IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 248 OF 2020

(Appeal from the Judgment and Decree of the District Court of Ilala at Kinyerezi in Civil Case No. 47 of 2019 before Hon. K.C. Mshomba, **RM** dated 14/08/2020)

NEEMA JOSEPH GESASI.....APPELLANT

VERSUS

KOLI FINANCE LIMITED.....RESPONDENT

JUDGMENT

27th Oct, 2021 & 10th Dec, 2021.

E. E. KAKOLAKI J

The appellant in this appeal is aggrieved with the decision of the trial Court dismissing her suit with costs. She is equipped with three grounds of appeal which I shall soon reproduce. The appeal proceeded by way of written submissions and both parties are represented as Nyasembwa's Attorney was instructed by appellant to prosecute her appeal while the respondent fended by Jackline Kulwa, learned advocate. It transpired to the court that on 27/10/2021, the date fixed for setting the judgment date, the appellant had not filed the reply submission and did not appear in court to explain as to

why it failed to so do hence judgment date was set with an order for notice of judgment issued to her.

Briefly before the District Court of Ilala in Civil Case No. 47 of 2019, the appellant had instituted a suit against the respondent, the company duly registered under Companies Act, Cap. 202 dealing with money lending business, for breach of contract. It was averred in her plaint that on the 16/08/2015 and 25/05/2016 the respondent borrowed Tsh. 10,000,000/- and Tshs. 20,000,000/- attracting interest rate of 10% and 20% respectively, thus making a total amount of Tshs. 30,000,000/- on agreement that the respondent would be repaying the agreed interest rate per month. And that, the respondent in acknowledging the first loan facility transaction issued to her (appellant) with a receipt No. 19428. It was contended the respondent managed to repay the said loan for five months only before she defaulted despite of several demands to make her due loan good, something which resulted into being sued. She therefore claimed for declaratory orders that the contract was breached and payment of three million per month be made to her by the respondent from January 2017 to the date of judgment as accrued interest, thirty million as unpaid debt and costs of the suit. The respondent denied any knowledge of existence of an

agreement (loan contract) between her and the appellant and any issue of demand notice against her. And stated further that, the appellant was not a financial institution legally allowed to run money lending business. In her testimony the appellant (PW1) informed the court that the she was introduced by her friend (PW2) to one Mr. Abel Sanga (deceased) whom she advanced the alleged loan facility to, the money which he failed to repay hence the said suit. In a bid to corroborate PW1's testimony PW2 informed the court that he is the one who introduced PW1 to the respondent company which secured loan to the claimed amount but the same was not repaid. As alluded to the respondent disclaimed any liability to the alleged loan facility transaction through DW1 who told the court that though Mr. Abel Sanga (deceased) was one of the three respondent company's directors, as the company never entered into loan agreement with the appellant as the company itself was the one doing the said money lending business having obtained its capital from different banks. In adjudging the suit the trial court which had framed four issues for determination held in negative issues as to whether there existed a contract between the parties and whether the same was breached, as the appellant failed to prove them. It reasoned the appellant failed to prove her case since there was contradiction between the

evidence of PW1 and PW2 as to who loaned the alleged money, the piece of evidence which affected their credibility. And that, the said loan agreement if existed was oral made between the appellant and Mr. Sanga on his personal capacity as there was no evidence to prove that it was executed in favour of respondent as a company in written form. The relief granted to the parties was therefore dismissal of the suit with costs. As alluded to, discontented the appellant filed three grounds of appeal challenging the said decision going thus:

1. The learned trial magistrate erred in law and fact by failing to consider the evidence adduced by the appellant.
2. The learned trial magistrate erred in law and fact ruling in favour of the Respondent while he has not shown any proof.
3. The learned trial magistrate erred in law and fact by by failing to order the Appellant to be entitled for compensation of Tshs. Thirty Million which she rendered to the Respondent.

On the strength of the said grounds of appeal this court is called to allow the appeal and grant the reliefs prayed by the appellant in the plaint with costs.

In this judgment I am prepared to determine each and every ground of appeal in seriatim as canvassed by the appellant. To start with the first ground it is Nyasembwa's contention that the trial court failed to consider evidence as adduced by the appellant. He argued in her evidence PW1 tendered in court the receipt issued by the respondent proving that she received the said first ten million as per the requirement of section 111 of the Evidence Act, [Cap. 6 R.E 2019], thus a proof of existence of the said loan agreement. In her response Ms. Kulwa while admitting tendering of the said receipt she noted that as correctly found by the trial magistrate the same did not suffice sufficient evidence to prove the case as is does not even bear particular of who deposited the said money and the signature leave alone the fact that it does not establish what was the said payment for.

