

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)**

PC CIVIL APPEAL NO. 01 OF 2021

**(Arising from Civil Appeal No. 19 of 2021 at Singida District Court and
Original Civil Case No. 3 of 2021 at Singida Urban Primary Court)**

KENEDY MAKUZA.....APPELLANT

VERSUS

MONALIA MICROFINANCE LTD..... RESPONDENT

JUDGMENT

24/3/2022 & 16/5/2022

KAGOMBA, J

This is the second appeal by Kenedy Makuza, the appellant, who lost in both the first appeal at the District Court of Singida (the first appellate court) and in the original suit at Singida Urban Primary Court (the trial court). Monalia Microfinance Ltd, the respondent, successfully sued the appellant in the trial court for breach of a loan agreement. It was alleged in the trial court that on 23/12/2019 the appellant took a loan of Tsh. 7,190,000/= from the appellant and in March 2020 he paid Tsh. 1,500,000/= thereby leaving behind an outstanding debt of Tsh. 5,690,000/= inclusive of interest and costs, which he refused to pay. After a full trial the trial court found that the appellant had in deed breached the loan agreement based on the weight of

evidence adduced before it. The appellant's first appeal was to no avail as the first appellate court stated clearly that it found no cause to vary the decision of the trial court. Having been aggrieved, the appellant has preferred this second appeal based on the following six grounds:

1. That, the learned Appellate Magistrate erred in law and fact when he held that no legal requirement to attach annexures in a plaint.
2. That, the learned Appellate Magistrate erred in law and fact by misleading himself that the District Court can not entertain a matter which was not raised before the trial Primary Court.
3. That, the learned Appellate Magistrate erred in law and fact when he overlooked that the appellant didn't dispute that he borrowed money from the respondent.
4. That, the learned Appellate Magistrate erred in law and fact by relying on a Board resolution that was invalid and was not tendered as an exhibit.
5. That, the learned Appellate Magistrate erred in law and fact by wrongly arguing that the Board Resolution was properly attached in the plaint.

6. That, the learned Appellate Magistrate erred in law and fact when he improperly applied the principle of overriding objective.

The appeal was argued by way of written submissions following the order of this court to that effect. Going by the contents of leadings, both parties appears to have drawn and filed their submissions themselves and they abided by the schedule set by the court in their respective submissions.

In his submission in chief, the appellant preferred to argue on the first three grounds of appeal each separately while the fourth, fifth and sixth grounds were argued together. On the first ground of appeal, the appellant submitted that the plaint is required to explain the claims and provide all relevant supporting documents if any, according to rule 44 and 45 of the **"Primary Court (Civil Procedure) Rules and Appendix 1 of A Handbook for Magistrate in the Primary Court, revised Edition 2019"**. He added that it was therefore a requirement of the law that all relevant documents are to be filed, tendered and admitted upon qualification before the primary court.

On the second ground of appeal, the appellant submitted that since the District Court was the first appellate court, and since the rationale of an appeal is to challenge the findings, reasoning and decision of the trial court, then the first appellate court can entertain any matter brought before it.

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On the third ground of appeal, the appellant submitted that unlike what the learned appellate magistrate said in his judgment, he denied during trial, to have taken loan from the respondent as is shown in the trial court judgment.

On the fourth, fifth and sixth grounds of appeal, the appellant submitted generally that the Board resolution of the respondent company was neither tendered nor admitted during trial, hence the trial was a nullity. He cited the Case of **Evarist Steven Swai and Another v. The Registered Trustees of Chama Cha Mapinduzi**, Land Case No. 147 of 2018 to the effect that a Board resolution has to be part of initial pleadings.

Yet, on the same grounds, the appellant further argued that if the Board resolution was placed before the trial magistrate as the learned appellate Magistrate held, there was no reason for the first appellate magistrate to invoke the overriding objective principle. Basing on these grounds, the appellant prayed for the appeal to be allowed and the decisions of the District and Primary Courts to be quashed and set aside with costs.

The respondent responded to the above submission in the same order of presentation adopted by the appellant. On the first ground of appeal, she vehemently denied the appellant's submission by arguing that the rules governing contents of plaint or special form in primary courts are quite different from rules under the Civil Procedure Code [Cap 33 R.E 2019]. She

argued that the above point was very well cemented by the learned trial magistrate in his judgement.

The respondent further submitted that reference to rule 44 and 45 of the Primary Court (Civil Procedure) Rules, Appendix 1 of A Handbook for Magistrates in Primary Court, Revised Edition of 2019 is totally misleading as the cited source does not impose a requirement of annexures to the plaint as the appellant claims.

