IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

(AT DAR ES SALAAM)

CIVIL APPEAL NO. 262 OF 2020

(Originating from the decision of Ilala District Court at Samora Avenue in Civil Case No. 139 of 2018)

LOGASIAN MARK SILAYO.....APPELLANT

VERSUS

MAENDELEO BANK LIMITED..... RESPONDENT

JUDGMENT

15/12/2021 & 12/8/2022

LALTAIKA, J.

This is an appeal by **LOGASIAN MARK SILAYO** who is dissatisfied with the judgment and decree of the Ilala District Court in Civil Case No.139 of 2018 delivered on 24th September,2020 (Hon. Nassary-SRM).

In order to facilitate an easy appreciation of the case I find it desirable to preface the judgment with a brief historical account. The appellant Logasian Mark Silayo is a business man dealing with a variety of household items in his shop located at Aggrey and Jamhuri Steet at Kariakoo in Dar es salaam. In the course of his business, the appellant applied and he was granted a loan amounting to TZS 150,000,000/= from

Maendeleo Bank, the respondent in this appeal. The appellant managed to pay a part of the debt amounting to TZS 60,000,000/= Due to his health-related challenges he was forced to close the business for some time thus failed to service his loan during that time of business closure.

Upon his recovery and resuming business, the respondent asked him to pay Tshs.500,000/= every day to clear the debt. The appellant paid for the first three days. On the fourth day, he received a letter that his guarantor's house was about to be sold and was to be charged with the offence of mortgaging the property of the deceased one Lyasenga without his heirs' consent.

The appellant raised his complaints to the respondent's (Maendeleo Bank) Manager who told him that his problem would be solved but the promise was never fulfilled.

In July 2018, the respondent went to his shop in the absence of the appellant and allegedly collected from the shop goods valued about TZS 179 million and money in cash to the tune of TZS. 27 million. The appellant reported the matter to the police where he was advised to take it up to the courts of law.

Consequently, on the 11th September 2018 the appellant instituted a Civil Suit (No.139 of 2018) at Ilala District Court claiming against the

respondent a total sum of TZS 197,000,000/= as follows: TZS.170,000,000/= for the collected stock from his shop and TZS 27,000,000/= cash money collected without his notice.

In the ensuing case for the appellant two (2) witnesses, Logasian Mark Silayo (PW1) and Antipas Philipo Lyimo (PW2) were lined up in support of the claim. On the adversary side, the respondent featured one witness George (DW1) and four exhibits to wit; bank agreements admitted as D1and D2, the sixty days' notice which was marked as Exhibit D3 and bank statement marked D4 to support the denial of the appellant's claim.

At the height of the trial on 24th September 2020, the trial court found that the appellant had failed to prove its case hence the matter was dismissed. Dissatisfied with the decision of the trial court, the appellant lodged the present appeal with four grounds as shown below:

1. *That the trial Magistrate erred both in law and fact by reaching a decision basing on contradictory evidence.*

2. That the Trial Magistrate erred both in law and fact by dismissing the appellant's case while the Respondent unlawfully collect the stock in the Appellant's shop.

3.That the Trial Magistrate erred in law and fact by contradicting herself in addressing and answering issue No.3 and issue No.4 framed in the original suit thereby failing to give a clear determination of the said two issues as to whether they answered in affirmative or not.

4. That the trial Magistrate erred both in law and in fact by considering the testimony of the respondent that the value of the goods taken from the Appellant's shop amounted to Tshs.3,000,000/= while there is no evidence adduced by the respondent to prove the same.

At the hearing of this appeal on 26th October 2021 Mr. James Mwenda, Advocate holding brief for Advocate Mariam Hussein for the appellant prayed the matter to proceed by way of written submissions. The prayer was granted.

In her submission in support of the appeal Ms. Hussein opted to start with the 4th ground that the trial Magistrate erred both in law and fact by considering the testimony of the respondent that the value of the goods taken from the appellant's shop amounted to TZS.3,000,000/= while there was no evidence adduced by the respondent to prove the same. She submitted further that it is trite law in civil cases that the one who alleges must prove as provided under section 110 and 111 of the law of Evidence Act, Cap 6 R.E 2019.

The learned counsel contended that at page 3 and paragraph 3 line 9 of the typed judgment of the trial court, it is recorded that the defendant had testified before the court that the value of the goods taken from the shop amounted to TZS 3,000,000/=. Ms. Hussein is of a view that those were mere words without any document to prove the same and should not have been relied upon. To bolster her argument, Ms. Hussein referred this court to the apex court's decision in **Barelia Karangirangi Versus Asteria Nyalwambwa**, Civil Appeal No.237 of 2017. Ms. Hussein went on to argue that nowhere in the judgement could one find that the respondent had adduced evidence before the court that goods taken from the appellant's shop were valued at TZS.3,000,000/=.

