

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

(PC) CIVIL APPEAL NO. 45 OF 2020

(Arising from Civil Appeal No. 53 of 2019 in the District Court of Muleba at Muleba and Originating from Civil Case No. 108 of 2019 in the Muleba Urban Primary Court)

EVANGELINA K. CHARLES----- APPELLANT

VERSUS

PROJESTUS RUTINWA BENDABENDA----- RESPONDENT

JUDGMENT

Date of Last Order: 04/10/2021

Date of Judgment: 11/11/2021

Hon. A. E. Mwipopo, J.

This appeal originate from the decision of the Muleba Urban Primary Court in Civil Case No. 108 of 2019. The Respondent namely Projestus Rutinwa Bendabenda sued the Appellant namely Evangelina K. Charles as the administrator of the estate of Erasto Higombeye Andrea for recovery of Tshs. 10,500,000/= which heloaned to the said Erasto Higombeye Andrea. The Primary Court delivered its decision in favour of the Respondent and it ordered the Appellant to pay the Respondent from the deceased retirement benefits or from deceased estates. The Appellant was not satisfied with the decision of the

Primary Court and filed Civil Appeal No. 53 of 2019 in the Muleba District Court. The District Court dismissed the said appeal for want of merits. The Appellant was not happy and she filed the present appeal.

The Petition of Appeal filed by the Appellant contain 5 grounds of appeal. The said grounds of appeal are as follows hereunder:-

- 1. That the appellate Court erred in law and facts for failing to hold that the trial Court had no jurisdiction to entertain the case on formal contract contrary to law. The appellant avers that the purported contract of parties does not fall within contracts on customary law which Primary Court is vested with jurisdiction.*
- 2. The appellate Court misdirected itself by relying on suspicious contract dated 11th day of December, 2017 which does not bear signature of the spouse (deceased's wife).*
- 3. That the appellate Court at suspicious speed was biased for failure to evaluate and consider the evidence of the Appellant. The Appellant avers that the case was not proved to the required standard that is on balance of probabilities.*
- 4. That the Court erred in law and fact by relying on the purported contract of parties without following proper procedures for tendering and admitting exhibits. The Appellant avers that any document before*

being admitted in Court the other party has to be given an opportunity to object it.

- 5. That the appellate Court erred in law by failing to hold that there was conflict of interest. The Appellant further avers that the purported contract was witnessed by advocate from Enrich Associates who testified in Court as plaintiff's witness. At the same time another advocate from the same chamber represented the Respondent in the appeal before the District Court.*

The Appellant who appeared in person unrepresented submitted on all grounds of appeal jointly. She said that the trial court erred to decide the case on the contract which is not legal. That the trial court did not consider the evidence adduced in court but it depended on the agreement only. She said that the Appellate court upheld the decision of the trial court while the evidence shows that no her signature was not in the main the agreement despite the fact that she is the wife of the deceased. That the Respondent started to claim for the debt after one year and 3 months from the death of her husband. The deceased was sick before he passed away and the Respondent never claimed the alleged loan to the deceased before or soon after death. There is no explanation as to why it took long time for him to start to claim for the debt if the debt was genuine. Thus, there is no evidence sufficient to prove that the deceased took loan to the Respondent as it was held by these courts.

She added that there is conflict of interest as the Advocate who signed the agreement is the one who represented the Respondent before the Appellate court and in this court which is wrong.

In response, Mr. Mbekomize, Advocate who represent the Respondent, decided to submit on each of the ground of appeal as found in the Appellant's petition of appeal. Starting with the first issue, the Counsel submitted that the Appellant have not named the Law with prohibit the agreement to be tendered as exhibit before the Primary court. The agreement was entered between late Erasto Andrea who was the husband of the Appellant and both parties signed the agreement. The parties were bound by what they agreed in the agreement. It was a legal agreement and the court was right to admit it. He said that the Appellant is administrator of Erasto Andrea's estate hence she may sue or be sued on behalf of her late husband. That is the reason he was sued at the Primary Court. In the case of **Mawalla Advocates V. Fosun Wood Tanzania Ltd, Misc. Commercial Application No. 79 of 2019, High Court Commercial Division at Dar Es Salaam**, it was held that parties to the agreement are bound by their terms of the agreement. Thus, the Primary Court properly admitted the agreement which proved that the parties agreed to the terms of contract.

On Appellant's second ground of appeal, the Counsel argued that the proceedings and the judgment of the Primary Court proves that Appellant's

evidence was considered. The Appellant's allegation that she was not involved in the signing of the agreement has no merits since the law and the nature of the agreement does not need her signature. In the agreement, there was no land or house as collateral for the loan. For that reason, the agreement does not need the signature of the Appellant for the contract to be legal.

