

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA
CIVIL APPEAL NO.57 OF 2021

(C/f Civil Case No.7 of 2020 in the Resident Magistrates Court of Arusha at Arusha)

GIDEON MEYAN MAKARA.....APPELLANT

Vs

ELKE ROSE MARIE ZINK.....RESPONDENT

JUDGMENT

Date of last Order:25-7-2022

Date of Judgment:25-8-2022

B.K.PHILLIP,J

Aggrieved by the judgment of the Resident Magistrates' Court of Arusha at Arusha the appellant herein lodged this appeal on the following grounds;

- i) That the trial Court erred in law and fact as it has admitted Exhibits P1, P2, P3, and P4 which are irrelevant to the case as no single document proved that the plaintiff deposited any money into the defendant's account.
- ii) That the trial Court erred in law and fact as it has ruled the case in favour of the plaintiff by relying upon hearsay evidence as the plaintiff failed to call Silvana Scholler to appear before the trial

Court to prove that she had deposited money into the defendant's account on behalf of the plaintiff.

- iii) That the trial Court erred in law and fact as it had ruled that the defendant had admitted the case while it is not true as the amount of Two Millions (Tshs 2,000,000/=) paid to the plaintiff was not related to the suit .

A brief background to this appeal is that the respondent instituted a suit against the appellant at the Resident Magistrates' Court of Arusha at Arusha alleging as follows; That the appellant had been her friend for a long time. Basing on that friendship they decided to work together. On the 23rd of February, 2015 the appellant successfully opened a Bank Accounts No.300211224336 for Tanzanian shillings (Tshs) and No.300211224337 for Euro at Equity Bank in Arusha branch, (hereinafter to be referred to as "The bank accounts"). The said bank accounts were for the use of the respondent and she is the one who requested the appellant to open the same. The appellant authorized the respondent to deposit money into the bank accounts as well as withdraw the same vide a letter which he wrote to the branch manager of Equity Bank, Arusha. The appellant had access to online banking and was issued with visa Cards for the bank accounts. Thereafter, she deposited a sum of Tshs 8,389,747.76 and Euro 9,840.64 in bank accounts No.300211224336 and No.300211224337 respectively. However, most of the time she had been staying in Germany. Consequently, she was not able to use the online banking services regularly. Consequently, the same was blocked. In 2017, she made a follow up of the bank accounts and realized that

the said bank accounts had no money. All the money she had deposited had been withdrawn by the appellant. She communicated with appellant and demanded him to pay back the money but he was uncooperative. Finally, the respondent lodged this case in court praying for the following reliefs;

- i) That the appellant be compelled to pay the respondent specific damages to a tune of Tshs 50,045,156.17
- ii) Payment of interests at the rate of 10% on the principle amount.
- iii) Payment of General Damages at the Court's discretion.
- iv) Payment interests on decretal amount at the Court rate.
- v) Costs of the case.

The case was heard inter parties. Neither the appellant nor the respondent brought a witness in Court. At the end of the day, the trial Court entered judgment in favour of the respondent. It ordered as follows;

- i) That the Plaintiff (respondent herein) partly won her case with costs .
- ii) The defendant (appellant herein) to pay Tshs 42,000,000/= to the plaintiff.

In this appeal the learned advocates Lengai Loita and Frida Magesa appeared for the appellant and respondent respectively. This appeal was argued by way of written submissions.

Submitting for the 1st ground of appeal Mr.Loita argued that appellant being businessman dealing with tourist business had two Bank accounts

at Equity Bank for smooth running of his business. Those Bank accounts were solely owned by the appellant. They were not joint Bank accounts as shown in Exhibit P1. They were in the appellant's names and the visa card in respect of those Bank accounts (Exhibit P3) was in his name. Exhibit P3 came into possession of the respondent because she was the appellant's girlfriend. The appellant wrote Exhibit P2, a letter allowing the respondent to draw money from the bank accounts because she was his girlfriend. The sum of Tshs 8,389,747.76 and Euro 9,840 were deposited into the Bank accounts by the appellant as evidenced by Exhibit P4 (Bank deposit slip). Relying on the provisions of section 8 of the Evidence Act, Mr. Loita contended that exhibit P1, P2, P3 and P4 were wrongly admitted since they do not have any connection with the respondent's claims.

