IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CIVIL APPEAL NO. 25 OF 2020

(Appeal from the judgment of the District Court of Ilemela at Ilemela (Sumari, RM) in Civil Appeal No. 17 of 2019 dated 31st of December, 2019)

MATHIAS PAUL MTASA ..... APPELLANT

VERSUS

RUTH MHOJA ..... 1ST RESPONDENT
ONESMO MRUSHI ..... 2ND RESPONDENT
EMMANUEL MRUSHI ..... 3RD RESPONDENT

JUDGMENT

25th March, & 11th June, 2021

ISMAIL, J.

The proceedings that bred the instant appeal were commenced in the Primary Court of Ilemela at Ilemela, and it involved a claim of TZS. 3,543,900/-. The said sum constituted the aggregate of TZS. 2,568,900/-, allegedly loaned to the respondents, and TZS. 975,000/- which is alleged

to be the value of assorted electronic items. Having allegedly failed to settle these outstanding sums, the appellant took his battle to court. The respondents admitted to the indebtedness but only to the tune of TZS. 550,000/-, while the balance was denied. The view held by the defence side was that, though the sum TZS. 1,400,000/- was applied for, the same was never disbursed. After a hearing that saw the attendance of five witnesses, the trial court sustained the claim of TZS. 550,000/-, whilst the remainder of the claim was dismissed for want of sufficient evidence.

This decision triggered an appeal which was preferred by the appellant. The 1st appellate court, before which the appeal was preferred, saw nothing blemished in the decision of the trial court. It dismissed the appeal and upheld the decision of the trial court much to the appellant's dissatisfaction. This decision did not amuse the appellant. He chose to climb a ladder up to this Court with the instant appeal. The appeal has two grounds, reproduced as hereunder:

1. *That the first appellate magistrate misdirected himself for his failure to evaluate properly the appellant's watertight evidence on record concerning his claims of money against the respondents.*

2. *That the first appellate magistrate did err for his failure to give weight to the appellant's documentary evidence with regard to the second loan to the 2nd respondent despite the admission by the latter to have received the same.*

Disposal of the appeal was done by way of written submissions, preferred by counsel for both parties. These submissions were filed within the scheduled time.

Getting us under way was Mr. John Edward, learned counsel for the appellant. With respect to ground one of the appeal, the counsel's contention is that, while the appellant adduced ample evidence (through a letter) that he lent money to the 2nd respondent, there is no evidence that such sum was paid to the appellant. The appellant's counsel played down the contention that disbursement of the sum was to await completion of the agreement by a lawyer. He argued that the said agreement was taken to the lawyer just for information and not for attestation. The learned counsel took the view that evidence in support of his case was watertight and it ought not to have been ignored. He argued that evidence tendered in the trial court was not in conformity with section 110 (1) of the Evidence Act, R.E. 2002. In the counsel's

view, the appellant's advocate had a water tight evidence to support the findings at made.

With regards to the second ground of appeal, the appellant's argument is that evidence adduced by the appellant was not accorded weight. The counsel argued that the 1st appellate court failed to appreciate the evidence tendered, whilst there were documents to prove that the second loan of TZS. 1,418,920/- was actually disbursed to the plaintiff. The counsel submitted that the 1st appellate court chose to remain silent and failed to act on the documents which were sent to a lawyer just for information and not for attestation.

The learned counsel urged the Court to allow the appeal and quash the proceedings and judgment of the lower courts with costs.

For his part, Mr. Silas John, who advocated for the respondents, took the view that the appeal is lacking in merit. With respect to ground one, his view is that the evidence adduced by the appellant was not watertight to answer the question on whether the sum of TZS. 1,418,920/- was actually disbursed to the respondents. He took the view that the testimony of the appellant's fulfilment of his promise was lacking. Submitting on exhibit P2, the learned counsel argued that DW1,

DW2, DW3 and DW4 were all unanimous that exhibit P2, which is a loan agreement for the sum of TZS. 1,418,920/-, was not fully executed and, as such, the sum which was to be lent on the basis thereof was not disbursed. The learned counsel especially singled out the testimony of Msuguli Tete Chanyingu who testified that he never approved the loan sum of TZS. 1,400,000/-. Mr. John argued that this testimony contradicted the appellant's testimony which stated that the sum owing was handed to the 2nd respondent in the presence of Mr. Chanyingu.

