

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**AT TABORA**

**PC. CIVIL APPEAL NO. 28 OF 2020**

*(Originating from Urambo District Court in Civil*

*Appeal No. 10 of 2020).*

**SHABAN KAYUNGILO .....APPELLANT**

**VERSUS**

**EINSTEIN ENTERPRISES LTD .....RESPONDENTS**

**JUDGMENT**

*Date:23/6/2021 &8/9/2021*

**BAHATI,J.:**

The brief fact of the case is that the plaintiff is a company doing microfinance business. The first defendant, Mashaka Yasini in Civil Cause No. 30/2020 on the 29<sup>th</sup> day of February 2020 borrowed the plaintiff TZS 1,000,000/= for the return of TZS. 1,200,000,000/=; TZS 200,000:00/= being the interest of the loan to be paid within forty (40) days and the return scheduled daily in which he had to return TZS 30,000.00/= every day and his property charged as security for the loan. Until the 15<sup>th</sup> day of March 2020, Mashaka Yassin made a return of TZS 810,000.00/= which make the remain of TZS. 390.000.00/=.

In their contract, the appellant, Shaban Kayungilo in the civil cause No. 30/2020 stood as guarantor of the said Mashaka Yassini. Mashaka Yassin defaulted to make a return of the remaining amount and run

away from being responsible for payments. The respondent instituted a suit against the appellant and the second respondent in Civil Cause No. 30/2020 within Kaliua Primary Court to which the appellant aggrieved by its decision and he later appealed to the District Court of Urambo in which he was also aggrieved by the court decision hence came to this court for the second appeal that;

- 1. That the magistrate erred in law and facts by not taking into consideration the second ground of appeal, that is to say, the District Court never considered the issue of a certificate of microfinance business license from the Bank of Tanzania that arose during the trial proceedings.*

Wherefore the appellant prays for the following reliefs that;

- 1. The decision of the trial and appellate court be quashed*
- 2. The appeal be allowed with costs.*

During the hearing of the appeal, parties urged this court to submit by way of written submission which the court granted.

Submitting on the first ground, the appellant stated that the magistrate erred in law and fact by not taking into account the issue of a certificate of microfinance business licence from the Bank of Tanzania that arose during the trial proceedings that the respondent was illegal conducting microfinance business by the time she contracted with Mashaka Yassin

as she was not legally established and registered under section 4(1) of the Microfinance Act, No. 10 of 2018.

He further reinforced that the provision of the Microfinance Act is simple as that for a person to conduct microfinance business within the jurisdiction of Tanzania must be legally established and registered under the Microfinance Act No. 10 of 2018. That means, doing microfinance business without registration renders all transactions illegal and *void ab initio* because the person lacks legal stand to transact.

He then contended that the provision of section 16 (1) and (2) of the Microfinance Act, No. 10 of 2018 prohibits a person from conducting Microfinance business without a licence from the authority.

He submitted that the respondent had a chance to prove her registration and legitimacy of doing microfinance business during the trial, and she failed to prove before the trial and the first appellate court that she was legally authorized to conduct microfinance business, *by failing to bring the license certificate* from the authority to prove her legality of doing microfinance business.

He further submitted that since the respondent failed to prove her legitimacy before the lower courts, she was illegally conducting microfinance business contrary to section 6 (1) (b) and section 16 (1) (2) of the Microfinance Act No. 10 of 2018. Thus the contract was illegal

and void *ab initio*, and the respondent's claim should not be recognized and enforced by the trial court and the first appellate court. The High Court (Commercial Division) in the case of **Mauri- Tan Holdings Limited Vs. The Copycat Tanzania Limited and others**, Misc. Commercial Case No. 33 of 2020 (Unreported) in which Magoiga J. had this to say on page 17 of the ruling that;

*"...I have no reason to differ with her on this point and proceed to find that the impugned loan in support of this petition was tainted and in law illegal and unenforceable with all intents, No. court of law can bless and illegal transaction."*

He further submitted that the respondent has no legal legs to enforce his claim against the appellant because she conducted illegal business especially by the time she contracted to Mashaka Yassin thus her contract with the appellant was null and void *ab initio*. He prayed to this court to quash the decision of the lower courts and allow the appeal.

Responding, the respondent submitted that; the trial court was correct not to take into consideration the issues of certificate of microfinance business license from the Bank of Tanzania. He submitted that as a matter in dispute was not about the legality of the microfinance bank. The matter before the court was the default of loan

payment of which the appellant was the guarantor and not the legality of the microfinance business license.

Further, it was submitted that the trial court was correct to disregard the evidence of the appellant as the appellant admitted that Mashaka Yasin the then 1<sup>st</sup> Respondent in the trial court was indebted and he was the guarantor and he was ready to pay what he guaranteed. The appellant agreed to pay the remained sum from what the guaranteed and this was evidenced at the trial court during cross-examination by the court assessors.

Again he stated that, had they were given chance to prove, they were in a position to prove the legality of the microfinance bank that Einstein Enterprises Ltd is the company established by the laws of Tanzania and has been conducting its business legally and that is why it has the legal capacity to sue and be sued.

