IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

(PC) CIVIL APPEAL NO. 4 OF 2020

(Arising from the Judgment and decree of the District Court of Magu at Magu (Kimaro, RM) in Civil Appeal No. 10 of 2019, dated 1st November, 2019.)

DEBA SIMA NGEREJA ..... APPELLANT

VERSUS

WANINGO MICRO CREDIT ..... RESPONDENT

RULING

24th, August & 9th November, 2021

ISMAIL, J.

The instant appeal arises from a decision that was issued by the District Court of Magu (Kimaro, RM) that sat at Magu, to determine a four-ground appeal which was preferred against the decision of Magu Urban primary Court. At stake in both courts was a claim by the respondent, for the sum of TZS. 510,000/- constituting a balance sum due to the respondent. The sum is part of the sum of TZS. 612,000/- that the respondent lent to the appellant. The trial court found that, since the appellant effected a part payment of TZS. 102,000/-, his indebtedness fell to TZS. 510,000/-.

Discontented by the decision, the appellant instituted an appeal against the decision (Civil Appeal No. 10 of 2019) which was dismissed for want of merit. The dismissal ignited the journey to this Court, through a petition of appeal which carries a single ground of appeal. The respondent has thrown spanner in the works, though. Through a reply to the petition of appeal, the respondent has raised a preliminary objection to the effect that:

> *"The petition of appeal is incompetent for not containing ground of appeal which was never raised in the trial curt and first appellate court."*

On 24th August, 2021, the parties were ordered to prefer written submissions in disposal of the preliminary objection. A schedule for filing was drawn. Whereas the respondent filed her submission as scheduled, none was filed by the appellant up until close of business on 7th September, 2021, and subsequent thereto. Worst still, no reason was adduced for the appellant's inability to conform to the order.

The trite position is that such failure to file written submissions is akin to non-appearance when the matter is called for hearing.

In ***Olam Tanzania Limited v. Halawa Kwilabya***, HC-(DC.) Civil Appeal No. 17 of 1999 (unreported), it was held thus:

> *"Now what is the effect of a court order that carries instructions which are to be carried out within a pre-*

determined period? Obviously, such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to halt or it will be so chaotic that everyone will decide to do only that which is conversant to them. In addition, an order for filing submission is part of hearing. So, if a party fails to act within prescribed time he will be guilty of in-diligence in like measure as if he defaulted to appear .... This should not be allowed to occur. Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos."

The foregoing position was reiterated in the subsequent decision of the Court in ***P3525 LT Idahya Maganga Gregory v. Judge Advocate General***, Court Martial Criminal Appeal No. 2 of 2002 (unreported), in which it was held:

"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequence of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be. The Court decision on the

subject matter is bound .... Similarly, courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions within the time frame ordered."

See also: ***Tanzania Harbours Authority v. Mohamed R. Mohamed*** [2002] TLR 76; (***National Insurance Corporation of (T) Ltd & Another v. Shengena Ltd***, CAT-Civil Application No. 20 of 2007; ***Patson Matonya v. Registrar Industrial Court of Tanzania & Another***, CAT-Civil Application No. 90 of 2011; and ***Geofrey Kimbe v. Peter Ngonyani***, CAT-Civil Appeal No. 41 of 2014 (all unreported).

In view thereof, I order that the objection raised by the respondent be heard and determined *ex-parte*.

Submitting in support of the preliminary objection, the respondent contends that the petition of appeal is incompetent for containing a ground of appeal which was never raised in the trial court and the 1st appellate court. He argued that evidence of books of account and bank statements that exhibited unpaid loan amount were neither discussed nor raised during the trial proceedings in the subsequent appeal to the 1st appellate court. The respondent argued that introducing them at this stage of the proceedings was in contravention of the provisions of Order XXXIX Rule 2 of the Civil Procedure Core, Cap. 33 R.E. 33 2019, which bars introduction of new

grounds of appeal without leave of the Court. This provision states as follows:

> *"The appellant shall not, except by leave of the Court, argue or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule."*

The respondent buttressed her contention by citing the decisions of the Court in ***National Bank of Commerce Limited v. Lake Oil Limited***, HC-Commerical Appeal No.5vof 2014; ***Sumbawanga District Council v. Adosta Investment Company Limited***, HC-Civil Appeal No. 4 of 2018; and ***Laurent Adriano v. Lameck Airo & 2 Others***, HC-Civil Appeal No. 18 of 2015 (all unreported).

