IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO. 82 OF 2020

(Arising from the decision in Civil Appeal No. 54 of 2019 of the District Court of Kinondoni by Hon. F. MOSHI-SRM)

EFC TANZANIA MICROFINANCE BANK LTD.....APPELLANT

VERSUS

DMK LEGAL.....RESPONDENT

JUDGEMENT

3rd February & 29th August, 2022

ITEMBA, J;

This is the second appeal by the appellant upon being dissatisfied with the findings of the two lower Courts. Prior, it was the decision of the trial Court, the Kinondoni Primary Court in Civil Case No. 237 of 2018 which was made in favour of the respondent and the latter, was the verdict reached by the District Court of Kinondoni in Civil Appeal No. 54 of 2019 in which upheld the decision of the trial Court. This appeal has instantly been preferred by the appellant to challenge the decision by the first Appellate Court basing on the following points of grievances;

1. *That, the appellate Magistrate erred in law and fact for failure to quash and set aside the decision of the Primary Court while there was no sufficient proof of awarding TZS. 28,120,000/=*

2. *That, the appellate Magistrate erred in law and fact for failure to quash and set aside the decision of the Primary Court, as the respondent failed to prove that, he was instructed by the appellant and defend Land Case No. 269 of 2016 on behalf of the appellant.*
3. *That, the appellate Magistrate erred in law and fact for failure to quash and set aside the decision of the trial Court for not appreciating that, the respondent was supposed to file bill of costs to claim the cost of land case No. 269 of 2016 in which the appellant and respondent were sued before the High Court and not file before the Primary Court.*
4. *That, the appellate Magistrate erred in law and fact for failure to quash and set aside the decision of the Primary Court for the reasons that, the decision of the Primary Court reached without involving the assessors.*

Briefly, the facts which gave rise to the instantaneously appeal is that, the appellant and the respondent had entered into the debt collection agreement sometimes in 10th July 2015. The respondent's office is a law firm and the appellant was their client. It is apparent that on 18th January 2017, the said agreement was rescinded by the appellant upon the changes in the management team of the appellant's Microfinance bank. The dispute arose between the parties when the respondent wanted to be reimbursed by the appellant for the costs incurred in respect of a case which it was representing them, that was filed by Ms. Kudrazake Wilson Bhukoli against the appellant and others in the High Court of Tanzania at Dar es salaam, Land division. The same was indexed as Land case No. 269 of 2016 which was later settled

by the parties. The respondent had requested for payments in number of occasions but the appellant neglected to comply as it claimed not to have been indebted with the respondent. It was these circumstances that lead to institution of the original case by the respondent before the trial Court in which it successfully sued the appellant.

Upon hearing the parties, the trial Court proceeded to order the appellant to make payment of a total sum at a tune of TZS. 31,120,000/= to the respondent, in which TZS. 28, 120,000/= were specific damages and TZS. 3,000,000/= were the costs of the suit.

Disgruntled, the appellant unsuccessfully appealed against such decision before the first appellate Court, hence this appeal as a second kick.

Upon leave of this Court, this appeal was agreed to be argued by way of written submission and the parties herein were represented in which they complied accordingly with the schedule. The appellant was duly represented by Mr. Cleopace James, learned advocate whereas the respondent enjoyed the services of Ms. Shamimu Kikoti, learned advocate.

At the outset, I endeavour to demonstrate primarily that the appellant had raised four (4) grounds of appeal before the first appellate court. To wit the same, they were as follows; - **One,** that the Honourable Trial Magistrate was extremely biased when determining the matter before her to the extent

of relying on the side of the decree holder. **Two,** that the Honourable trial Magistrate erred in law and fact by failure to consider the evidence that was adduced by the appellant hence arrived to a fault decision. **Three,** that the trial magistrate erred in law and in fact by awarding the respondent with TZS 28 million without any justifiable reasons or proof to arrive to such amount awarded. **Four,** the Honourable trial magistrate erred in law and fact by introducing new facts in the judgement which were not adduced during the proceedings.