It was the respondent's further argument that there are special forms for submission of claims in primary courts where the law governing civil proceedings in primary court is the Magistrates Courts (Civil Procedure in Primary Courts) Rules 1984 GN No. 119 of 1984. She added that according to rule 46(1) of the cited Rules, even during hearing, the claimant had a right to present and tender any documentary evidence to support her case. She added that, in reality, she did exactly that, before the trial court, by producing all the required documents to prove that the loan was really given to the appellant.

On the second ground of appeal, the respondent totally disputed the submission by the appellant. She argued that at appellate stage there is no room to raise any new matter or evidence that were not argued during trial. To this end she referred to the case of **Seifu Mohamed Seifu v. Zena Mohamed Jaribu**, Misc. Land Case No. 84 of 2021, a decision of High Court Land Division (unreported). She also cited the decision of the Court of Appeal

in **Hassan Bundala @ swaga V. Republic**, Criminal Appeal No. 386 of 2015 (Unreported). In the latter case, it was held:

“it is now settled that as a matter of general principle this Court will only look into matters which came up in the lower courts and were decided; and not on new matters which were not raised or decided by either trial court”.

On the third ground of appeal, the respondent supported the decision of the first appellate court. She argued that the appellant’s intent was to delay justice because in his grounds of appeal, the appellant did not dispute that he borrowed the respondent’s money. The respondent added that there is no any grounds of appeal filed in the first appellate court where the appellant disputes to have taken loan, rather he clings to technicalities to try to bend the course of justice.

Turning to the fourth, fifth and sixth grounds of appeal, the respondent replied as follows:

One; the Board resolution for the appointment of representatives of the respondent company was passed, and produced before the trial court.

Two; with regard to the invocation of the overriding objective principle, the appellate District Court Magistrate was right to invoke it because the appellant is bent on technicalities to avoid paying the debt. She added that

the invocation of the overriding objective principle by the District Court Magistrate had nothing to do with the Board resolution which was tendered.

Rejoining, the appellant attacked the respondent's reply on two fronts: one, on tendering of documents to justify the existence of the respondent company. From this angle, the appellant rejoined that failure to attach certificate of incorporation, TIN and Business license is a failure to prove its existence. He added that by the respondent's failure to furnish such documents during trial, this court has been denied of a means to know whether the respondent company was established since 2016. He added that the case of **Silas Sendaiyebuye Msagabagabo V. DPP (sic)**, was distinguishable because it is the Court of Appeal which can not look at matters not previously raised in lower courts. This court will determine the validity of this assertion in due course. In the meanwhile, however, the court notes that the case of **Silas Sendaiyebuye Msagamagabo (supra)**, is nowhere in the reply submission filed by the respondent. As such the appellant's rejoinder is somehow obfuscated by such reference, which appears to come from the blues.

It was the appellant further rejoinder that the Board resolution which was said to have been passed on 31/12/2019 is surprising, illogical and unrealistic because the appellant is alleged to have taken the loan on 23/12/2019 and was to repay the same by 23/3/2020. The appellant therefore questions reason for the respondent's board to resolve to sue the appellant while he was yet to default. He reiterated his submission in chief

that the Board resolution was supposed to be pleaded in the plaint as per the decision in **Namburi Agriculture Co. Limited v. Kibelo Agrovvet Supplier**, Civil Case No. 16 of 2018 by High Court, Mbeya Registry.

Having read the rival submissions by both parties and having perused the records of the lower courts, this finds one major issue to determine, which is, whether the appeal has merit in the eyes of the available facts and the law.

In determining the said issue, the court is very much alive to the fact that this is the second appeal. The court is further aware that there exists a concurrent finding of both lower courts that the appellant breached a loan agreement and is obliged to pay the outstanding amount plus interest and costs. This pair of facts has the effect of limiting the scope this court can traverse into the decision already reached by the lower courts.

From the submissions of both parties, it is obvious that the hotly contested issue is on whether it was mandatory for the respondent to attach to the plaint documentary evidence to show that the respondent company is duly incorporated and whether it had authorized the filing of the case in the trial court. Obviously, these are issues of evidence and not of law. So far as records of the lower courts can reveal, these issues were never raised, never argued and never determined during trial. They are new creatures from planet Saturn which should not be accommodated in this appeal. Unlike issues of jurisdiction and time limitation which are purely points of law that



can be raised at any time, the issue whether there was or there was no Board resolution attached to the plaint was supposed to be raised by the appellant during trial to cloth the issue with justification for higher courts to consider it on appeal.

The trial court proceedings are very clear on how the case for both sides were argued during the trial. Nowhere in the records the appellant raised such issues of shortfalls in the plaint for determination by the trial court. It is a settled legal position that raising new matters during appeal is not proper as correctly decided by this Court in **Seifu Mohamed Seifu v. Zena Mohamed Jaribu** and in by the Court of Appeal in **Hassan Bundala @Swaga v. Republic (supra)**. For this reason, the argument by the appellant that restriction in raising new matters only applies to the Court of Appeal is unfounded. The court therefore finds no merit in the first and second grounds of appeal.