In the issue of conflict of interest, the Counsel said that the same was not among the issue raised before the trial or appellate Court. It is raised for the first time here in court. Also, he said that the Appellant did not disclose the name of the Advocate who signed the agreement and there is no evidence to prove that the Advocate who signed the agreement is from the same chamber which represented the Respondent before the District Court and before the High Court. The conflict of interest would arise if the said Advocate was witness and legal representation. For that reason the allegation has no merits.

In her rejoinder, the Appellant retaliated her submission that if she did not sign the agreement how she will know that the agreement is genuine. And that, why the Respondent appeared after she has already paid all the debt her late husband was owed. She is of the opinion that the Respondent late claim to the alleged debt was for the reason he was making those documents for the alleged debt. The way the debt accumulated creates a lot of doubt since the Respondent was giving more loans to the deceased before he pays the previous debts.

From submissions, the issue for determination is whether or not the appeal has merits.

In determination of the appeal I'm going to consider each ground of appeal in Appellant's petition of the appeal since the Appellant is a layperson and she did not cover all grounds in her submission.

The Appellant on the first issue stated that the appellate Court erred in law and facts for failing to hold that the trial Court had no jurisdiction to entertain the case on formal contract contrary to law. She added that the purported contract of parties does not fall within contracts on customary law which Primary Court is vested with jurisdiction. The Counsel Respondent argued that the Appellant have not named the Law which prohibit the agreement to be tender as exhibit before the court. That the parties were bound by what they agreed in the agreement and the trial Court was right to admit it and to determine the matter.

The jurisdiction of the Primary Court is provided under section 18 of Magistrate Courts Act, Cap. 11 R.E. 2002. The section provides for civil jurisdiction of the Court in subsection (1). The jurisdiction of the Primary Court in proceedings of civil nature for recovery of civil debt arising out of contract is provided in section 18(1) (iii) of the Act. The said section reads as follows:-

"18.-(1) A primary court shall have and exercise jurisdiction (a) in all proceedings of a civil nature-

(i)

(ii)

(iii) for the recovery of any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed thirty million shillings, and in any proceeding by way of counterclaim and set-off therein of the same nature not exceeding such value."

From above cited section, the Primary Court has jurisdiction to determine proceedings of civil nature for recovery of any civil debt arising out of contract where the value of the subject matter of the suit does not exceed thirty million shillings. In the matter at hand the subject matter is the debt of shillings ten million five hundred thousand only. Thus, the trial Court had jurisdiction to entertain and determine the matter which was before it. For that reason I find that the first ground of appeal has no merits.

The Appellant second ground of appeal is that the appellate Court misdirected itself by relying on suspicious contract dated 11th day of December, 2017 which does not bear signature of the spouse (deceased's wife). The Respondent argued that the nature of the agreement does not need spouse signature as there was no land or house as collateral for the loan in the agreement. Looking at the record, the District Court in its judgment held that the agreement revealed that the loan was secured by the deceased retirement benefits and not Appellant matrimonial house, thus there was no requirement of spouse consent as it was alleged by the Appellant. As it was rightly held by the District Court, there is no requirement of spouse consent when one spouse sign

contract. The spouse consent is required where one spouse is alienating by any means the estate or his interest in matrimonial home according to section 59(1) of the Law of Marriage Act, Cap. 29 R.E. 2019. There is no requirements for spouse consent when one spouse decides to take loan or enter into a contract. Thus, the Appellants second ground of appeal has no merits.

In the third ground of appeal the Appellant alleged that the appellate Court at suspicious speed was biased for failure to evaluate and consider the evidence of the Appellant and that the case was not proved to the required standards. There is no evidence in record at all to support Appellant's claims that the appellate Court was biased. The judgment of the District Court shows that there is sufficient evidence to prove that the deceased namely Erasto Higombeye Andrea took a loan from the Respondent and signed the agreement to the effects. The witness of the transaction proved as to when the deceased took loan and the agreement which was reached where the deceased agreed to use his retirement's benefits as collateral for the loan. The amount which were taken as a loan was a sum of Tshs, 10,500,000/=. The said agreement was signed before advocate Mbekomize in the presence of other witnesses. This evidence proved without on balance of probabilities that the deceased namely Erasto Higombeye Andrea took the loan from the Respondent as a result the Appellant being administrator of deceased estate has to pay the loan from among the estate of the deceased.