Indeed, there are a range of cases in which the Supreme Court had the occasion to observe that as a second appellate court, it cannot adjudicate on grounds of appeal which were not raised and determined in the first appellate court. [See the cases of **Abdul Athuman vs. Republic** [2004] T.L.R. 151 and **Samweli Sawe vs. Republic**, Criminal Appeal No. 135 of 2004 (both unreported), just to mention some]. In **Samweli Sawe vs. Republic,** the Apex Court held on the point that: -

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was not among the appellants ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman vs. R (2004) TLR 151*** *the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first*

appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."

The above exposition applies to the situation in the present case in which grounds 2, 3 and 4 are new grounds of appeal. Principally, only the grounds poignant a point of law can be raised for the first time before the second appellate Court. Ground 2 and 3 have been improperly raised because they are new and based on facts. Save for ground 4 which is on point of law that can ultimately be determined by the second appellate Court. In the circumstances, ground 2 and 3 of appeal are accordingly struck out.

Excavating from the appellant's written submission on ground 1; Mr. James argued that the amount of TZS. 28,120,000/= was awarded to the respondent while there was no sufficient proof given. His argument was centred on the following predicaments; *One,* it was not the appellant who was supposed to pay for the costs of the suit to the respondent. He referred to the letter which the appellant issued to the respondent of 26th June 2017 (Exhibit 5) which expresses that all the costs in respect of the said case were to be paid by Ms. Kudrazake herself who was the plaintiff in Land Case No. 269 of 2016. *Two,* there was no evidence tendered by the respondent which proved that the respondent appeared to defend the Land Case No. 269 of 2016.

Three, the order pertaining 10% of the recovered amount from Ms. Kudrazake as debt collection fees was not proper. According to Mr. James, the respondent did not recover any amount from Ms. Kudrazake who was the loan defaulter. He insisted that there was no auction and even the full amount was refunded back to the purchaser as far as the settlement in Land Case No. 269 of 2016 is concerned.

Four, the first appellate Court did not evaluate the evidence afresh and come out with it's own finding over the matter. To bolster her contention here, he cited the case of **Salum Mhando vs. Republic** [1993] T.L.R 170 (CAT) which provides for that effect.

Five, that the amount of a tune of TZS. 28,120,000/= which was claimed by the respondent against the appellant were specific damages. According to the learned brother for the appellant, the same were to be proved but no invoices or any evidence were tendered to prove the so purported expenditures. To support his argument, he cited the case of **AMI TANZANIA LTD vs. PROSPER JOSEPH MSELE**, Civil Appeal No. 159 of 2020 (Unreported) in which the Apex Court observed that:-

> *"I would expect more evidence to support or prove the payment, say by production of receipts or bank statement or any other form of such proof to confirm the expenditure. Evidence of having opened Letters of Credit as per exhibits PII would also suffice to*

provide such evidence. In the absence of such evidence, I hesitate to accept there was actual expenditure of the amount as stated by the plaintiff."

In respect of ground 4 of the appeal; the counsel for the appellant contended that there was violation of section 7 (1) and (2) of the Magistrates Court's Act [Cap 11 R.E: 2019] which requires involvement of assessors in matters before the Primary Court. He contended that, the assessors did not give their opinions in the judgement. For that reason, he stiffly strained that the judgment of the trial and appellate Court were nullity.

In rebuttal, Ms. Kikoti in respect to the 1st ground did submit that; the appellant has never disputed to have been indebted to the respondent. She contended that the respondent had tendered as exhibits before the trial Court; the contract between the parties in respect of debt collection, notice of termination of the said contract by the appellant, demand notice, several letters and correspondences reminding the payment of such debt by the respondent to the appellant. According to her, the TZS. 28,120,000/= was then proved. The learned sister further accentuated that the first appellate Court did analyse the evidence properly as it was well reflected under page 7 of the judgment that the appellant did not dispute the debt.

However, she had reservation to make in respect of TZS. 3,000,000/= which was awarded as costs of the suit. She contended that there was no

proper evaluation of evidence on how the trial Court arrived to order the said amount as costs to the suit.

