

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

(PC) CIVIL APPEAL NO. 04 OF 2020

(Arising from Civil Appeal No. 57 of 2018 of Bukoba District Court and Civil Case No. 235 of 2018 of Bukoba Urban Primary Court)

LUCY FESTO.....APPELLANT

VERSUS

ANNAGRACE KABYEMELA..... RESPONDENT

JUDGMENT

13/10/2021 & 10/12/2021

NGIGWANA, J.

This is a second appeal in which the appellant has set out six (6) grounds of appeal reproving the judgment and decree of the first appellate court to wit; Bukoba District Court handed down on 30/05/2019. The grounds of appeal are as follows:-

1. That after correctly decided that the Appellant is not supposed to pay the illegal interest of Tshs. 800,000/= being claimed by the Respondent, the learned Magistrate of the Bukoba District Court erred in law and in fact to hold that the Appellant admitted to be indebted to the respondent to the tune of Tshs. 1,000,000/= (one million) and as such is required to pay that amount of money.

2. That the Hon. Magistrate of the first Appellate court erred in law and in fact for failure to take note that the proceedings of the Bukoba Urban Primary Court was a nullity, for the reasons stated in ground no. 2 of the petition of appeal and that being the case it can be said that there was no judgment at all to be upheld, except to quash and set aside the said judgment and whole proceedings of the trial court.
3. That the learned Magistrate of Bukoba district Court misdirected herself to enter the judgment in favour of the respondent by deciding that she admitted to be indebted to the tune of Tshs. 1 million which she was ordered to settle, without taking into consideration that the said judgment is fatal defective in that it leaves contested material issues of law and facts as revealed by ground no. 1 up to 5 of the petition of appeal unresolved and undecided.
4. That the learned Magistrate of the first appellate court went astray in law and in fact to enter the judgment merely basing on the issue of an admission on the part of the appellant, without taking into account that the circumstances surrounding the case at hand and the so called admission does not make it to qualify the ones suggested under the provisions of law governing an admission.
5. That the first appellate court misdirected itself to simply support the judgment of the trial court on the ground that the Appellant admitted to be indebted Tshs. 1 million, without taking note of the Appellant's to the effect that the Magistrate of the trial court failed to record a

correct view of the evidence adduced by the Appellant before the trial court over that subject matter.

6. That the learned Magistrate of the Bukoba District Court erred in law and in fact to hold that the Appellant did not pay even a single cent to the respondent out of Tshs. 1 million, while the facts on the ground clearly shows the contrary to be the case.

It is the appellant's prayer that the judgment; decree and proceedings of the 1st appellate court be quashed and set aside. That the appellant be allowed to adduce additional evidence and call a material witness in order to prove that Tshs. 700,000/= of the advanced loan had already been paid.

By the order of this court dated 04/08/2021 the appeal was disposed by way of written submissions because the appellant is a laywoman and unrepresented. The back ground leading to this appeal was that before the Primary Court of Bukoba Urban, the respondent Annagrace Kabyemela sued the appellant Lucy Festo claiming Tshs. 1,800,000/= being un paid loan facility. The judgment was entered on admission whereas the appellant was ordered to pay the respondent Tshs. 1,400,000/= together with costs for filing the suit at a tune of Tshs. 10,000/=.

Aggrieved by that decision, the appellant appealed to the District Court of Bukoba in Civil appeal No. 57 of 2018. After hearing the parties, the amount payable as a loan facility was reduced from Tshs. 1,400,000/= to Tshs. 1,000,000/= being the principal sum advanced to the Appellant by

the respondent as a loan facility. Each party was ordered to bear its own costs.

The appellant was also unhappy with that decision, thus lodged the instant appeal.