Furthermore, Mr. Loita argued that if the respondent was the who deposited the claimed amount and Bank accounts were owned jointly by her and the appellant, the respondent would have sued Equity Bank for allowing the appellant to withdraw the claimed amount without her consent or being involved in that transaction. He insisted that the respondent failed to discharge her burden of proof to the standard required by the law. To cement his arguments he cited the case of **John Sapuli and two others Vs Rajabu A. Athuman Mrope and the Attorney General, (1985) T.L.R. 148.**

With regard to the 2nd ground of appeal, Mr. Loita argued that the respondent's failure to bring in Court one Silvana Scholler is fatal because in her testimony the respondent alleged that she asked Silvana Scholler to deposit the claimed Euro 9,840.64 into the appellant's bank

account .He contended that Exhibit P7, the respondent's bank statement for her bank account in Germany is irrelevant and has no connection with the respondent's claims. Moreover, he insisted that the respondent's testimony on the money allegedly given to Silvana Scholler by the respondent for depositing them into the Euro bank account on behalf of respondent is hearsay because the said Silvana did not come to Court to testify on the same. To cement his arguments he referred this Court to section 62(1) (a) (b) (C) and (d) of the Tanzania Evidence Act. He contended that Silvana sent money to the appellant after being asked by the appellant to assist him as he was in need of money for payment school fees for his children. Mr. Loita went on submitting that the number of witnesses called by a party to suit do not matter. What matters is the quality of the evidence. He cited case of **Hemedi Saidi Vs Mohamed Mbilu (1984) T.L.R. 113** and **Yohanes Msigwa Vs Republic (1990) T.L.R. 148**, to bolster his arguments.

With regard to the 3rd ground of appeal , Mr. Loita submitted that the trial Court erred in law to rely on an email communication (Exhibit P8) which was written by a person who was not brought in Court to testify on the same. He maintained that the email communications are irrelevant in the respondent's case since they are concern with the communication between the respondent and another person unknown to the appellant, and that person did not testify before the trial Court. There was no evidence adduced to prove that the appellant sent to the respondent a sum of Tshs 2,000,000/= as claimed by the respondent and ruled by the trial Court.

In rebuttal, Ms. Magesa, submitted as follows; That exhibits P1, P2, P3 and P4 are relevant in this case. The trial Court admitted the above mentioned exhibits in accordance with the requirements of the law and the same forms part of the Court's records. She cited the provision of Order XIII , Rule 7(1) of the Civil Procedure Code (CPC) to cement her arguments. She contended that Mr. Loita has no mandate to declare exhibits P1, P2, P3 and P4 irrelevant since that is the domain of the trial Court. To cement her arguments she cited the case of **A.A.R. Insurance (T) Limited Vs Beatus Kisusi, Civil Appeal No. 67 of 2015**, in which the Court of Appeal held that;

"The function of admission of documentary exhibit is the domain of the trial Court and not the parties to the proceedings"

She insisted that the aforesaid exhibits were properly admitted after the trial Magistrate had overruled the objections raised by the appellant. To cement her contentions, she cited the case of **M/S Sam Construction Limited and another Vs Mr. Peter Gwaydes Gorwa , Civil Appeal No. 26 of 2021**, (unreported).

Moreover, Ms. Magesa submitted that the evidence adduced shows that the appellant is the one who assisted the respondent to open the bank account in Tanzania because she is a German not Tanzanian, thus, she was not able to open the bank account on her own. The appellant took advantage of the circumstances. He opened the bank accounts in his names. Ms. Magesa went on submitting that the appellant gave the respondent mandate to operate the bank account while in Tanzania and

was registered in the online banking system. That was proved by exhibit P1 and P2. Exhibit P3 is a proof that the respondent requested her friend Silvana to transfer a sum of Euro 9,750 into the Euro bank account. The appellant withdrew all the money deposited into the bank account by the respondent clandestinely without informing her. Exhibit P4 proves that the communication between the respondent and the appellant regarding the respondent's claims. The amount of money so far paid back to the respondent is Tshs 2,000,000/= only and the unpaid amount is Tshs 42,000,000/=. Ms. Magesa maintained that the 1st ground of appeal has no merit. The appellant failed to prove that the money he withdrew from the bank account were his money.

With regard to the second ground of appeal, Ms. Magesa submitted that there was no need of summoning Silvana Scholler to testify in Court because the documentary evidence tendered by the respondent (Exhibit P3) was enough to prove that Silvana deposited the amount of money claimed after being requested by the respondent to do so. The appellant did not dispute that Silvana deposited the claimed amount of money, though he claimed that Silvana was his friend but hopelessly failed to prove his aforesaid allegation. Ms. Magesa maintained that the trial Court's findings regarding the money deposited by Silvana in the Euro Bank account is correct. She urged this Court to dismiss the 2nd ground of appeal for lack of merit.