In respect of ground 4 of appeal, Ms. Kikoti argued that the grievance is unfounded since the Judgement of the trial Court considered the opinion of two assessors named Kimolo and Mzee Yusuph. It was her argument that this is evidenced at the first page of the judgement. Therefore, according to her the assessors were involved in the decision making.

In his rejoinder, Mr. James emphasized on what he had submitted in chief and eloquently added that there was neither invoice nor receipts that were tendered before the trial Court to justify TZS. 28,120,000/=. This was in respect of ground one. Thus, because of that, Mr. James resisted that it couldn't justify the appellate Court's decision to uphold the findings of the trial Court. Moreover, as to ground 4, the learned brother stressed vehemently that the assessors' opinions were never reflected in the judgement.

Upon digesting the submissions by the parties, the crucial question for determination is *whether the first appellate Court's decision was faulty to render this appeal meritorious.*

I prefer to dispose this appeal not in a seriatim rather starting with ground no. 4 for reasons to be apparent in due course. The appellant has contended

that the assessors were not involved contrary to the provisions of section 7 (1) and (2) of the Magistrates Courts Act *(Supra)* since the Court's trial Court's Judgement do not reflect their opinions. On the other hand it has been argued that the names of the assessors appears on the front page of the trial Court's judgment which shows that they were involved in the decision.

I wish to make it vibrant here, the law governing composition of Judgment in Primary Court is the **Magistrate's Court's (Primary Courts) (Judgement of Court) Rules, 1987 GN No. 2 of 1988**. The issue of involvement of assessors in composition of judgement is well certified under Rule 3 (1) (2) and (3) which provides as follows: -

> *3. (1) Where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court,* ***the magistrate shall proceed to consult with the assessors present, with the view of reaching a decision of the court.***
>
> *(2) If all the members of the court agree on one decision, the magistrate shall proceed to record the decision or judgment of the court* ***which shall be signed by all the members.***
>
> *(3) For the avoidance of doubt a magistrate shall not, in lieu of or in addition to, the consultations referred to in subrule (1) of this Rule, be entitled to sum up to the other members of the court.* [Emphasis added]

It is apparent clear, the above provision only requires consultation to the assessors, as well the signatures of the assessors in the content of the judgement. The provision does not require the assessors' opinion to be reflected in the judgement as contended by Mr. James.

The Upper bench when confronted with the similar circumstances of our case at hand, in **Neli Manase Foya vs. Damian Mlinga,** Civil Appeal No. 25 of 2002, CAT at Arusha (Unreported), it had this to say:-

> *"**We do not read anything in Rule 3 (1), (2) and (3) above which demands the assessors to give their opinions on an issue before the court**. Under Rule 2 assessors are members of the court which include the magistrate. It is evident from sub rule (2) above that all members of the court are required to participate in the decision-making process of the court. Assessors are members of the court, co – equal with the magistrate. After they have completed hearing the evidence from the parties, the stage is then set for the magistrate to consult with them in order to reach a decision of the court. This presupposes that before the court reaches a decision, there will be a conference of the members of the court to deliberate on the issues before them and reach a decision. In such a case, the*

magistrate will write down the decision, which will then be signed by all members of the court."

The Supreme Court went further to point out that:-

> *"...**The assessors are members of the court and sign the judgment as such**, and not for the purpose of authenticating it or confirming it. In answer to the second point of law, **assessors are neither required to give their opinions, nor to have their opinions recorded by the magistrate..."***
>
> [Emphasis is added]

Guided by the above held by the Apex Court, the fact that the trial Court's Judgement bears the names and signatures of assessors, it is enough to conclude that the assessors were involved in the composition of the judgement. Hence, ground 4 lacks merit thus dismissed.

Embarking to ground 1 in which the appellant complains that the amount of TZS. 28,120,000/= was not proved. Again, the appellant's verily protest that the first appellate Court did not analyse the evidence well. Whilst on the other hand the respondent's counsel had submitted that the so amount was proved by the appellant. As well, it had been argued that the first appellate Court did analyse well the evidence by scrutinising the exhibits and concluded in the favour of the respondent as the appellant did not dispute that he was indebted to the respondent.

