IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

DC CIVIL APPEAL NO. 16 OF 2021
(Originating from District Court of Dodoma in Civil Case No. 12 of 2019)

TPB BANK LIMITED.....1ST APPELLANT

MCHINGA AUCTION MART AND .....2ND APPELLANT

VERSUS

GEOFREY ROGATH SHAYO.....RESPONDENT

JUDGMENT

28/03/2022 & 27/04/2022

KAGOMBA, J

In the District Court of Dodoma at Dodoma, GEOFREY ROGATH SHAYO (the respondent herein) had successfully sued TPB BANK PLC and MCHINGA AUCTION MART AND REAL AGENY CO. LTD (the 1st and 2nd appellants herein respectively) following the appellants action of taking and converting the respondent's business product, items, goods, supporting tools and money illegally and for specific and general damages.

It was alleged by the respondent during trial at the District Court, that on 28th day of March, 2019, the appellants herein through their employees went to the respondent's business premises located at Nyerere Street, Uzunguni area, Kilimani Ward within the City of Dodoma, in the absence of the respondent but in the presence of his worker, and started collecting the said items of the respondent and took them to unknown place illegally.

Upon full trial, the District Court found that the alleged action of the appellants was based on the principle of banker's lien, which is "an enforceable right of a bank to hold in its possession any money or property belonging to a customer and to apply it to the repayment of any outstanding debt owed to the bank, provided the property is not already burdened with other debts". The trial District Court was satisfied from the evidence adduced that the stocks in the respondent's shop were hypothecated to the 1st appellant as collateral of the loan security.

According to the trial Court's judgment the only anomaly noticed is the 1st appellant's failure to follow due process in taking the pledged stocks. The trial District Court went on to hold as follows:

> *"Reading the loan agreement between the lines what the contract created between the parties is a charge or pawn. It follows therefore that if the hypothecation constitutes a pledge or pawn, the said right is specifically described under section 124 of the law of contract Act, Cap 345 [R. E 2019] (hereinafter to be referred as the act).."*

Having quoted the provision of Section 124, the trial District Court held that the 1st appellant was the Pawnee and the respondent was the Pawnor. The trial District Court proceeded to mine the Pawnee's right from the provision of section 128 where the pownor makes default, as it was the case before it and held;

> *"The law as contained in the statute book recognized* ***the rights of the Pawnee who is in possession*** *of the title and the property pledged to sell the property without the intervention of the Court. However, in the case at hand the Pawnee (first defendant) was not in possession of the stock and to enforce the covenant in the loan agreement can only be enforced through Court process. The simple logic behind is to protect the weaker parties and restricting the stronger party from taking the law into their own hands and causing anarchy"*

Finally, the trial District Court entered judgment in favour of the respondent against the appellants jointly by, among other things, declaring that the appellants' act of invading the respondent's business premises was and still is unlawful and uncalled for. The appellants were also ordered to pay the respondent TZS 5,000,000/= as general damages for the loss of business and income resulting from taking possession of the stocks from the shop and that that principal sum of TZS 5,000,000/= shall attrack interest at 3% per annum plus further interest of 1% per annum chargeable on decretal sum from the date of judgment till payment in full. As specific damages were neither pleaded nor proved by the respondent, the trial Court found the claim lacking in merit. This decision of the trial District Court has not been received well by the appellants, hence this appeal, which is based on the following grounds;

1. That, the trial Magistrate erred in law and fact by disregarding and misinterpreting the terms of the loan agreement entered between the 1st appellant and the respondent.
2. That, the trial Magistrate erred in law and fact by holding that the appellants unlawfully invaded respondent's business premises.
3. That, the trial Magistrate erred in law and fact by holding that the act of the appellants to attach and sell hypothecated stocks which were placed as loan security without Court intervention/order was illegal.
4. That, the trial Magistrate erred in law and fact by misdirecting herself in interpretation of the provision of the Law of Contract Act, [Cap 345 R.E 2019] in reaching her decision.

5. That, the trial Magistrate erred in law and fact by granting the respondent the general damages of TZS 5,000,000/= without any proof of the respondent's loss of income.

Based on the above grounds, the appellants prayed this Court to allow the appeal against the respondent, set aside the decision of the trial Court, award the relief sought by the appellants at trial stage, cost of the appeal as well as other relief(s) this Court may deem fit and just to grant.

During hearing go the appeal, the appellants enjoyed the service of Mr. Meiseyeki Msangi, learned advocate while the respondent enjoyed the service of Mr. Erick Christopher, learned advocate.

Mr. Msangi for the appellant sought and was allowed to argue the 3rd and 4th grounds jointly; then the 1st and 2nd grounds jointly, followed by the 5th ground of appeal lastly and separately.

