IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

DC. CIVIL APPEAL NO. 13 OF 2021

(Originating from Civil Case No. 14 of 2020 of the Resident Magistrate Court of Singida at Singida)

OMARY MOHAMED NTANDU..... APPELLANT

VERSUS

ELIAS SAMWEL MBURA.....RESPONDENT

JUDGMENT

13/06/2022 & 11/07/2022

KAGOMBA, J

The appellant herein OMARY MOHAMED NTANDU being dissatisfied with the decision of the Resident Magistrate Court of Singida at Singida (the trial Court), in Civil Case No. 14 of 2021 which was entered in favour of the respondent ELIAS SAMWEL MBURA ("the respondent" herein), filed this appeal to challenge the same.

The memorandum of appeal filed by the appellant carries a total of 4 grounds of appeal. However, during hearing of the appeal, the learned advocate for the appellant, Mr. Cosmas Lwambano dropped the 1st, 2nd and 4th ground. Hence, the remaining ground is the 3rd ground which states that;

> *"That, the trial Court erred in law and fact in upholding a contract that was prohibited by law".*

The trial Court in determination of this matter framed three issues, to wit, 1) whether the contract between the respondent and appellant was legal, (2) whether the respondent is legally allowed to carry out financial services and (3) whether the appellant paid the amount owed by the respondent.

Being guided by the above-mentioned issues, the trial Court answered the 1st and 2nd issues in the affirmative and on the last issue the trial Court found that the appellant defaulted to pay a part of the whole debt of Tsh. 40,000,000/= to the respondent. Therefore, in its final decision ordered the appellant to pay the respondent a total of Tsh. 9,450,000/= being the outstanding loan and Tsh. 4,000,000/= as general damage.g

On hearing of the appeal Mr. Lwambano, for the appellant, argued that the trial Court erred in law by upholding a contract that was prohibited by the law since the same was a contract for lending money with interest. He argued that such kind of an agreement was also contrary to S. 4(1) & (2) of the Banking and Financial Institution Act, [Cap 342 R.E 2002] ("BFIA") which prohibits any person to carry on business of lending money at interest unless he is licenced to do so by the Bank of Tanzania (BOT).

Mr. Lwambano argued further that the respondent was neither a registered institution nor a licenced businessman permitted to issue loans on interest. Hence the agreement entered by the parties was illegal for contravening the law.

Mr. Lwambano cited the case of **David Charles V. Said Manumbu, Civil Appeal No. 31 of 2006, High Court, Mwanza** where this Court held that, the only institution that can give loan on interest are those licenced to do so under the law and where one had issued loan on interest, the agreement so entered becomes illegal in the eyes of law.

In addition to that, Mr. Lwambano contended that the respondent becomes criminally liable for doing lending business without obtaining a licence from the BOT as provided under S. 4(3) of BFIA.

Mr. Lwambano, on other hand, argued that the respondent by doing business of lending money without having business licence he contravened the requirement of the law under section 3(1)(a) of the Business Licensing Act, [Cap 208 R.E 2002] ("BLA") which requires any person who carries on business to have a business licence.

For the above reasons, Mr. Lwambano prayed this Court to quash the decision of the trial Court.

Mr. John Chigongo, the learned advocate for the respondent in replying contended that, S. 3(1)(a) of the BLA does not apply in the case at hand. He stated that the respondent had never done a business of lending money, but he only lent the appellant the sum of Tsh. 40 million as his relative, so as to support his business of transportation. He added that at that time the respondent being a retired teacher was paid his terminal benefits and so he could afford to lend the appellant that amount of money.

Mr. Chigongo contended further that there is no evidence in records which shows that the respondent was lending people money apart from the appellant. Thus, lending money to the appellant can't be concluded as a business. He added that under such circumstance there was no need for the respondent to have a business licence to lend money to his relative. Mr. Chigongo argued that S. 4(1) & (2) of BFIA is not applicable to a natural person who lends money to another.

Therefore, Mr. Chigongo was of the view that the trial Court was right to admit the said agreement and the same was legally binding to the parties in accordance with S. 10 of the Law of Contract Act, [Cap 345 R.E 2019] because there was free consent of the parties, offer and acceptance and parties had capacity to contract.

