IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

(PC) CIVIL APPEAL NO 27 OF 2021

(Arising from Civil Appeal No 7 of 2021 of the District Court of Musoma at Musoma, Originating from Civil Case No 11 of 2021 at Bwasi Primary Court in Musoma District)

MENGI MTANI NYAMAGWIRA .....APPELLANT

VERSUS

GWASOLA NYASORO ..... RESPONDENT

JUDGMENT

4th August & 4th August, 2022

F. H. MAHIMBALI, J.

In this appeal, the appellant has been aggrieved by the decision of the first appellate court which reversed the decision of the trial court.

In essence, the respondent unsuccessfully sued the appellant at the trial court on claim of Tshs 400,000/= the money allegedly credited to him on interest basis of 40,000/= weekly.

The trial court dismissed the claims on the basis that the respondent's claims stood unestablished. Aggrieved, the respondent successfully appealed to the District Court where it reversed the decision of the trial court and ruled that the respondent's claims were established

as per available evidence. This then displeased the appellant, thus the basis of this current appeal. In digest to the all five grounds of appeal, it can be paraphrased that there was no viable evidence at the trial Court thus, the District Court (first appellate court) reached an erroneous decision.

In digest to the parties' evidence at the trial court, there is no sensible evidence that the respondent credited the appellant the alleged money. The testimony of SM2 and SM3 don't support the said claims or allegation. The legal principle is he who alleges must prove (See **Regulation 1(2) and Regulation 6 and 7 of the Schedule of Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations – GNs Nos 22 of 1964 and 66 of 1972**).

The law not only at the trial court, provides that where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim. Though in civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other (**Hemed Said vs Mohamed Mbilu** (1984) TLR

113). Only a party with stronger evidence is the one who must win. In the current case, it was expected that the respondent had established the advancing of 400,000/= to the appellant. A mere saying is not proof. It is only a mere statement or say empty words with no any probative value, and it only remained a fact to be established. Whether the respondent advanced the said 400,000/= to the appellant strictly saying, there is no such proof. What SM1 said in his testimony establishing the said claims, had this to say, I quote:

> *Nakumbuka ilikua tarehe 15/08/2020 mdaiwa alikuja kwangu na kuniomba nimkopeshe pesa Tsh. 400,000/= hizo pesa azungushe na kulipa kwa riba. Nilimwambia hizi pes ani mzunguko tumeuza mkaa na mwenzangu, tumshirikishe aliniomba nilimuita na mwenzangu na walikubaliana riba. Ndipo mimi nilimpatia hela kwa riba ni kila wiki mdaiwa alitoa wiki mbili tu alidai biashara imekua mbaya hivyo hivyo tulimwomba amrudishie pesa mdaiwa alizungusha tu. Mdaiwa kila tukimfuata anasema hana pesa. Kulingana na mbanano, kama shimeji yake mwenzangu aliniambia nimrudishie hiyo pesa aendelee na biashara. Mimi nilimpatia Tsh 200,000/=. Baada ya mdaiwa kunizungusha, nilikwenda kwa mtendaji. Kule kwa mtendaji aliniomba nimvumilie kwa mwezi mmoja tu. Mtendaji aliniomba nimpe barua.*
>
> *Sm2 had said this in his testimony:*

Mdai ninafafanya nae Biashara na pia tunalima wote. Baada ya mimi na mdai kuuza miwa nilipata taarifa toka kwa mdai kuwa mdaiwa anakopa fedha, alifanya hivyo kwa ajili ya biashara. Tulipokuwa tunauza miwa mdai alisema mdaiwa anataka Tsh. 400,000/= (laki nne). Alisema atakopa kwa riba kwa mahusiano yao ya undugu. Mdaiwa aliomba laki nne tu. Mdai alikubali. Mimi na mdaiwa nae alikuwapo. Mdai alikopeshwa Tsh 400000/= na alishalipwa zamani.

Can it then be said that there was any proof? A fact is said to be proved when the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim. I differ with the findings of the first appellate court on its findings that there were inconsistences of the appellant's evidence thus benefited the respondent's case. In my considered view that has not been the case. There is no alleged that inconsistence. In any way, it was the respondent's duty as claimant to establish the existence of the alleged claims in balance of probabilities. In that balance, I have not seen any sensible evidence suggesting the balanced evidence for the said claims by the respondent. I had expected there to a clear and cogent evidence on the accreditation as alleged. Supposing that the said claims were lodged at SM3's office, there ought to have been clear evidence on that. Though witnesses must be given credence on what they testify in court,

but the credence must lead to the establishment of the alleged facts in dispute.

In deciding all cases, the court must confine itself to the facts which are proved in the case. A court must not take into account any fact relating to the case which it hears of out of court except facts learnt in the presence of the parties during a proper forum concerned in the case.

That said, the appeal is allowed. Considering the consanguinity factor of the two parties (brother-in-law) each party shall bear its own costs.

DATED at MUSOMA this 4th day of August, 2022.

F. H. Mahimbali

JUDGE

Court: Judgment delivered this 4th day of August, 2022 in the presence of both parties and Mr. Gidion Mugoa, RMA

F. H. Mahimbali

Judge

04/08/2022