On the 3rd and 4th grounds of appeal, Mr. Msangi submitted that the learned trial Magistrate erred in interpreting section 124 and 128 of the Law of Contract Act, [Cap 345 R.E 2019] (hereinafter "LCA") by holding that the act of the appellants to attach and sell the hypothecated stocks pledged as loan security without Court intervention or order was illegal. Mr. Msangi argued that the loan agreement between the 1st appellant and the respondent was of hypothecation of goods and not of bailment of goods as held by the trial Magistrate. He further argued that the Magistrate erred to hold that the loan agreement is of a charge or pawn and hypothecation of goods constitutes a pledge or pawn that falls under

section 124 to 128 of the LCA. He said it was an error for the Magistrate to hold that the 1st appellant was a Pawnee and the respondent a Pownor, and that section 124 of the LCA was applicable.

In showing how the Court erred in misinterpreting section 124 and 128 f the LCA, Mr. Msangi argued that section 100(1) of LCA defines the term "bailment" as follows,

> *"the bailment is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purposes are accomplished be returned or otherwise disposed of according to the directions of person delivering them. And the person delivering the goods is called the bailor while the person to whom they are delivered is called the bailee".*

Such a definition, according to Mr. Msangi did not match the type of agreement the 1st appellant and the respondent entered. He said the term "hypothecation" of goods as defined in Black's Law Dictionary is security or collateral for debt in which generally, there is no physical transfer of the pledged property to the lender and neither is the lender given title to the property though he has a right to sell the property upon default. With such definitions, Mr. Msangi fiercely argued that the agreement in question was of hypothecation of goods and not of bailment of goods as held by the trial Magistrate. To further expound his point, Mr. Msangi submitted that the respondent's goods, which were loans security, were not delivered to the 1st appellant rather they were goods in movement at respondent's shop.

Mr. Msangi further, submitted that the trial Magistrate erred in law by misapplying section 128(1) of LCA in holding that the 1st appellant as a Pawnee, was required to bring a suit against the respondent as the Pawnor. It was Mr. Msangi's argument that this section applies to bailment of goods, which are in possession of the Pownee as clearly elaborated under section 124 of LCA. The latter section of LCA recognizes the right of the Pawnee who is in possession of the title and property pledged to sell the title and property pledged, to sell the property without Courts intervention, as correctly held by the trial Magistrate. It is Mr. Msangi's further contention that the trial Magistrate clearly admitted that the 1st appellant was not in possession of the stock, hence section 124 and 128 of LCA cannot be applicable.

Mr. Msangi argued however that even if section 128(1) of LCA is applicable to the situation at hand, the content of the section does not force the Pawnee to bring a suit against the pawnor as the words used are "may bring a suit" and not "shall bring suit" That, the section gives a Pawnee right to sell the goods upon giving the Pawnor a reasonable notice of the sale. He then argued that, the issue of the 1st appellant's failure to follow due process was not pleaded by the respondent in his plaint nor was it among the framed issues during trial.

According to Mr. Msangi, the respondent had alleged that his business stocks were not loan security. However, through evidence adduced, it was confirmed they were.

On the 1st and 2nd ground of appeal, Mr. Msafiri submitted that the terms of the loan agreement were very clear as to security for loan and right of the bank to sell the hypothecated goods in case of default, but the trial Magistrate discharged those binding terms and misinterpreted the same too. Mr. Msangi argued that the law is clear that parties are bound by the terms of their contract unless there is fraud or misrepresentation.

He said in the signed Loan Agreement parties clearly agreed that the security shall be the house and stocks. That, the 1st appellant could take possession and sell the stock is case of default, without Court order. He further submitted that the case of **THOMAS CHUBWA KAPERA VS. NKYA CO. LTD & ACCESS BANK (T) LTD**, Civil Case No. 1 of 2019, High Court, Mwanza (Unreported) is similar to the case in hand and the Court held as follows;

> *"failure by the borrower (who in this case is the plaintiff), to observe his contractual obligations under the Loan Agreement, the bank will have the right to take possession of the items or goods which were pledged as security to attach and sell them. If the debt will be paid by the borrower before the item were sold, then the items or goods will be returned to the borrower"*

Mr. Msangi enjoined this Court to use the above cited case to hold that the act of the appellants to attach and sell the hypothecated stock was legal and contractual right under the loan agreement.

On the 5th ground of appeal' Mr. Msangi stated that despite the trial Magistrate ruling that the plaintiff had failed to prove he was making any profit or earnings, she still awarded him general damages of Tsh. 5,000,000/=. To this end Mr. Msangi referred this Court to the case of

TANZANIA SANY CORPORATION VS AFRICAN MARBLE CO. LTD [2004] TLR 155 where it was stated;

> *"General damages are such as the law will presume to be the damage natural or probable consequence of the acts. The acts complained of the defendant's wrongdoing must therefore have been caused if not a sale or particular significant cause of the damage".*

It was Mr. Msangi's argument that since the appellant's seized the respondents stock following his failure to repay the loan as per Loan Agreement there was no wrongdoing on their part in the eyes of the law. He cemented his point by referring to the case of **THOMAS CHUBWA KAPERA** (Supra) which held that the said acts of seizing goods are not wrongful acts.