I have carefully and deeply internalised the submissions by both counsels for the parties as well thoroughly perused the entire pleadings and evidence adduced in in the court by both sides. It is the principle of law under sections 110 and 111 of the Evidence Act, [Cap. 6 R.E 2019] that, he who alleges or claims right basing on certain facts and wishes the court to pronounce judgment in his favour basing on the said facts must prove to the court that, the same exists and the burden of proof lies to the person who would fail if

no evidence at all is given on either side. The claim by the appellant that she tendered the receipt of ten million allegedly received by the respondent which claim is admitted by Ms. Kulwa for the respondent and is referred at page 3 of the typed trial court's judgment as Exh.P1 the "Open date", in my firm view is not supported by the record. A glance of an eye to the trial court proceedings shows that on the 09/04/2020 the court marked one document titled "Creditor Details Report" as exh.P1. Surprisingly it is indicated nowhere in the proceedings that the alleged exhibit P1 was tendered and admitted as exhibit by the trial court. It is the law that no any court can make a decision relying on evidence or document not tendered and admitted in court as exhibit. This position of the law was stated in the Court of Appeal decision in the case of **Shemsa and Two Others Vs. Seleman Hamed Abdallah**, Civil Appeal No. 82 of 2012 (unreported) when discussing the consequences of courts relying on the documents not tendered and admitted, where it had the following to say:

> *"At this juncture, we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court . We out-rightly are of*

considered opinion that, ***it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold that this led to grave miscarriage of justice****"*(emphasis supplied)

Guided with the above position of the law, in this matter since the alleged exh.P1 was not tendered and admitted in court as exhibit, I refrain from accepting both parties submission that the same was received as evidence in court and hold that is not worth of any consideration by this court. As such the trial court wrongly believed that it had admitted it as exhibit and proceed to make reference to when determining the matter before it though the decision of the court did not base on it. Any document admitted in court must be reflected in the proceedings for the court to drive the authority to make reference to. In this case since exh.P1 cannot be referenced as the appellant would want to, to prove that the respondent received ten million from her, I hold there is no proof that the alleged money was advanced to the respondent, a company as loan without any written proof. What is gleaned from PW1's evidence at page 12 of the proceedings is that she advanced the said money to one Mr. Abel Sanga (deceased) and the

respondent's company director in his personal capacity. It is the law that, a company is a legal person independent from its members or shareholders as well as its subscribers. See the case of **Solomon Vs. Solomon and Company** (1879) AC 22. In that regard the company has to act through the requisite authority of a resolution sanctioned by the company's board of directors. The authority must be expressly provided and not merely perceived. In this case since there is no written express authority from the respondent's board of directors tendered by the appellant authorising Mr. Sanga as director to secure the alleged loan from the appellant, it cannot be concluded under any stretch of imagination that, Mr. Sanga received the said loan for and on behalf of the respondent as rightly found by the trial magistrate. It is from the afore stated I see no reason to fault the trial court's correct findings on the issues as to whether there was a contract between the parties and whether the same was breached, which were entered in disfavour of the appellant. This ground has no merit and it fails.

Next for determination is the second ground of appeal where the appellant is assailing the trial magistrate's finding for entering judgment in favour of the respondent without proving her case. Ms. Kulwa is of the submission that the ground is meritless as the appellant tends to shift the burden of proof of

the case to the respondent in contravention of section 110(2) of the Evidence Act, [Cap. 6 R.E 2019]. It is true and I embrace Ms. Kulwa's submission that it is incorrect for the appellant to shift the burden of proof to the appellant as under section 110(2) of the Evidence Act, the burden of proof lies on the person who seeks to prove that a certain fact exists. The said section 110(2) of Evidence Act, reads:

> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

In this case since it is the appellant who was seeking to prove to the court that there was loan agreement between her and the respondent and the same was breached causing her to suffer damages as per the claimed reliefs, the onus of so proving lied on him and not to the respondent as submitted by Nyasembwa. This ground has no merit as well and I dismiss it.

Lastly is the third ground in which the appellant argues the trial magistrate was in error when fialed to order the appellant was entitled to payment of Tshs. 30,000,000/-. Nyasembwa contended since it was evidenced by appellant's witnesses that the respondent's director one Patrick Sanga confirmed to have knowledge of the said debt and promised to repay it, the trial court should have taken into consideration that fact and find the case

was proved hence order the appellant to be compensated as per section 73 of the Law of Contract Act, Cap. 345. Ms. Kulwa for the respondent resisted the submission reasoning that, the appellant was not entitled to the alleged remedies as the claimed contract in existence if any was illegal from the beginning for not being entitled to run money lending business despite the fact that the alleged loan contract was not proved. To support her stance the court was referred to the cases of **Yara Tanzania Limited Vs. Charles Aloyce Msemwa and 2 Others**, Commercial Case No. 5 of 2015 and **Grofin Africa Fund Limited Vs. H. Furniture and electronics Limited and 3 Others**, Commercial Cause No. 81 of 2017 (both HC-unreported). She thus prayed the court to dismiss the ground and entire appeal for want of merit. I think this ground need not detain me much. As already held herein above when determining the first ground the appellant failed to prove that she entered into contract with the respondent as the said contract if any existed was between her and Mr. Abel Sanga (deceased) in his personal capacity. Since the alleged contract was not proved to exist between the parties in this suit the trial court was justified to find there was no breach of contract and therefore the appellant was entitled to nothing than dismissal of the suit. I therefore find no merit in this ground too.

Basing on the above deliberation and findings, I am enjoined to hold this appeal is wanting in merits, thus the same is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of December, 2021.

E. E. KAKOLAKI
JUDGE
10/12/2021

Delivered at Dar es Salaam in chambers this 10th day of December, 2021 in the presence of Ms. Benadetha Fabian Advocate holding brief for Mr. Daniel Ngudungi, advocate for the respondent and Ms. Asha Livanga, court clerk and in the absence of the appellant.

Right of appeal explained.

E. E. KAKOLAKI
JUDGE
10/12/2021