In her submission the appellant argued the 1st, 2nd, 3rd, 4th, 5th and 6th grounds of appeal together submitting that the learned Magistrate of Bukoba District Court failed to make a proper re-evaluation of the evidence adduced before the trial court, as a result he arrived to a wrong decision. She argued that, the respondent's evidence was contradictory as to whether she claimed from her the sum of Tshs. 1,800,000/=, or Tshs. 1,400,000/= or Tshs. 1,000,000/=. She further argued that the 1st appellate court ought to have addressed all her grounds of appeal and subject the loan agreement into the required standard due to the fact that it was not attested by competent witnesses from both sides, but also was not attested by the Commissioner for Oath. Moreover, no stamp duty was paid as required by the law. She cited the case of **Zakaria Barie Bura versus Theresia Maria John Mubiru** [1995] TLR 211 where the Court of Appeal held that contract that bears no indication of payment of stamp duty as per stamp duty Act renders the contract inadmissible as evidence in court due to the reason that such contracts are aimed at defrauding the Internal Revenue and such contracts are un-enforceable in law. She further stated that the learned District Court Magistrate erred in law when trusted the admission done in the trial court, an admission which does not qualify to be termed so in the eye of the law. The appellant further argued that assessors who were present did not give their opinion and sign the court

decision. She cited the case of **Mohamed S. Amir versus Said Ngapwela** [1992] TLR 342 in which the court stated that the trial Magistrate erred when he failed to record the unanimous decision of the court and call upon the Assessors to sign the judgment with him. She also cited the case of **Mathias Katonya versus Ndola Masimbi** [1999] TLR 390 where it was held that it is mandatory on the part of the trial magistrate to consult the assessors and to call them to sign the judgment.

On his side Mr. Zedy Ally for the respondent stated that the 1st appellate court was very right to decide that the appellant had admitted to have been indebted and that he had received the sum of Tshs. 1,000,000/= from the respondent, and that the Primary Court record speaks for itself as to what transpired in court. The learned counsel further referred the court to the case of **Alex Ndendya versus Republic, Civil Appeal No. 207 of 2018** CAT (unreported) where *"it was held that it is settled in this jurisdiction that a court record is always presumed to be accurately represent what actually transpired in court. This is referred to in legal parlance as the sanctity of the court record"*.

The counsel further cited the case of Sadick M. Mandari versus Salum s. Mandari, Civil Appeal No. 120 of 2006 where the High Court held that;

"It is common knowledge that where the defendant or respondent in a suit or petitioner admits any facts either on the pleading or otherwise, the court may give judgment infavour of the plaintiff or petitioner upon such admission". As regard the issue of contract, Zedy Alli cited the case of **Philipo Joseph Lukonde versus Frasi Ally said, Civil Appeal No. 74**

of 2019 that once the parties have duly entered into a contract, they must honour their obligations under the contract.

Neither this court, no any other court in Tanzania for that matter, should allow deliberate breach of the sanctity of the contract. As regard the document introduced into the submission to show that the Appellant had paid Tshs. 407,000/= to the respondent, Zedy ally stated that that is not the proper way to introduce documentary evidence. He cited the case of **Industrial and Commercial Worken (TUICO) at Mbeya Cement Company Ltd and Another** [2005] TLR 41 where it was held;

"It is now settled that a submission is a summary of arguments. It is not evidence. In principle all anexutures, except extracts of judicial decisions or text books, have been regarded as evidence of facts. Their annexure to the submissions has been condemned --- they have to be expunged from the submission and totally dis regarded --- and shall be ignored".

In rejoinder, the Appellant stated that the respondent counsel has not addressed the issue of assessors.

Now the duty of this court is to see whether this appeal has any merit.

Section 44 of the Magistrates Courts (Civil Produce in Primary courts) Rules, G.N. No. 310 of 1964 provides that;

"At the first hearing of the proceeding the court shall ascertain from each party whether he/she admits or denies the allegations made against him by the other party and shall record all admissions and denials and shall decide matters are in issue".