On the 3rd ground of appeal, Ms. Magesa submitted that the amount of Tshs 2,000,000/= paid back to the respondent by the appellant was related to the respondent's claims. During the hearing the appellant

denied to have paid the said amount of Tshs 2,000,000/= in fulfillment of his promise to pay back the money he withdrew from the Bank account as agreed in Exhibit P4. However, he failed to give plausible reasons why did he pay the respondent the said amount of Tshs 2,000,000/=. She insisted that the payment of the said Tshs 2,000,000/= supports what is written in exhibit P4. Referring this Court to pages 11 and 12 of the trial Court's judgment, Ms. Magesa contended that the trial Court made a correct analysis of the evidence adduced by the parties at the trial which showed that the appellant withdrew the claimed amount because he had access to the bank account and believed that he would be able to pay back the same as revealed in the whatsapp communication between him and the respondent.

Moreover, she urged this Court not to accept to be used by defaulters to escape their their contractual obligations. She cited the case of **Liza Nathan Mwankusye Vs CRDB Bank , Land Appeal No. 202 of 202** (unreported) .She prayed this appeal to be dismissed for lack of merit.

In rejoinder, Mr. Loita reiterated his submission in chief and contended that Ms. Magesa has missed the gist his arguments in the 1st ground of appeal. Her response was completely out of context, since she based her arguments on the procedure for admission of documentary evidence whereas his arguments was on the relevance of exhibits P1,P2, P3 and P4. He was of the view that all cases cited by the Ms. Magesa in support of her arguments are irrelevant as all were on the procedure of admission of documentary evidence.

Moreover, Mr. Loita submitted that he raised objection on the filing of the said exhibits and the trial magistrate expunged the same from the Court's records. However, in an explainable way, the trial Magistrate allowed the respondent's advocate to file those exhibits in Court again before the commencement of the hearing. Consequently, he wrote a letter explaining that he had no confidence for the trial Magistrate (Ho. Mushi) to proceed trying the case. Ultimately, the case file was transferred to Hon Ngoka. Mr. Loita refuted the arguments raised by Ms. Magesa that the respondent was not able to open bank account in her name because she is Germany national. He contended that Ms. Magesa failed to cite any law which prohibits foreigners from opening and operating bank accounts in Tanzania. In this country there are many foreigners engaging in genuine business who have bank accounts in their names, contended Mr. Loita.

In addition Mr. Loita was of a view that the case of **Liza Nathan Mwankusye** (supra) does not support Ms. Magesa's argument instead it supports the appellant's position because in the case at hand the respondent failed to present in Court any documentary evidence to prove the existence of any transaction between the appellant and the respondent. He insisted that the appellant denied to have directed anybody to send money to the respondent. The email correspondences relied upon by the respondent are fake /not genuine. The respondent failed to call material witnesses for no good reason. Thus this court is entitled to draw adverse inference to the respondent. To cement his arguments he cited again the case of **Hemedi Said** (supra).

Having analyzed the submissions made by the learned advocates, let me embark on the determination of the grounds of appeal.

Starting with the 1st ground of appeal, having perused the Court's records as well as read exhibits P1,P2,P3 and P4 , I wish to point out from outset that I am in agreement with Mr. Loita that Ms. Magesa misconstrued his argument in respect of this ground of appeal since the same was not in relation to the procedure in admission of the exhibits, but the relevancy of the exhibits to the case. Therefore ,it is correct that the case cited by Ms. Magesa in support of her arguments are irrelevant. However, it is not in dispute that exhibit P1 is a letter which was written by the appellant addressed to branch manager of Equity Bank, in which the appellant was informing the branch manager of Equity Bank his authorization to the respondent to withdraw money from the two bank accounts where the respondent claims that she deposited her money. Also the appellant does not dispute that he withdrew the claimed amount of money. The appellant's defence is that he is the sole owner the bank accounts in question and money deposited therein belonged to him, and was not obliged to ask for permission from anybody for withdrawing the same.

From the foregoing, it is evident that exhibit P1 is a relevant document in this case since it has connection with the respondents claims/ facts in issue in this case. Exhibit P2 (a visa card for the said bank account), exhibit P3 (Document transfer of Euro 9,750 from Germany to the bank account) and exhibit P4 (whatsapp communication between the respondent and appellant) are all related to the bank accounts where the

respondent claims that she deposited her money, the subject of this case. In short, there is no doubt that these exhibits are relevant in this case because they so connected to the facts in issue in this case. (See section 7 and 8 of the Evidence Act).

