

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CIVIL APPEAL NO.18 OF 2021

(Originating from the District Court of Chato at Chato in Civil Case No. 02 of 2020)

ROJAS FORTUNATUS 1st APPELANT

GLADIUS MKATAKIU 2nd APPELANT

VERSUS

EVA LUDIGILA RESPONDENT

RULING

Date of last Order: 24.06.2021

Date of Ruling: 24.06.2021

A.Z.MGEYEKWA, J.

The appellants appealed against the Judgment of the District Court of Chato in Civil case No. 02 of 2020, which was decided in favor of the respondent.

The background to this appeal is briefly that, the respondent instituted a Civil Suit No. 02 of 2020 before Chato District Court claiming from the appellants for the payment of Tshs. 7,225,000/= being a loan advanced

to them and general damages at a tune of Tshs. 4,500,000/= plus 10% interest from the date of the judgment to the date of the payment in full and costs of the case. When the case was fixed for hearing at a trial court, the 2nd defendant did not appear and his advocate conceded to proceed under Order IX Rule 8 of the Civil Procedure Code Cap. 33 [RE: 2019].

During the trial, the matter was determined and the court had its verdict in favour of the plaintiff thus the case against the 1st and 2nd defendants was proved in the balance of probabilities, and the plaintiff was awarded a sum of Tshs. 7,225,000/= being the loan advanced to appellants as claimed, and Tshs. 2,500,000/= as general damages.

The defendants before Chato District Court were not content and pursuing justice, they appealed to this court based on the following grounds:-

1. *That the trial court erred in law and in fact in composing Judgment for violating the mandatory provision of Order IX Rule 8 of the Civil Procedure Code cap 33 [RE: 2019]*
2. *That the trial court erred in law and in fact by deciding that the appellant herein has failed to repay the loan of Tshs. 7,225,000/= to the respondent herein on time while the said amount was not specifically and substantially proved.*

3. *That the trial court failed to analyse and consider the weight of evidence given by the respondent and the 1st appellant on its judgment contrary to the rule of law on the balance of probabilities.*
4. *That, the trial court erred in law and in fact for considering the evidence of the respondent which is full of contradictions and therefore unreliable.*

When served with the copy of the petition of appeal, the counsel for the respondent on 10.06.2021, filed before this court a Notice of Preliminary Objection that the appeal is bad in law, the 2nd appellant contravened Order IX Rule 9 of the Civil Procedure Code Cap.33 [R.E 2019].

Again, on 15.06.2021, the respondent learned advocate filed before this court additional Notice of Preliminary Objection that the appeal is bad in law for the 2nd Appellant for contravening Order XXXIX Rule 1(1) of the Civil Procedure Code Cap 33 [RE: 2019].

The matter was called for hearing of the Preliminary Objection on 24.06.2021 whereby the appellants had the service of Beatrice Paulo learned counsel and the Respondent had the service of Mr. Salilo Learned Advocate.

When the respondents learned counsel paraded the matter, Ms. Beatrice, learned counsel had no time to waste, and hitting the point, she enlightens this court that she went through the records and found that the Preliminary Point raised by the respondent's Advocate has merit and therefore she conceded that the appeal be struck out without cost.

Cherishing the precious time of the court, Mr. Salilo has nothing to object rather retires insisting this court to strike out the appeal without cost.

I have given due consideration to the submissions of both learned counsels, whereby the learned counsel for the appellant has conceded that the appeal is defective.

I have had time to revisit the law and find out what is claimed by the learned counsels. Under Order IX Rule 9 of the Civil Procedure Code Cap 33 [RE: 2019] the law provides that: -

"In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him..."

I am in agreement with what has been claimed by the learned counsel that the appeal is bad in law for the records at the trial court shows that the trial against the 2nd appellant proceeded *ex parte* and the remedy available to him was to apply to the trial court for an order to set aside the ex-parte proof and appeal was not proper.

In the upshot, I proceed to strike out the appeal. No order as to the costs.

Order accordingly.

Dated at Mwanza this date 24th June, 2021.




A.Z.MGEYEKWA

JUDGE

24.06.2021

Ruling delivered on 24th June, 2021 whereas in the presence of Ms. Beatrice Paul, learned counsel for the applicant and Mr. Salilo, learned counsel for the respondent.


A.Z.MGEYEKWA

JUDGE

24.06.2021