The learned counsel stressed his contention by submitting that mere signing of an agreement would not, *ipso facto*, be the basis of attaching liability where the parties are yet to fulfil their obligations or promises.

In his brief reply to the appellant's submission on ground two, Mr. John relied on the submission made with respect to ground one and held the view that there was no evidence to prove that the appellant paid out the sum owed. It was his contention that, at the instance of the appellant, the contract had not been performed. He concluded by urging the Court to uphold the concurrent decisions of the lower courts and prayed that the appeal be dismissed with costs.

In his rejoinder, the appellant's counsel reiterated what he stated in his submission in chief, and maintained that the 2nd respondent appended his signature to exhibit P2 and that he was bound by the contents of the document he signed. He added that the 2nd respondent cannot be allowed to escape a liability by relying on technicalities. The learned counsel maintained that exhibit P2 was taken to a lawyer just for information of what was going on and confirm if the drafting was in order. It was his contention that the contract becomes binding the moment it is signed by the parties and it does not matter if the subject matter of the said contract was consummated or not. Mr. Edward contended that a mere objection by DW4 that he did not see the appellant disbursing the loan sum of TZS. 1,418,920/- raised questions about DW4's testimony. He maintained that the lower courts indulged in an error when they failed to properly evaluate the appellant's watertight evidence and give weight to the documentary evidence adduced by the appellant.

Given the similar nature of the grounds of appeal, I chose to deal with these grounds of appeal in a combined fashion, and the crucial

issue for determination is whether the concurrent findings of the lower courts were erroneous.

As submitted by both counsel, the divergence by the parties appears to rest on the sum of TZS. 1,418,920/- which was allegedly advanced through exhibit P2. This is so because, as the 1st appellate court rightly concluded, the claim of TZS. 550,000/- does not appear to have any contention. The respondents admit that this sum is still owing.

With respect to the remainder of the claim, my observation is that the signing of the agreement (exhibit P2) brings no contention between the parties. What is contentious is whether, after the agreement had been executed by the parties, the sum constituting the subject matter of the loan agreement was disbursed. While the respondents contend that such disbursement was neither done nor witnessed, the appellant's emphasis seems to be premised on the execution of the agreement, without anything to support the contention that the sum changed hands. In my view, the changing of hands of the sum allegedly owing is what would constitute an obligation on the part of the respondents, and not mere appendage of signatures to the agreement. Going by the testimony of DW3, DW4, it is clear that the second tranche of the loan was not paid. DW4, was

especially factual and bold in his testimony that he expressed his reluctance to the appendage of signatures before any release of the payment. He testified that, up until the signing of the agreement, the loan amount had not been seen or paid to the respondents. This view has been supported by the 1st appellate court.

The concurrent view taken by the lower courts is that, while evidence of signing of the loan agreement is abundant, none is prevalent on whether such sum was actually disbursed to the respondents. This is a finding that I find to be perfectly sound and unblemished. It is a finding that is not tainted with any misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure, and I am inclined to get along with it. I find no justification to fault them. My position is predicated on the trite position set out in ***Fatuma Ally v. Ally Shabani***, CAT – Civil Appeal No. 103 of 2009 (unreported), in which it was held as follows:

> *"Where there are concurrent findings of fact by two Courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law*

or procedure. In other words, concurrent findings of facts by lower Courts should not be interfered with except under certain circumstances."

The counsel for the appellant has maintained that the parties are bound by their undertakings under the agreement (exhibit P2), contending that the said agreement was admittedly taken to the lawyer, but just for informing his lawyer on the stage at which the appellant had reached, and whether the same had been properly written. This allegation is stranger than fiction because I do not comprehend what would a lawyer do with an agreement that had been executed by the parties, other than notarizing it. The contention that the same was intended to be reviewed by the lawyer and/or assess its propriety does not wash to me. Would the lawyer's comment post-signing have any bearing on the contract that had already been signed?