The respondent urged the Court to sustain the objection and dismiss the appeal with costs.

The question to be resolved by the Court is whether the ground of appeal presented before this Court constitutes a new point which was not canvassed in any of the previous proceedings. The quest for the answer to this question took me to the record of the proceedings in both of the courts. In the trial proceedings, the parties adduced their respective testimonies

after which the decision was composed and delivered. An appeal followed to the District Court and four grounds of appeal were raised as reproduced hereunder, with all their grammatical challenges:

1. *That, the trial Magistrate erred both in law and fact for failure to evaluate the evidence tendered by the appellant before the court of law during the proceeding.*

2. *That, the trial Magistrate failed to consider deeply the suit in generality that the respondent didn't have locus standi to file the court suit against Appellant because he had no special power of Attorney that legalize him to file a suit on behalf of the Company.*

3. *That, the trial Magistrate erred both in law and fact to decide that the appellant makes admission of this respondent claims while the suit was mentioned before 3 trial magistrate and the appellant was totally denied that he had no knowledge on such claim.*

4. *That, the trial Magistrate erred both in law and fact to decide that the respondent was employee of WANINGO MICRO CREDIT LTD while during court proceedings he testified that he is BUSINESSMAN but not employee at the company.*

None of the quoted grounds of appeal fall anywhere close, in its substance, to the ground of appeal raised in the instant appeal. This implies that the ground of appeal in the instant appeal is an invention done at this second level of the appeal proceedings. This is what the respondent points an accusing finger at. It is a new ground of which was not deliberated upon

by the 1st appellate court, and the legal position, as it currently obtains, is to the effect that matters raised anew in the second appeal should not be entertained. If such ground is a sole ground of appeal, as is the case here, the consequence is to render the appeal collapse for lacking the requisite competence. This position traces its legitimacy from the holding in ***Ng'waja Joseph Serengeta @ Matako Meupe v. Republic***, CAT-Criminal Appeal No. 417 of 2018 (unreported), wherein the Court of Appeal of Tanzania quoted with approval, its earlier decision in ***Asael Mwanga v. Republic***, CAT-Criminal Appeal No. 216 of 2018 (unreported). In the latter, the upper Bench held as follows:

> *"Now all those grounds, whatever may be their merits, should have been argued in the High Court had the appellant lodged an appeal to that Court. In the event the High Court failed to discuss and decide them satisfactorily, the appellant could resort to this Court. What the appellant is now trying to do is to turn this Court to the first appellate court after the judgment of the District Court.*
>
> *We must, therefore decline to turn this Court into a first appellate court from decisions of the District Court. in the result, we express no opinion on the grounds of appeal which the appellant brought to this court."*

The superior Court sealed the fate of a defective appeal in ***Ng'waja Joseph Serengeta @ Matako Meupe v. Republic*** (supra), when it held:

> *"... the appellant's attempt to challenge the conviction at this stage is therefore not only legally untenable but illogical too."*

See also: ***Hotel Travertine Limited & 2 Others v. National Bank of Commerce Limited*** [2006] TLR 133.

Inspired by the upper Bench's splendid position, I hold that the respondent's contention is plausible and that the objection is sustained. Accordingly, the appeal is struck out with costs.

It is so ordered.

DATED at **MWANZA** this 9th day of November, 2021.

M.K. ISMAIL

JUDGE

Date: 09/11/2021

Coram: Hon. C. M. Tengwa, DR

Appellant:

Respondent: Absent

B/C: P. Alphonce

Court:

Ruling delivered today in the absence of the both sides.

C. M. Tengwa

DR

At Mwanza

09th November, 2021