appellant and respondent respectively. I heard them through mobile numbers 0686 702 308 and 0653 393 539.

The sole ground of appeal actually revolved around evaluation of the evidence.

Mr. S. Kazenga learned Counsel submitted that in fact the appellant was not in breach of the loan agreement nor had he registered the alleged shop items as collateral or something. No notice of default was ever issued or at all served on the appellant and the latter actually had proved his case on the required balance of probabilities.

On her side Ms. O. Merchior learned counsel submitted that according to Annexure 1 to the plaint no doubts the parties had executed the loan agreement on 08.04.2021 much as also, the appellant was on record having had acknowledged receipt of several default notices and contrary to the agreed amount of shs. 340,000/= monthly, the appellant only paid as little installments as he only chose hence the total of the outstanding sum plus penalty and interest the latter therefore having had defaulted for more than 120 days. That the list and value of the shop items attached it left much to be desired therefore nothing to fault the trial court. We pray for dismissal of the appeal counsel further contended.

A brief account of the evidence on record reads thus:

Pw1 Bahati Kapili Lwama stated that for the previous six (6) years he owned and ran a hardware shop at Kilimahewa area, Kiloleli B Ilemela district in Mwanza and having had been barrowing from the respondent but this time around upon depositing shs. 400,000/= (Exhibit P2) they lend him shs. 3,000,000/= in 2018 fully repayable on or by 08.03.2019 leave alone a parcel of land and shop business that he had registered as collateral and he paid the installments regularly (Annexure 4- Exhibits P1, P11 and P111). That he should have paid them shs. 340,000/= monthly but without notice and in his back on 02.01.2019, say 6 days before expiry of the loan term, instead of the alleged outstanding shs. 1,200,000/= the respondent swept away all the shop items worth shs. 40,000,000/=. That in attempt to settle, say five days later, at the respondents' request he paid shs. 300,000/= and by that that time therefore he was done.

Pw2 Yuda Eliud Kapili son of the appellant stated that as he was on the material 02.01.2019 at work as shop assistant, the respondent's agents inclusive of one Happy a lady but in absence of the appellant and any local leaders they just stormed in and swept away all the shop items whose list they did not even let him (Pw2) sign. That is it.

Having have sufficiently considered the appellant's evidence on record the central issue is no longer whether or not, between the parties there was breach of the loan agreement because not only contrary to the agreed monthly installments of shs 340,000/= (Clause 1 of the Contract), and one he admitted, at times the appellant only paid shs. 100,000/=, 80,000/= and even shs. 20,000/= monthly, but also contrary to the legal principal he who alleges must prove, the appellant did not sufficiently show that he was long ago done. Perhaps one was no longer aware of the elements of interest and penalty chargeable. Whether or not attachment was done three months before expiry of the loan term in my considered opinion it was immaterial under the obtaining circumstances.

With regard to the whole shop items having had been swept away by the respondent, from the outset that one the appellant should have had foreseen because it is dictates of English Common Law that it is only the principles of sanctity of contract that counted much as also, it is trite law that parties are bound by their pleadings (in this case paragraphs 4, 5, and 6 of the plaint).

The shop items, if it all swept away with regard to contract the collateral, they may have had been totally valued at shs. 40,000,000/= but as specific as the damages alleged were, the appellant should have

specifically proved it but like the learned trial resident magistrate correctly held, with greatest respect the former didn't, leave alone existence of the stock on trade.

In the upshot, the appeal is devoid of merits. It is dismissed with costs. It is so ordered.

Right of appeal explained.


S. M. Rumanyika

JUDGE

27.05.2021

The judgment is delivered under my hand and seal of the court in chambers this 31.05.2021 in the absence of the parties.




S. M. Rumanyika

JUDGE

31.05.2021