It was time for Mr. Benjamin, counsel for the respondent, to submit in response to the above submission by Ms. Hussein. Starting with the fourth ground of appeal, it is Mr. Benjamin's submission that it was the appellant who had alleged that the respondent unlawfully collected stock and cash money from his shop to the tune of TZS.197,000,000/=. The learned counsel expounded further that at the trial court, DW1 who is principal officer of the defendant, testified that the goods that had been collected were valued Tshs.3,000,000/= only. He tendered the bank statement (Exhibit 4) to prove that after Tshs.3,000,000/= was debited

from the principal sum, still the appellant had a debt of Tshs.134,821,638.34/=Therefore the appellant's argument that there is no evidence to justify the fact was a misleading argument and should not be relied upon by this court.

The learned counsel submitted further that section 110 and 111 of the Law of evidence Act Cap 6 R.E 2019 cited by the appellant defeats her own argument because the appellant was the one who alleged that goods and cash money collected from his shop amounted Tshs.197,000,000/= and he failed to prove it before the court.

On the third ground, counsel for the respondent submitted that it is clear that the trial magistrate had answered the two framed issues in the negative. The learned counsel averred that the appellant was expecting the said issues to be answered in the affirmative while he did not tender any evidence to justify the allegation raised that the good and cash money collected from the shop amounted TZS 197,000,000/= lawfully and that the respondent was not entitled to sell the mortgaged property.

The learned counsel for the respondent submitted further that the appellant was issued with sixty a days' notice which was tendered before the court and admitted as exhibit D3. To that end, Mr. Benjamin averred, the dictates of section 127(1) of the Land Act, Cap 113 R.E 2019 was

complied with. He argued further that section 132 of the Land Act allows sale of the mortgaged land by the mortgagor after expiry of sixty days from the date of receipt of a notice under section 127 of the said Act. To back up his argument the learned counsel cited the case of **Joseph Kahungwa Vs. Agricultural Inputs Trust Fund and 2 others**, Civil Appeal No.373 of 2019 (unreported).

The learned counsel argued further that from the outset of records of the trial court the appellant had never raised any claims that the sale of the mortgaged property was in breach of duty of care or the said sale was in twenty-five per centum or below the average price as provided under section 133 of the Land Act. Mr. Benjamin is of a firm belief that the sale adhered to the formal procedure prescribed under the law. He concluded his submission on this ground by appealing to this court to dismiss the appeal with cost.

Turning to the second ground the learned counsel averred that in the typed judgment of the Ilala District Court page 5 paragraph 2, the trial court had carefully analysed the evidence adduced by both parties and made a conclusion that the issue was answered in the negative. To substantiate his argument Mr. Benjamin referred this court to the case of **Juma Jaffer Juma Vs. Manager of the People's Bank of Zanzibar**

Ltd and Two Others, [TLR] 2004 as quoted in the case of Joseph Kahungwa Vs. Agricultural Inputs Trust and 2 Others, Civil Appeal No.373 of 2019.

Mr. Benjamin averred further that it was the intention of the appellant to rush to this court to seek redress which he does not deserve with the intention to deprive the respondent, a financial institution, ability to perform its duties. The learned counsel emphasized that such an attempt was against a well-established principle in the case **of Hydrox Industrial Services Ltd and Another Vs. CRDB (1996)** as quoted in the case **of David Kyungu and Another Vs. Tanzania Postal Bank and Others, Civil case** No.74 of 2012 and **Merely Ally Salehe Vs. Kwaheshwa A.R. Mishra and Another.**

The learned counsel concluded his submission by yet another prayer that this court dismisses this appeal with cost for lack merit adding that the same was designed as a shield to protect the appellant from repaying the outstanding balance of TZS 134,821,638.34 owed to him by the respondent.

Having considered the rival submissions by the learned counsels, the issue for my determination is whether the appeal has merit.

