IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL No. 240 of 2020

GEORGE PETER WANNA..... APPELLANT

VERSUS

AFRICAN MICROFINANCE LIMITED.....RESPONDENT

(From the decision of the Resident Magistrates' Court of Dar es Salaam at Kisutu)

(Mbando, Esq- SRM)

Dated 8th July, 2020

in

Civil Case No.67 of 2018

JUDGEMENT

12th July & 20th August 2021

Rwizile, J.

This appeal traces its origin in Civil Case No.67 of 2018 which was instituted by the appellant herein at the resident magistrate court of Dar es salaam at Kisutu. Factually, it was on 1st July 2017 when the parties herein entered into a loan agreement. Whereby respondent advanced a loan of 30,000,000/= to the appellant to be repayable after four months. Appellant pledged his matrimonial house and some of the house hold items as collateral to secure the said loan. The appellant upon getting the loan, he entrusted the same to his business partner who defrauded him.

He managed to repay the loan at the tune of 15,100,000/=. On 29.01.2018, he wrote a letter to the respondent to seek for restructuring terms of payment of the loan, which was accepted. On 24.02.2018 officers of the respondent went to his house and took the house hold items which placed as collateral for the loan, without notice. He wrote a letter to request for the same to be returned but in vain. The items-collateral were sold by the respondent at the lower price without considering the value of each item.

The appellant asked the respondent to discharge his matrimonial house on ground that the sold items that were placed as collateral were enough to settle the remaining amount. The respondent refused. The appellant therefore filed a civil suit to claiming discharge of his matrimonial house as collateral to secure the loan, payment of 10,000,000/= as general damages and costs of the suit.

The respondent filed a counter claim seeking for the appellant to pay 28,600,000/= being the outstanding loan remain unpaid, an order for vacant possession and sale of landed property, general damages, interest at the commercial rates of 12% and costs of the suit.

After a full trial judgement was entered in favour of the respondent. by ordering the appellant to pay the outstanding balance of 22,000,000/=. The appellant was aggrieved by the said decision; he is now before this court appealing on eight grounds that;

1. *That the trial magistrate erred in both law and fact by ordering the appellant to pay TZS22,000,000/= to the respondent without considering the respondent's unlawful conduct of taking the*

appellant's house hold items whose value was enough to discharge the outstanding loan that the respondent owed the appellant.

2. *The trial magistrate erred in both law and fact by ordering the appellant to repay the outstanding loan and interest to respondent after finding that respondent has no legal capacity for lending monies.*
3. *The trial magistrate erred in both law and fact by ordering the appellant to repay the respondent 22,000,000/= as the outstanding principal loan and interest thereof without proof of the awarded sum.*
4. *The trial magistrate erred in both law and fact by holding that the auction of the appellant's household items, as alleged by the respondent was unlawful but at the same time legalizing the alleged unlawful auction.*
5. *After finding that there was no proof from the respondent of selling the appellant's household item at 2,800,000/= only or any other figure, the trial magistrate erred in both law and fact to set the value of the item at 6,000,000/= only, the figures which the trial magistrate lastly used to enter judgement in favour of the respondent.*
6. *The trial magistrate erred in both law and fact by her failure to consider in the judgement the amount which the appellant had already paid to the respondent in order to offset it from the outstanding loan, if any.*
7. *The trial magistrate erred in both law and fact to enter judgement in favour of the respondent who did not prove her case against the*

appellant at the standard required in civil case/ on balance of probability.

8. *The trial magistrate erred in both law and fact by her failure to enter judgement in favour of the appellant who proved her case against the respondent at the standard required on balance of probability.*

He therefore prayed for this appeal to be allowed, judgement of the trial court to be quashed and costs of this appeal be provided for. At the hearing the appellant was represented by Sasa Advocate. While for the respondent was Ms Masecha learned advocate. Parties agreed to argue the appeal by written submission.

Supporting the appeal, Mr Alex argued on ground 1 that, since the trial magistrate held that the sale procedures were not followed. According to him, that barred the same from legalising the illegal conduct of the respondent taking the appellant's household item. He referred this court to page 10 para 5 of the typed judgement.

As for ground 2, he submitted by citing section 16 of The Microfinance Act [Cap 197 R. E 2018] and section 6(1) of the Banking and Financial Institution Act. The same prohibit a non-licenced person to engage in the banking business. According to him, the trial magistrate erred in deciding in favour of the respondent. After finding out that respondent had no capacity of lending money. He invited this court to page 11 para 4 of the typed judgement. He also cited the cases of **Mauri Tan Holding Limited vs The Copy Cat Tanzania Limited and three others**, Misc Commercial Cause No. 33 of 2020 at page 17 and **Ronjino Matuli vs George Katambi**, Pc Civil Appeal No. 35 of 2020.