It was submitted that the respondent never brought the license before the court of law because it was not the matter in dispute since the borrower entered into a contract with the respondent after the satisfaction that the microfinance bank is legal and that is why the appellant agreed to be the guarantor so introducing the issue of legality at this stage is useless and it is a mere tactic by the appellant to deny the respondent right.

He elaborated further that the respondent in this appeal is established by the laws of Tanzania and it is registered and if the appellant would wish to proceed with that issue or to challenge the legality of the respondent he can go to a proper forum.

Having summarized the facts of the case and submissions of both parties I now turn to confront the ground of appeal raised. The issue for determination is whether the appeal has merit.

This being a second appeal, the question to be addressed at this juncture is whether this court, being a second appellate court, can and should re-evaluate the evidence on record. Being a second appeal duty of this court was explained well by the Court of Appeal in **Amratlal D. M. t/a Zanzibar Silk Stores v A. H. Jariwara t/a Zanzibar Hotel [1980] TLR 31, CAT, D.P.P. v J. M. Kawawa [1981] TLR 143, Musa Mwaikunda v R, Criminal Appeal No. 174 of 2006 (Unreported)** as hereunder;

*"On a second appeal, this Court will not interfere unless it is shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of a principle of law or practice".*

Also in **Salum Mhando v R [1993] TLR 170** the Court of Appeal held that;

*"A court of the second appeal is entitled to look at the relevant evidence and make its finding of fact where there is misdirection or non-directions on evidence."*

Notably, the District Court was the first appellate court in the case at hand and had a duty to re-evaluate the entire trial evidence on record by reading it and subjecting it to critical scrutiny and if warranted arrive at its conclusions. This position traces back to the precedent laid down by the East African Court of Justice in the case of **D. R. Pandya v. R. [1957] EA 336.**

Having carefully reviewed the ground of appeal, the evidence on record, and submissions by both parties, I find that the issue raised by the appellant was not an issue in the lower court.

As clearly submitted by the respondent the dispute before the trial court was on the contract between Mashaka Yasin and 2 others. This court went further to see whether the respondent was not registered. As correctly submitted by the respondent that the contract was tendered, the business license, tax clearance to the court. Also, the court noted that during the trial she was asked if she had a permit to do business and admitted.

In my considered view, the case cited by the appellant is distinguishable in this matter since both guarantors agreed to pay the amount of money after the default of the 1<sup>st</sup> respondent.

As submitted by the appellant, the plaintiff testified before the trial court and has submitted the contract and agreement entered with the respondent as the evidence which was admitted by the trial court that he agreed with the Appellant and the respondent failed to pay the said amount.

I have thoroughly re-visited the loan agreement which was agreed upon and signed by both parties. The agreement stipulates that the loan is TZS 1,200,000/=From this fact and since the appellant in the trial court agreed to the terms of the loan agreement entered, I find there is no justifiable reason to dispute as they admitted in the proceedings that he was ready to pay the loan.

Having traversed through the Contract which is binding in law; where the contract was entered on 29/2/2020 where the agreed amount was TZS 1200000/= I am of the considered view that those documents tendered in court are sufficient that she was legal.

Section 10 of the Law of Contract, Cap 345 [R. E. 2019] defines what agreements can be legally termed as contracts and I wish to quote in verbatim:

*"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not hereby declared to be void".*



Looking at the case at hand vis a vis the cited provision, the factors in dispute in my view are free to consent and consideration. That being the case, the lower court cannot be faulted at any rate since the appellant was mandated to abide by the terms of the loan agreement.

It is the principle of the law that, where parties agree on the terms of the agreements, the duty upon the court is to enforce the agreement made by those parties. In the case of **Nhombe Mbulangwa V Chibaya Mbuyape HCD 1967 No. 378** held that,

*"Courts do not make agreements for parties but enforce agreements which they have made."*

The scenario demonstrates that the 1<sup>st</sup> respondent paid his debt and was ready to repay. It is thus worthwhile for the respondent to pay the remaining amount which is legally seen in the contract.

I find the allegation made by the appellant that the respondent is doing business illegally is not substantiated since the respondent submitted her business certificate to prove her business which was made under the Ministry of Trade. This argument is disregarded by this court.

In the upshot, I find no merit in this appeal because in principle, what was binding to the parties was not the Certificate of Microfinance but the Loan Agreement which was also issued on 30/9/2019 by the

Ministry of Industry Trade and Investment which stated that;  
"Kuendesha Biashara ya Micro Credit".

In the same vein, it is the court's findings that there is no basis to disturb the findings by the lower court. The appeal is hereby dismissed with costs.

Order accordingly.



**A. A. BAHATI**

**JUDGE**

**8/9/2021**

Judgment delivered under my hand and seal of the court in Chamber, this 8<sup>th</sup> day September, 2021 in the presence of both parties.



**A. A. BAHATI**

**JUDGE**

**8/9/2021**

Right of appeal fully explained.



**A. A. BAHATI**

**JUDGE**

**8/9/2021**