I will start off my analysis in respect of the fourth ground as the appellant's counsel did. It appears in the lower court records that the respondent when testifying admitted to have collected properties valued TZS 3,000,000/= which was not enough to clear the debts. It is from the respondent admission that he collected those properties the appellant contests that there was no proof that the property amounted to TZS 3,000,000/= only, contrary to section 110 and 111 of the evidence Act, Cap 6 R.E 2019. For clarity, the section cited provides:

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist".*

Section 111 of Cap 6 R.E 2019 also provides that;

> *"The burden of proof in a civil proceeding lies on that person who would fail if no evidence at all were given on either side."*

It does not take much thought to realize that, as the counsel for the respondent correctly submitted, the above provisions work against the appellant and not the respondent. It is the appellant who instituted a suit claiming TZS.197,000,000/= against the respondent. He claimed that the respondent collected the properties valued at the amount mentioned and also money in cash. The appellant, therefore, based on this allegation,

wanted the court to give judgment for his legal rights. Clearly, the burned of proof was on the side of the appellant who had alleged and not the other way round as this ground of appeal suggests. See **Future Century Limited v. TANESCO** Civil Appeal No.5 of 2009 and the case of **Abdul Karim Haji vs. Raymond Nchimbi and Joseph Sita**, [2006] TLR 419. I find this ground of appeal is destitute of merit.

In the third ground of appeal, the appellant has faulted the trial magistrate alleging that she contradicted herself in addressing and answering issues No.3 and 4 framed in the original suit. I have decided to go the lower court records and I reproduce the issues as hereunder to guide me in my analysis.

> "3. *Whether the defendant was Justified to sale (sic!) security of the loan*
>
> *4. Whether sale of security was lawful and valid."*

It is on page 5 line 1 of the typed judgment where the trial magistrate analysed those issues. I take the liberty to reproduce what she wrote in her judgment:

> *" These two issues should not detain me as there is no any evidence adduced by the plaintiff in his side (sic!) and the defendant in other side which show that the collected goods was (sic!) sold or not…."*

It appears to me from the above extract of the judgement, that there was no evidence adduced to show that the collected goods were sold or not. In other words, the appellant had not proved what he had alleged hence the trial magistrate was justified in answering the issue in the negative. Needless to say, that this ground of appeal, likewise, lacks merit.

This brings me to the appellant's grievance in relation to dismissal of his case while the respondent had, allegedly, unlawfully collected the stock in his shop. Was such an act unlawful? The word unlawful is defined in the Oxford English Dictionary as

"Not in conformity to, permitted by, or recognized by law or rules"

The Cambridge Dictionary on the other hand, defines the word unlawful as *"not allowed by law".*

In the present appeal, it is undisputed that there was a contract between the appellant and the respondent. The parties entered into a loan agreement. There was a contractual obligation between them. The appellant was bound to pay back the loan as agreed according to the terms and conditions he had accepted. It appears to me that after benefiting from the TZS.150,000,000/= loan and failed to pay back the said loan in full as agreed, the respondent is striving to get his money back. It was in 2016 when he served the appellant with the 60 days' notice

to pay back the loan but the appellant did not act upon the notice as expected. What happened thereafter, is what the appellant claims to be illegal. I do not see any illegality here.

It must be emphasized that illegality in contract law is not co terminus with illegality in criminal law. The appellant was at fault for inability to service the loan as agreed. How can he run to the court of law and claim illegality? This brings to my mind a useful Latin maxim which used to be popular among theory of law scholars, "***Nemo auditur propriam turpitudinem allegans"*** (no one can be heard, who invokes his own guilt)

In addition to Legal Theory enriched by the vast heritage of Latin Maxims, The Law of Contract Act (supra) under part V, provides for obligations of the parties to a contract. **Section 37(1)** provides that;

> *"the parties to contract must perform their respective promises. unless such performance is dispensed with or excused with or excused under the provisions of this Act or any other law."*

In this appeal the appellant had entered into a contract with the respondent. From the said agreement he was issued with a loan to the tune of TZS 150,000,000/=. He promised to pay the same within 36 months. Unfortunately, he did not perform his obligation as promised. It should be recalled that the Respondent is a natural person doing among

other things, lending money to support new and upcoming businesses. When the appellant applied for the loan, he was supposed to repay it to enable other businesses to enjoy the service while for economic growth of our country.

Premised on the principle of sanctity of contract, there is no way this court can interfere except directing that the appellant honours his part of the agreement namely to repay the loan. See Joseph **Kahungwa versus Agricultural Inputs Trust Fund and 2 Others**, Civil Appeal No.373 of 2019, CAT.

From the foregoing analysis I find no fault with the trial court's findings. I hereby dismiss the appeal with costs and uphold the decision of the trial court.

It is so ordered

E.I. LALTAIKA

JUDGE
12/8/2022