It was his argument on ground 3 that, the requirement of the law under section 110 of the Evidence Act is whoever alleges must prove. He then said, the trial magistrate erred in holding that appellant has to pay 22,000,000/=. He added that, the said figure was not established in evidence by the parties.

On ground 4, learned advocate argued, since at page 10-11 of the trial court judgement, it condemns the auction to be unlawfully. Learned advocate said, the trial magistrate was not justified to legalise it by deciding in favour of the respondent.

His argument on ground 5 was, the trial magistrate erred in assuming that the items would have been sold at the tune of 6,000,000/=. He said, the said amount was not pleaded by respondent at the trial. It was the learned advocate's view that, the trial magistrate assumed the said value which according to him is contrary to the law. To support his argument, he cited the case of **African Banking Corporation vs Sekela Brown Mwakasege**, Civil Appeal No. 127 of 2017.

He submitted on ground 6 that, it was undisputed that appellant made several payments of the loan to the total amount of 15,100,000/=. Which he said, the trial court failed to set off the same from the principal sum. Hence, he said, appellant suffered injustice.

On ground 7, Mr. Alex learned advocate asserted that, in civil cases proof is on the balance of probability. He added that, at the trial, the respondent failed to prove if she had capacity to give loan on interest, the actual outstanding loan and interest, the lawfully proof of selling the appellant's properties, the amount secured and how the same offset the outstanding amount.

Lastly on ground 8, he said, appellant proved his case at the trial. He added that, he proved that he had already repaid 15,100,000/=of the loan. He also said, he testified to have not been given a default notice. And that the auction was illegal. He therefore said, the judgement ought to have been entered in the appellant's favour and not the respondent. He therefore prayed for this appeal to be allowed with costs.

Disputing the appeal, the learned advocate argued on ground 1 and 4 that, the trial magistrate was right in holding that respondent has to be paid 22,000,000/= by the appellant. He said, the allegation by appellant that the item was unlawfully sold is baseless. His reason was, since the same was security for the loan, upon default they were to be sold. He also said, the amount of 22,000,000/= was obtained by the trial court after setoff of 6,000,000/= the forced market value from the outstanding amount of 28,000,000/=. He referred this court to page 11 of the typed judgement. He therefore said the grounds are baseless.

On ground 2, the learned advocate argued that the parties to this appeal entered into the contract freely. The same should be performed. He added that at the trial, the appellant admitted to have borrowed money from the respondent and defaulted in repaying 28,000,000/=. He argued, depending on the sanctity of contract, there is reluctance to accept the appellant's version on non-performance of the contract. He also said, the decision in the case of **Mauri Tan Holding Limited** (supra) was overruled by the case of **Simon Kichele Chacha vs Aveline M. Kilawe**, Civil Appeal No. 160/2018 (unreported).

The learned advocate argued together ground 3 and 5 that, it was not in dispute that before filing the case at the trial court, the standing debt was 28,000,000/=. He said, appellant admitted to the said amount being the balance remined unpaid. He asserted further that; it is crystal clear in the judgement how the trial court came up with 22,000,000/=. He referred to page 11-12 of the judgement. According to him, the trial magistrate did not assume the figure, rather she shows the basis of ascertaining the value of the home furniture.

Lastly, it was his argument on ground 6, 7 and 8 that, the trial magistrate was right in deciding what it did. He said, the appellant failed to prove what he alleged at the trial as per section 110 of TEA. He was clear that, the respondent proved her case at the standard required. It is undisputed, he argued that the appellant is owing the respondent 28,000,000/= as an unpaid balance. To support the same, he cited the case of **Justine Paul Makabi and 50 others vs Nyaso Enterprises Co. Ltd and Another**, Land Case No. 128 of 2012) [2018] TZHC 69 (unreported)

He therefore prayed for this appeal to be dismissed with costs. When re-joining, learned advocate had no any substantial argument to add, rather he reiterated what he submitted in chief.

Having considered the rival submission of the learned counsel and the record of the lower court. and after meditating the grounds of appeal, I think I am going to deal with ground two which I consider to be based on the point of law. The said ground reads;

The trial magistrate erred in both law and fact by ordering the appellant to repay the outstanding loan and interest to respondent after finding that respondent has no legal capacity for lending monies

This ground raises the question as to whether respondent is a registered financial institution who can lend money to be repayable with interest. As it transpired, the record shows that, the respondent is a Micro-finance Company dealing with providing loans. And the same to be payable with interest. It goes without saying that, the same is a financial institution undertaking banking business.