As per trial court record, the claim was as follows:-

"Mdai alimkopesha mdaiwa Tshs. 1,800,000/= na mdaiwa hakuweza kumlipa mdai pesa yake kwa muda waliopangiana kwa maandishi".

When the claim was read over to the appellant, the appellant replied as follows;

"Ni kweli ninadaiwa ila nadaiwa shilingi milioni moja alinikopesha tarehe 15/09/2017".

Sgd: Lucy (Appellant)

On her side, the respondent replied as follows;

"Mimi nilimkopesha hiyo fedha Tshs. 1,000,000/= na ataweka riba ya Tshs. 100,000/= kila mwezi. Nimempa miezi mitatu alipe fedha yangu hiyo Tshs 1,400,000/=".

Sgd Anna (Respondent)

From there the Appellant made this reply:-

"Sawa nimeelewa ni sawa, hili deni Tshs. 1,400,000/= nitalilipa, nipate muda nililipe"

Sgd: Lucy (Appellant)

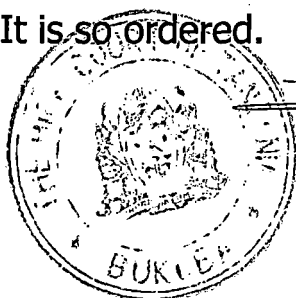
The trial court ordered the Appellant to pay the respondent the sum of Tshs. 1,000,000/= being the principal sum of unpaid loan facility and interest thereto at a tune of Tshs. 400,000/= to make a total of Tshs. 1,400,000/=.

Aggrieved by the court decision, the Appellant appealed to the District Court of Bukoba, whereas, the appeal was partly allowed. The appellant was ordered to pay the principal sum only amounting to Tshs. 1,000,000/= with no costs. Aggrieved by that decision, she has appeal to this court.

The handwritten decision is very clear that the trial court decision was signed by the trial magistrate **Hon. Ishabakaki** and two assessors; **Imelda and Pudensiana**. It is not mandatory that the opinion of assessors should be recorded, what is mandatory is that the magistrate should consult the assessors to get their opinion before composing the judgment, after he/she had done so, call them to sign the judgment. The ground therefore that the assessors did not give opinion and sign the judgment is devoid of merit hence dismissed. Furthermore the attached document to the written submission to show that the appellant had paid Tshs. 407,000/= to the respondent was not supposed to be part of the submission thus it is hereby expunged.

There is no dispute that the agreement between the parties on loan was in the nature of business transaction. The capital invested into lending to the appellant was Tshs. 1,000,000/= with an expected profit of Tshs. 100,000/= per month. No evidence on record that the respondent had a valid business licence as required under section 3(1) of the Business Licensing Act Cap. 208 R:E 2019, therefore she contravening the Banking and Financial Institutions Act, Cap. 342 R:E 2019. According to this act, only Bank and Financial institutions can run business in the nature of financial transactions like lending money on interest basis. I agree with the first appellate court that the respondent was not entitled to any interest

except the principal sum which she advanced to the appellant. Since there is nothing as per trial court record that shows that the appellant repaid any single coin to the respondent, and the appellant's admission before the Primary Court was very clear and unambiguous that the debt was Tshs. **1,000,000/= (One million)**, and if at all she paid repaid any money, she would have told the trial court, and since the appellants' admission speaks for itself (refer page 7 of this judgment) that she admitted the debt and promised to pay Tshs. 1,400,000/=, the amount which was correctly reduced by the first appellate to Tshs. 1,000,000/=, it is apparent that this 2nd appeal is devoid of merits. Consequently, the same is hereby dismissed in its entirety. Given to the nature of the appeal, I enter no order as to costs. It is so ordered.




E. L. NGIGWANA

JUDGE

10/12/2021

Judgment delivered this 10th day December, 2021 in the presence of both parties in person, Mr. Kamaleki, Judges' Law Assistant and Mr. Gosbert Rugaika, B/C




E.L. NGIGWANA

JUDGE

10/12/2021