On the issue of interest, Mr. Chigongo contended that the fact that the appellant consented to it, he cannot come to Court seeking sympathy after his failure to perform his obligation. Despite that, Mr. Chigongo clarified that the respondent, during trial, dropped the claim of Tsh. 12 million accumulated from interest of Tsh. 1.5 million per month as he only claimed the principal sum of Tsh. 40 million which the appellant didn't oppose.

Regarding the cited case of **David Charles** (Supra), Mr Chigongo contended that the same is distinguishable to the circumstances of this case as the cited case deals with the issue of unpaid interest while the case at hand the trial Court didn't deal with interest.

Mr. Chigongo further contended that the issue of interest is the new issue which was not dealt with by the trial Court as the contract in question was admitted in trial Court without objection. Consequently, Mr. Chigongo prayed the appeal to be dismissed with costs.

In rejoinder, Mr. Lwambano maintained his submission that the contract for lending money entered by the parties which was admitted by the trial Court is contrary to the law. That, the law clearly provides for what is to be complied with by any person who intends to do business of lending money which the respondent didn't comply with. Therefore, Mr. Lwambano reiterated his prayer that the appeal be allowed with costs.

Having heard the rival submission by both learned advocates, it is revealed that the appeal is based on the legality of the contract for lending money entered by the parties on 06th day of July, 2017 which was admitted by the trial Court as exhibit Pw1 "A".

That being the case, it is the duty of this Court to scrutinize the legality of exhibit Pw1 "A". It is Mr. Lwambano's submission that the said exhibit Pw1 "A" is illegal and the trial Court misdirected itself in relying on it to make its finding. Mr. Lwambano's reasons for that assertion is that the respondent being the lender was not licenced by the law to do business as provided under S. 3(1)(a) of the BLA and in addition to that S. 4(1) & (2) of the BFIA requires any person who wants to do business of lending money with interest to be licenced by the Bank of Tanzania (BOT) which the appellant wasn't.

It is settled requirement under the law that any person who wants to do any business has to obtain a business licence and those who want to engage in the business of banking and financial services have to obtain licence from the Bank of Tanzania (BOT). The issue is whether the agreement of the parties under exhibit Pw1 "A" falls under the precincts of the cited laws. For this reason, the Court has to examine if exhibit Pw1 "A" has adduced the fact that the respondent entered into an agreement of lending money to the appellant as a business entity or financial institution.

The introduction paragraph of exhibit Pw1 "A" identifies the respondent in his natural capacity. The terms of contract also clearly express that the agreement is between natural persons. For such provisions exhibit Pw1 "A" has not presented the elements of business of lending money between the respondent and the appellant.

Moreover, I have perused the trial Court records to ascertain if the respondent was doing lending business, yet I have failed to find such facts. It is shown to me that the appellant and respondent knew each other, the appellant had a need for money while the respondent had the money for that time being. Thus, they decided to enter into an agreement of lending money. Under such circumstances, I find a bit far-fetched to conclude that the respondent was doing lending business.

The substance of Mr. Lwambano's contention that the respondent was doing business of lending money is the issue of interest appearing in paragraph 4 of exhibit Pw1 "A". This paragraph requires the appellant to

pay interest of Tsh. 1.5 million per month. Mr. Lwambano cited the case of **David Charles** (Supra) to cement his contention. The decision of the Court in the cited case was to the effect that a loan advanced with condition of paying interest implies a business deal and the same shall be rendered illegal if such transaction is not initiated by the bank or financial institution.

In my opinion I see no relevancy of this cited case with the facts at hand, since the evidence in this matter is silent on the fact that the respondent has been doing business. Moreover, it cannot be concluded that by having a paragraph which imposes interest on the exhibit Pw1 "A" renders the agreement to be of business nature and thus illegal.

Enough to say that the BFIA has not prohibited natural person to lend money to another person with interest. The provision of S. 4(1) & (2) referred by Mr. Lwambano states;

> *4.–(1) Notwithstanding any provision of any other law,* ***the power relating to the licensing, regulation and supervision of all banks and financial institutions*** *in the United Republic that are subject to this Act is hereby vested in the Bank.*
>
> *(2) Without prejudice to the generality of the power conferred on the Bank, the Bank shall have power to –*
> *(a) grant licences;*
> *(b) carry out inspections over the operations of all banks or financial institutions in accordance with the provisions of this Act;*
> *(c) require any bank or financial institution within such time as it may stipulate, to furnish any information or to comply with any order, directive or determination issued or made*

by the Bank pursuant to all the powers of the Bank conferred on it under this Act; and
(d) require any bank or financial institution to provide periodical written reports at such times and in such manner as may be prescribed by the Bank
[Emphasis added]

Basically, the above provision provides for the manner in which the BOT regulates banks and financial institution. Hence in the circumstance, the agreement entered by the respondent and the appellant cannot be termed as a business of lending money governed by BFIA.