Section 3 of the Banking and financial Institution Act No.5 of 2006 defines micro finance company to mean;

> *a financial institution incorporated as a company limited by shares formed to undertake banking business primarily with households, small holder farmers and micro-enterprises in rural or urban areas of Tanzania Mainland and Tanzania Zanzibar*

And for the company which undertakes banking business must be registered by BOT in accordance with the provision of section 6 of Act No.5 of 2006 and section 17(1) of the Microfinance Act, No.10 of 2018 (which has to be read together with section 5(1)(b) of the same Act. Which states;

> *6.(1) A person may not engage in the banking business or otherwise accept deposits from the general public unless that person has a licence issued by the Bank in accordance with the provisions of this Part.*
>
> *17.-(1) A person who intends to undertake microfinance business under Tier 2 shall apply to the Bank for a license in a manner as prescribed in the regulations.*

Coming to this case at hand, it was submitted by the appellant that, the respondent is not legally allowed to lend money. But the respondent disputed the same by saying that she is allowed to lend money even without a banking licence, since what matters is the sanctity of the contract between the parties. Humbly, I am in agreement with the counsel for the respondent because, since in the case of **Simon Kichele Chacha vs Aveline M. Kiwale,** Civil Appeal No.160 of 2018, the Court of Appeal emphasized on sanctity of contract. It was stated that, parties are bound by the agreement they freely entered into. It is a fact that, parties do not dispute that they entered into the loan agreement. In **Simon Kichele Chacha** (supra) it was held;

> *It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in* ***Abualy Alibhai Azizi v. Bhatia Brothers Ltd*** *[2000] T.L.R 288 at page 289 thus: -*
>
> > *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"*

Basing on the foregoing, this ground of appeal lacks merit.

The rest of the grounds, in my view are hinged on whether the district court erred in ordering appellant to pay 22,000,000/= despite the fact that his collateral was sold unlawfully.

Appellant's main argument was that, the trial court erred in ordering him to pay 22,000,000/= as an outstanding balance of the loan for the reasons that; his collateral was unlawfully sold, the respondent did not give a default notice and inform him about the auction, considering the value of collateral to be 6,000,000/=.

To begin with, I think it is prudent to ascertain facts which are not in dispute. The fact that parties entered into a loan agreement is not in dispute. Among the collaterals were appellant's household items which upon default were to be sold. It is also undisputed that, before 29/1/2018 the appellant had already repaid 15,100,000/=. So, it is therefore the remaining unpaid loan was 28,000,000/=.

In answering the foregoing issue above, it has to be noted that, it is on record that on 29/1/2018 the appellant wrote a letter to the respondent asking for restructuring the mode of payment. In it, he has shown, he would pay in four instalments a total sum of 28,000,000/=, his request was accepted. It is therefore certain that, as on 29/1/2018 the appellant was owing the respondents a balance of 28,000,000/=.

It is on record also that, on 24/2/2018 the respondent through his officers took the appellant's household items and sold them by auction without according him a default notice. It is for the very fact which appellant alleged is contrary to the law. I must say, I am in agreement with the appellant and the district court that, the respondent ought to have given a sufficient notice to the appellant before seizing the items. Failure to do so is an omission which is unlawful.

However, as much as I agree with that fact, I am not, with all due respect declare the sale of collateral void. I am saying so because despite the fact that, appellant was not given the said notice, it was in his knowledge that he defaulted in repaying the loan. It is for the same reason he asked for restructuring mode of payment.

Accordingly, I faulting the district court considering the value of collateral to be 6,000,000/= instead of 2,800,000/=, which the respondent claimed to earn after the selling of the collateral. It should be noted that the appellant was not given default notice and was not informed about the auction. When he ought to be acquainted with the said information. The said omission, gives a presumption that, if appellant could have known about the auction, he could have got some customers who would have bought the said item at higher price. But still, there is no evidence that proved if indeed, the auction was conducted. Still, if it was conducted was it in the fairly done and complied with transparent rules of the auction. I therefore do not see the basis for setting the value of the said collateral at a forced market value of 6,000,000/=.

It was also argued by appellant that, 22,000,000/= which the court ordered to be paid was not pleaded by the parties. I find this argument to be unjustifiable. Since it is crystal clear that, district court took the total outstanding balance of 28,000,000/= which appellant is yet to repay and deducted therefrom the sum of 6,000,000/= which was considered to be the forced market value of the collateral (household items). But as I have shown before, failure to give a default notice is an irregularity that cannot go unpunished. This in my view, is premise where unscrupulous money lenders may use to corner their defaulting customers.

I have held before that parties are bound by the terms of contract which is a legal issue. In equal force, executing terms of the contract upon default should squarely fallow the law. I therefore find these grounds with merit that the respondent cannot benefit from his own wrong. The view of the appellant that the collateral settled the remaining amount has merit.

Lastly, I find merit on grounds 1,3,4,5,6,7 and 8. That being the case, this appeal is allowed with costs.

AK. Rwizile
Judge
20.08. 2021

Recoverable Signature

X

Signed by: A.K.RWIZILE