As regards the third ground of appeal, it is true that during trial the appellant did resist his indebtedness. As such the first appellate Magistrate erred in stating the opposite. However, the court agrees with the respondent that, by and large, the appellant's grounds of appeal both at the 1st appellate court and in this court are leaning towards legal technicalities rather than seriously challenging his indebtedness. Rule 44 of the Magistrates' Court (Civil Procedure in Primary Courts) Rules, GN No. 199 of 1983 provides:



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

From the above cited law governing civil procedure in primary courts, it is obvious if the appellant was seriously disputing the loan, he should have seriously denied the same during trial by adducing sufficient evidence to exculpate himself from liability. A glance at the trial court's typed proceedings, particularly page 5, reveals that the appellant did not even oppose the admission of the loan agreement when the same was tendered during trial. It is for such reasons we find no merit in the third ground of appeal too.

As regards, the fourth, fifth and sixth grounds of appeal which were argued jointly, on Board resolution that was tendered, and improper invocation of the overriding objective principle, this court holds the view that the arguments raised by the appellant are rather academic and totally inconsequential in light of the court's determination of the first two issues. The appellant did not raise the issue of non-tendering of board resolution during trial. it was not deliberated at all by the trial court. As such this contention is based on a new matter which could not be entertained by the first appellate court. For this reason, it is immaterial whether or not the trial court was right to state that the board resolution was tendered.

On the invocation of the overriding principle, I think the point the first trial court intended to make needs to be appreciated. The appellant, as correctly observed by the first appellate court and the respondent, has pegged his hope of winning this appeal on technicalities. He wants this court to overturn the concurrent finding of the lower courts, that he breached the loan agreement, by invoking a technical reason that the Board resolution of the respondent company was not attached to the plaint filed in trial court. This type of argument is typically what Article 107A (2) (e) of the Constitution of this Land seeks to prohibit. One can not take a loan, promise to repay, fail to repay and then seeks refuge in legal technicalities. Overreliance on legal technicalities obviously contradicts attainment of substantive justice and becomes more deplorable in matters dealt with in primary courts.

Rule 15 and 16 of the Magistrates' Court (Civil Procedure in Primary Courts) Rules, GN No. 199 of 1983 govern procedure for instituting civil cases in primary courts whereby a civil suit is instituted by an application (the plaint). According to the cited rules, the mandatory matters to be specified in the plaint are: the name of court; name, occupation and place of residence or place of business of the claimant and the defendant; the facts on which the claim is based; relief claimed and value of property where property is claimed. Such are the basic requirements so simply made to suit the users of the court. As such by design, no legal technicalities are invited so to speak.

In this appeal, the appellant has laboured on citing authorities particularly the cases of **Evarist Steven Swai and Another v. The**

Registered Trustees of Chama cha Mapinduzi and Namburi Agriculture Co. Ltd v. Kibelo Agrovvet Supplier (supra) to the effect that a board resolution is a must when a company institutes legal proceeding. Apparently, such a procedure is not spelt in the cited rules governing institution of civil proceedings in primary court.

I have carefully read the above cited decisions of this court. In the last cited case of **Namburi** the court analyzed about nine (9) previous decisions, three of which being decisions of the Court of Appeal, before arriving at the decision fondly advanced by the appellant. The analysis done by the court is very sound and is appreciated. However, none of the cases considered in **Nyamburi's** case originated from primary court. I find this to be a very significant point of departure. There is a danger of applying a "one size fits all" approach in as far as requirement to attach Board resolution in suits filed in primary courts is concerned.

The jurisprudence in this country has recorded the evolution of primary courts from what they traditionally used to be to what they are becoming nowadays. Traditionally, our primary courts were not forums for legal technicalities as they were presided over by lay magistrates to cater for ordinary citizens of this country. We are witnessing a wide range of reforms in the judiciary, primary courts inclusive. Certainly, the future looks bright with the on-going reforms in terms of infrastructure, legally qualified personnel and updated laws and regulations to govern proceedings in primary courts. However, as we cherish reforms in primary courts, we should


not let go of the need to uphold substantive justice which is the first priority sanctified by the Constitution. For this reason, the overriding objective principle has to be viewed from a far wider perspective, within the limit set by the law. Once the overriding objective principle is fully applied the decision by the first appellate court to invoke the principle the way it did will no longer be challenged.

To recap on this decision, this court finds no good reason to vary the concurrent finding of the two lower courts, namely the trial court and the first appellate court, that the appellant had breached the loan agreement and has to make good his account, with interest and cost as ordered by the trial primary court. For the stated reasons, the appeal is dismissed with costs.

It is ordered accordingly.

Dated at Dodoma this 16th day of May, 2022.




ABDI S. KAGOMBA
JUDGE