Consequently, the contention by Mr. Lwambano that the respondent was doing business of lending money collapses and exhibit Pw1 "A" is rendered legal, hence the same was legally enforced by the trial Court. Under such circumstances, I am settled in my mind that the trial Court was legally justified to uphold exhibit Pw1 "A", provided all procedures for admission were complied. The same was tendered by respondent being a possessor of the same and the Court admitted it after hearing from both parties and subsequently it was read in Court.

On the other hand, the trial Court records are clear that the issue of interest was dropped by the respondent during trial. Hence even if the respondent was doing lending business as contended by Mr. Lwambano, which is not the case, the claim of interest which seems to be offensive to the appellant was dropped and the trial Court in making its decision did not consider the issue of interest, which makes the contention on interest to lose its footing.

Thus, it is my observation that the agreement entered by the respondent with the appellant is an agreement under the law of contract and therefore the same is governed by the Law of Contract Act, [Cap 345 R.E 2019] ("LCA") as rightly submitted by Mr. Chigongo.

In the law of contract there is sanctity of contract that, once parties duly entered into a contract, they must honour their obligations under such contract basing on their own terms and conditions provided the contract is valid. S. 10 of LCA provides for elements of valid contract to include free consent of the parties, capacity to contract, lawful consideration and lawful object.

In the case at hand, it is clear that the contract entered by the respondent with the appellant is valid. It is evident that parties agreed to their own conditions one of them being payment of interest and it is on record that, the appellant was not complaining about his consent to the agreement being obtained by coercion, undue influence, fraud or misrepresentation to make their contract void or voidable as provided under part III of the LCA. In that case, he was legally bound to perform his obligation.

This position has been insisted severally in our jurisdiction, see a case of **Miriam E. Maro V. Bank of Tanzania, Civil Appeal No. 22 of 2017, Court of Appeal of Tanzania at Dar es salaam**, where the Court made the following observation;

> *"It is the law that parties are bound by the terms of the agreement they freely enter into. "We find solace on this stance in the position we took in* ***Univeler***

Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009 *(unreported) in which we relied on a persuasive decision of the Supreme Court of Nigeria in* ***Osun State Government v. Dalami Nigeria Limited, Sc. 277/2002*** *to articulate: "Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses,* ***it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous****. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."*

[Emphasis added]

Also, in **Simon Kichele Chacha vs. Aveline M. Kilawe, Civil Appeal No. 160 of 2018, Court of Appeal of Tanzania, at Mwanza** it was observed that;

"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly Stated in ***Abualy Alibhai Azizi V. Bhatia Brothers Ltd [2000] T.L.R 288*** *at page 289 thus;*

> *'****The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance*** *where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement".*
>
> **[Emphasis Added]**

More instructively on the issue of sanctity of contract is the statement of the Court of Appeal of Tanzania at Dodoma in Philipo Joseph Lukonde V. Faraji Ally Saidi, Civil Appeal No. 74 of 2019, where the panel of the Court led by Juma, CJ stated;

> *"We take any such deliberate breach of contract very seriously. Once parties have duly entered into a contract, they must honour their obligation under that contract.* ***Neither this Court, nor any other Court in Tanzania for that matter, should allow deliberate breach of the sanctity of contract."***
> **[Emphasis Added]**

As I have narrated above and with the guidance of the above cited cases, I am inclined to hold that the trial Court was right to uphold exhibit Pw1 "A" being the contract for lending money entered by the respondent with the appellant.

Conclusively, I find no merit on this appeal and since there is no controversy on other trial Court's findings, henceforth I hereby hold the trial Court decision. Thus, the decree awarded by the trial Court is upheld. Accordingly, I dismiss the appeal with costs.

Dated at Dodoma this 11th July, 2022.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA
JUDGE