In reply, Mr. Eric Christopher for the respondent stated with regard to ground 3 and 4 of appeal that the word delivery which was applied does not mean it should be physical. He argued further that so as long as the said items were put as security for repayment of the loan, S. 124 of LCA was applicable, hence for the appellants to seize the hypothecated they stock had to seek Court's intervention first.

Mr. Christopher further submitted that the security which the respondent had put a house on plot No. 8 Mapinduzi.

Moreover Mr. Christopher lamented that, the appellants collected from the respondent's shop even other items not hypothecated as they were mentioned in the respondent's plant during trial. And hence the act of the appellants to take such items was illegal and unjustified.

On ground 1 and 2, Mr. Christopher conceded that the trial Magistrate misinterpreted the Loan Agreement by holding that the appellants unlawfully invaded the respondent business premises whereas there was a contractual relationship between the 1st appellant and the respondent. He prayed this honourable Court, being the first appellate Court, to re-evaluate the evidence and give its own decision.

On the last ground that the respondent did not prove general damages, Mr. Christopher had a different view. He said that evidence proved that the respondent did suffer damages from acts of the appellant such as locking the respondent's business premises. He added that the appellants took everything from respondent's shop including his desktop computer where he was storing his business information hence general damages were proved and the respondent was entitled to.

Therefore, Mr. Christopher prayed for dismissal of appeal with costs since the same has no merit.

Mr Msangi in rejoining he objected what has been said by the respondent's advocate that delivery does not necessarily mean physical transfer of goods from one person to another. He cited S. 100 of the LCA which elaborates that there must be physical transfer of goods from one person to another.

Also, Mr. Msangi added that both exhibits DE1 and DE2 were part of the loan and that exhibit DE1 was the final agreement between the parties

and therefore the assertion by the respondent's advocate that exhibit DE2 mentions only the house at Mapinduzi was wrongly pursued.

And with regard to attachment of stocks, Mr. Msangi stated that the respondent failed to prove before trial Court that items which were attached by the appellants were not part of the loan agreement or contrary to the lists submitted by the appellant in Court. He added that it is the 1st appellant who suffers damage as the loan is not cleared to date.

Furthermore, Mr. Msangi stated that upon default the respondent was given a prior notice before attachment to clear his debt but he did not clear it.

Having gone through rival submissions by the parties, this Court has the following issues to determine.

1. Whether the trial Court properly interpreted the law and the terms of the loan agreement in arriving at a decision that the acts of the appellants were unlawful.
2. Whether the trial Court's decision to award the respondent general damages of TZS 5,000,000/= was supported by evidence adduced by the respondent.

On the 1st issue, the Court agrees with the learned advocate for the appellants, and as supported by the learned counsel for the respondent that the trial Magistrate misinterpreted the terms of the loan agreement. She obviously erred by holding that the appellants unlawfully invaded the respondent's business premises by not having a prior Court Order.

It is my considered view that the loan agreement gave the appellants the right to take possession and sell the hypothecated goods. This right would not be exercised without the appellants going to the said premises physically. Evidence on record show that the respondent understood the terms of the agreement but defaulted payment of the loan without justifiable cause. Worse still it has been stated by the appellants that the respondent cheated on the landed property which was also part of loan security. Such serious allegations have not been seriously opposed by the respondent. Under such circumstances, this Court finds that not only did the loan agreement allow the action taken by the appellants but also the respondents behaviour of being unfaithful to the implement action of the agreement which he himself signed necessitated the action taken by the appellants. As correctly observed by the trial Court, the respondent had dirty hand. He could not expect to get equitable treatment.

In the cited decision of this Court in **THOMAS CHUBWA KAERA** (Supra) it was held that a bank had a right under the loan agreement firtly; to take possession of the items or goods pledged and secondly to sell the said items. I fully agree with the decision of my learned colleagues hon. Tiganga, J that indeed the upon default to pay the loan, the bank is justified under the loan agreement to take possession of the shop items

and sale them. There is neither surprise nor injustice to the borrower when such measure are taken by banks to recover depositors monies, provided the action taken was done was agreed upon by both parties.

Let me emphasize here that agreements, loan agreements inclusive are signed to be implemented. A borrower should desist from signing a loan agreement if he is unsure of performing its terms. Where no fraud or misrepresentation on part of banks, surely banks must be enabled to recover the loans, lest banking activities will be doomed to everyone's peril.

For this reason, I find merit in all grounds of appeal. As such the appeal is allowed in entirety with cost. The decision of the trial Court is quashed and set aside.

Ordered accordingly.

ABDI S. KAGOMBA
JUDGE
27/04/2022