The appellant has also argued that signing of exhibit P2 could not precede the disbursement of the funds, contending that a mere denial by the street chairman that he did not witness the disbursement is not enough to dilute the fact that the parties signed the agreement. This is in sharp contrast with the testimony adduced by the defence witnesses. These are DW2 (SU2) and DW3 (SU3) both of whom were of a unanimous view that

the actual disbursement was subject to completion of the agreement by having the appellant's lawyer append his signature. This was not done. DW2 is quoted at pages 25 and 26 stating as follows:

> *"Ndiyo nilimwomba anisaidie tena pesa kiasi cha 1,418,920/- napo alisema niweke picha na niweke familia kama shahidi na kwenda kwa mwenyekiti kugonga muhuri ili akienda kumfatia hela waamini kuwa ni mimi; Alienda kugonga mhuhuri na yeye na shahidi wake hawakutia sahihi na alidai mkopo ukikamilika mwanasheria wake atafika kusaini lakini baada ya siku mdaiwa hakufanikiwa na hela haikupatikani."*

This excerpt is echoed by the testimony of DW3 Msuguli Tete Nyachingu, who also testified as PW2 (SM2). He is quoted as saying the following at pages 28 and 29 of the typed trial proceedings:

> *"Kwa wadaawa mimi ni mwenyekiti wa mtaa wanaoishi; Mlalamikaji aliwahi kufika na barua kudai kutaka kumkopesha mdaiwa 2 pesa thamani ya 1,400,000/- nilijiridhisha kwa kuuliza naye mdaiwa alikubali; Baada ya hapo aliondoka akidai akishakamilisha mwanasheria wake atasaini na nikabaki na nakala mwanasheria sikumwona hadi alipoleta lalamiko kuwa hajalipwa pesa zake, tulihoji kwa nini hakurudi kukabidhiana kama alivyoahidi lakini hakukuwa na jibu. .... Sijawahi kuidhinisha mkopo zaidi ya*

mmoja. .... Sikuziona hela kwa macho ni karatasi tu kimaandishi."

With respect to the learned counsel, I find this contention unconvincing. Since the contention has been narrowed down to whether payment was effected or not, need for proving that such payment was paid prior to the signing is all too important. It constitutes a burden that should be discharged by the appellant. Like in all civil cases, such burden is on the balance of probabilities, consistent with the requirements of section 110 of the Tanzania Evidence Act, Cap 6. As stated in various decisions of this Court, including ***Khalfan Abdallah Hemed v. Juma Mahende Wang'anyi***, HC-Civil Case No. 25 of 2017 (MZA-unreported), the position in the cited provision traces its roots from the Indian Evidence Act, 1872. The latter statute has been discussed in the legendary commentaries made by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis*, which states at page 1896, as follows:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient*

rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case. ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

The views in the quoted passage bed well with of Lord Denning's splendid reasoning in ***Miller v. Minister of Pensions*** [1937] 2 All. ER 372, cited with approval in the most recent decision of the Court of Appeal of Tanzania in ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported). He held as follows:

"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches of the same degree of cogency as is required

to discharge a burden in a civil case. That degree is well settled. It must carry reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think is it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not ...."

It is my unflustered view that the trial court and the 1st appellate court was, as was the case with the trial court, quite spot on in their evaluation of evidence and their concurrent findings that the aspect of disbursement of the loaned amount was not proved. I hold the view, in consequence, that this appeal is barren of fruits. Accordingly, I dismiss it with costs.

Order accordingly.

Right of appeal duly explained.

DATED at **MWANZA** this 11th day of June, 2021.

M.K. ISMAIL

JUDGE

Date: 11/06/2021

Coram: Hon. M. K. Ismail, J

Appellant:

Respondent:

B/C: J. Mhina

Court:

Judgment delivered in chamber in virtual absence of both parties this 11th June, 2021.

M. K. Ismail

JUDGE

At Mwanza

11th June, 2021