The District Court in its decision considered each of the ground of appeal raised by Appellant. The judgment shows that the District Court in reaching its verdict it considered the Appellant's evidence on allegation of contradiction of Respondent's evidence, absence of her signature or consent in the contract, the delay on the Respondent part to demand for the payment of the loan after 1 year and 3 month's since the funeral of the deceased and way the debt accumulated creates a lot of doubt. The District Court after considering the defence evidence reached conclusion that the Respondent proved the claims for debt.

I agree with the District Court the evidence available proved that the Appellant husband took loan from the Respondent several times. Later on the deceased and the Respondent agreed to put the loan in agreement before advocate and in the presence of witnesses who testified in Court. This evidence proved that the deceased took loan from the Respondent. The parties were bound by the terms of the agreement. The Respondent rightly sued the Appellant who is the legal representative of the deceased. The Appellant evidence failed to show that the deceased did not take loan from the Respondent. Thus, I make findings that the District Court properly considered evidence from both parties where it found the Respondent was able to prove her claims. This ground also has no merits.

The Appellant's fourth ground is that the Court erred in law and fact by relying on the purported contract of parties without following proper procedures for tendering and admitting exhibits. She averred that any document before being admitted in Court the other party has to be given an opportunity to object it.

The production of the evidence in the proceedings before the Primary is provided under the Magistrates Courts (Rules of Evidence in Primary Courts) Regulations, G.N. No. 22 of 1964 and 66 of 1972. Regulation 8(1) (b) provides that facts are proved by evidence which may be the production of documents by witnesses (documentary evidence). The Regulation does not provide the mode of producing the documentary evidence but as it was stated in ground No. 4 of the appeal the opposite party is supposed to be afforded an opportunity to object the admission of the tendered document.

In the present case, the record of proceedings is silent on the tendering of the purported loan agreement. In practice, the party tendering documentary evidence is expected to tender it during testimony of the witness who is in position to provide explanation of the respective documentary evidence and the other party has to be afforded opportunity to object to the tendering of the documentary evidence before the Court admit it. In the present case this was not done and it is not known as to how the loan agreement has become part of the proceedings of the trial Primary Court. The irregularity means that the

Appellant was not afford an opportunity to examine and object the tendering of the said loan agreement. The effects of not affording the Appellant with opportunity to examine and object the loan agreement is to deny the Appellant right to examine and object it which is the right to defence herself as a result the remedy available is to expunge it from the record.

The question is does the remaining evidence after expunging the loan agreement is sufficient to prove that the Respondent loaned a sum of shillings 10,500,000/= to the Appellant's husband? Looking at the testimony of SU, SU2, SU3 and SU4, their evidence still proves on balance of probabilities that the Respondent loaned a total of shillings 10,500,000/= between September, 2014 to December, 2017. SU2 was witness when the Respondent gave a loan of shillings 3,300,000/= on 23.09.2014 and shillings 500,000/= on 31.10.2014. SU3 witnessed when the Respondent loaned shillings 1,200,000/= on 30/01/2014 and shillings 2,000,000/= on 01/01/2015. SU4 and SU5 on 11.12.2017 witnessed the Respondent giving loan of shillings 3,500,000/= to the Appellant's husband on promise that he will pay all the money he has loaned on August, 2019 after he has retired. The Appellant's evidence that the Respondent who attended her husband burial service did not claim for the payment of his loan when they inquired if the deceased was owing anybody has no basis. There is no requirement for the person owing another to claim for his debt during funeral of the loanee. Thus, I find that despite expunging the loan agreement still the

Respondent evidence is sufficient to prove that he gave loan of shillings 10,500,000/= to the Appellant's.

On the issue of conflict of interest that the advocates chamber which signed the loan agreement also its advocates appeared to defend the Respondent before the District Court and in the Primary Court, conflict of interest arises where a lawyer who has acted for a client in a certain matter act against the client or against persons who were involved in or associated with the client in the matter. This position was held by this Court in **National Bank Of Commerce Ltd V. Nabro Limited and Another**, Commercial Case No. 44 of 2001, High Court Commercial Division, at Dar Es Salaam, (Unreported). In the present case the evidence available shows that Advocate Remedius Mbekomize testified for the Respondent as SU5. In the District Court the Respondent was defended by Advocate Ndimubenya Alexander and in the High Court by Advocate Mbekomize. There is nothing showing that their presence as advocates for the Respondent has affected adversely the advocate's judgment or advice on behalf of, or loyalty to a client or prospective client. Thus, I find the issue to be devoid of merits.

Therefore, I find the appeal to be devoid of merits and I hereby dismiss it with cost.

1E/11/2021

JUDGE

A.E. MWIPOPO



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