The fact that the appellant is disputing exhibits P1,P2, P3 and P4 cannot be a justification to term them as irrelevant . In addition to the above, the pleadings and the appellant's testimony reveal that the appellant did not dispute that he is the author of exhibit P1 and did not dispute that the respondent has a visa card for the bank accounts. In fact, these facts show that the appellant acknowledges that the respondent had rights over the bank accounts and the money deposited therein, though the bank accounts are in the appellant's names. By connecting the dots between the exhibits tendered in evidence and the respondent's testimony as well as the facts not in disputed mentioned in this judgment, it is definite that the respondent had vested interest in the money deposited in those bank accounts. In short it is the finding of this Court that 1st ground of appeal has no merit.

With regard to the 2nd ground of appeal, Mr. Loita's arguments in respect of the respondent's testimony regarding the money that was deposited in the bank account by one Silvana is misconceived because the respondent testified before the trial Court that she is the one who talked to Silvana and requested her to deposit the money in the Euro bank account. Such evidence cannot be termed as hearsay. The respondent was not told that information by anybody. She talked to Silvana. I have no problem with the provision of the Evidence Act referred to this Court by Mr. Loita. What is

important here is that the respondent's testimony was in line with the requirements of the Evidence Act.

On whether it was necessary to bring Silvana in Court to testify, my answer to that question is a big "NO". I am in agreement with Ms. Magesa that there was no need for Silvana to appear in Court to testify. Exhibit P3 was quite enough to substantiate the respondents' claims as far as the deposit of the claimed amount of money into the Euro bank account is concerned. After all, the appellant did not dispute that Silvana deposited the claimed amount of money instead he alleged that Silvana was his friend and she sent the money to him following his request for assistance to pay school fees for his children. Interestingly, he failed to provide in Court any evidence to substantiate that he had been communicating with Silvana in relation to the said amount of money deposited in the Euro bank account. With due respect to Mr. Loita, the cases he cited in his submission are irrelevant and distinguishable from this case because the issue here is; was it necessary for Silvana to testify in Court? .Not the number of witnesses. In the case of **Yohanes Msigwa** (supra) the Court held that what matters is not the number of witnesses but the quality of the evidence. In the case of **Hemedi Saidi** (supra) the Court held that if a party fails to call a material witness adverse inference may be drawn against him. However, I have already said in this judgment that there was no need of summoning Silvana to testify in Court. From the foregoing it is the finding of this Court that the 2nd ground of appeal had no merit.

Coming to the 3rd ground of appeal, I have noted that in this case there are four exhibits only (Exhibits P1, P2 ,P3 and P4). With due respect to Mr. Loita, Exhibits P7 and P8 which he referred this Court in his submission are not into existence. The email correspondences referred to this Court by Mr. Loita in his submission as exhibit P8 were not admitted as exhibits in this case.Likewise, the respondent's Bank statement referred to this Court by Mr. Loita in his submission as exhibit P7 was not admitted in evidence. The decision of the trial Court is not based on the aforementioned email correspondences and bank statement referred to this Court by Mr. Loita because they are not part of the exhibits in this case.It is noteworthy that a document can only be referred to as an exhibit after being admitted by the trial Magistrate and labeled as an exhibit in accordance with the provisions of the Order XIII Rule 4 (1) 7 (1 of the Civil Procedure Code (CPC) .So, the whole of Mr. Loita's submission in respect of this ground of appeal is misconceived. Upon perusing the Court's records I noted that the said email correspondences and bank statement were among the additional documents intended to be relied upon by the respondent in her case but were not admitted as exhibits. There is nowhere in the judgment the trial Magistrate mentioned either exhibit P7 or P8. The trial Magistrate relied on the oral testimony made by the respondent and exhibit P4 to rule out that the appellant started paying back the respondent's money. The credibility of the whatsapp messages between the respondent and appellant (exhibit P4) have not been challenged by the appellant. The same prove that the

appellant promised to pay back the respondent's money . Thus, it is the finding of this Court that the 3rd ground of appeal has no merit.

In addition to the above, I wish to point out that the evidence adduced by respondent proved her claims to the standard required by the law and am in agreement with the decision of the trial Court. In the upshot, it is the finding of this Court that this appeal has not merit. Thus, it is hereby dismissed it with costs.

Dated this 26th day of August 2022




B.K.PHILLIP
JUDGE.