Apparently, it is an established principle of law that in composing judgments, Judges and Magistrates are duty bound to weigh evidence of both sides and that failure to do so is a serious error. It is the position of the law that, generally failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice.

Nevertheless, it is the duty of the first appellate Court to re-evaluate and re-consider the appellants' defense if the circumstances may so demand. *Ipsa jure,* this is the duty only vested to the first appellate court. I have a number of decisions in mind including the case of **Armand Gueh Vs Republic**, Criminal Appeal No. 242 of 2010, whereby the Court of Appeal of Tanzania stated that:-

> *"Before we embark on discussing the above referred doctrine however, we once again wish to reaffirm our stand that we are desirous to be guided, where circumstances may so demand, by the principle that this being a first appellate court, it has a duty to reconsider and evaluate the evidence on record and come to its own conclusion bearing in mind that it never saw the witnesses as they testified."*

I have taken time to read the decision by the District Court of Kinonodni (first appellate Court) and the trial Court's proceedings. The appellant had complained before the first appellate Court that the TZS. 28, 120, 000/= was awarded unjustly against her. It was appellant's contention that the evidence was not sufficient to prove the claims. The complaint being of evidence,

wisdom detects that, the first appellate Court was to inspect if the evidence by the respondent was sufficient enough to prove the awarded reliefs. This was to be done by re-evaluating the evidence of the respondent *vis a vis* that of the appellant to see if at all the orders granted were justified. It is very unfortunate that the District Court Magistrate only enlightened and evaluated the evidence by the respondent (plaintiff by then) to arrive at the conclusion against the appellant. This can be evidenced, at page 7 of the Judgement which for ease of reference I reproduce it, hereunder: -

> *'Moving to the third and fourth grounds of appeal jointly, respondent submitted that she had a debt collection contract with the appellant as stated above in which copy of the said contract dated 10th July 2015, notice of termination of that contract from the appellant dated 18th January 2018, demand notice by the respondent dated 10th February 2017 also 23rd June 2017, several letters and correspondences reminding the payment of the said debts by appellant were tendered and admitted as exhibits. In all submitted exhibits the appellant has never disputed that being indebted by the respondent, this honourable Court again consult* ***section 110 (1) of the Tanzania Evidence Act, Cap 6 R.E: 2002*** *provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence*

of the fact which he asserts must prove that those facts exist." This court find that nothing wrong with the court's decision because the respondent did give her evidence in court, and she supported her claim with exhibits which were admitted as proof on balance of probabilities, from that point appellant cannot say the matter was not proved in Primary Court."

From the above extract, there is no gainsaying that nothing transpired about the appellant's (defendant by then) defence rather than a general phrase that, the appellant had not disputed to be indebted to the respondent while the proceedings of the Primary Court underscores that it denied the alleged facts and there was a trial over the matter. It is of my opinion that the appellate magistrate upon scrutiny of the evidence of the respondent, he could have gone further to scrutinize the opposition case so as to come with a just conclusion as to how the appellant didn't deny that it was indebted to the respondent as contended. Unlike to what he did by explaining in generally the defence's admission on the fact.

The Court of Appeal of Tanzania in the case of **Leonard Mwanashoka vs. Republic**, Criminal Appeal No.226 of 2014 (Unreported), it was observed that:

'It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis."

Basing on the above, without divulging into other complains elucidated under ground 1 in respect of evidence, I see the necessity of the first appellate forum to invoke it's mandate to re-evaluate the evidence and to come out with the just conclusion over the matter. Through this task, the second appellate Court, at occasion of any appeal if so preferred, it will be in a proper position to address on the issues of evidence.

I wish also to edify on the irrelevancy of the Tanzania Evidence Act [Cap 6 R.E:2002] (now R.E 2022) to this matter. I have noticed an incongruity by the appellate magistrate to cite the same while the matter originates from Primary Court. The proper law instead is the **the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, GN. 66 of 1972.**

Basing on the generality of the above, the matter is ordered to be remitted back to the trial Court for proper composition of the judgment. The appeal partially succeeded. Each party bears it's own costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 29th day of August 2022.

Itemba

JUDGE