THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 06 OF 2022

(Arising from Civil Appeal No. 10 of 2021 of Mbulu District Court, Originally Civil Case No. 34 of 2021 in the Primary Court of the District of Mbulu at Endagikot)

LUCIA AUGUSTINO..... APPELLANT

VERSUS

EMMANUEL ANDREA..... RESPONDENT

JUDGMENT

13th July & 26h August, 2022

TIGANGA, J.

This appeal traces its history from the decision of the Primary Court of Mbulu District at Endagikot where the appellant successfully sued the respondent over the claim of Fourteen Million Shillings (Tsh. 14,000,000/=) and was also ordered to bear costs of the suit.

Dissatisfied with the decision, the respondent approached the District Court of Mbulu in order his grievances be addressed. Fortunately, the District Court decided in favour of the respondent and the decision of the primary court was overturned save for the amount the first appellate court considered to have been admitted indebted by

the respondent himself which is at the tune of Six Million Shillings (Tsh. 6,000,000/=). The appellant was not blessed by the first appellate decision hence, this second appeal.

The commotion which manifested the rival between parties briefly stand as follows: The appellant alleged to have loaned the amount of Tsh. 15,000,000/= to the respondent. The loan agreement was made through the written contract which was attested by the commission for oaths and notary public one Patrick Michael, an Advocate. In that contract which was alleged to have been entered on 4th September, 2019. They alleged to have agreed the said amount be repaid to the appellant in two instalments of 7,000,000/= each within fourteen months. To make the credit worthy believable, the respondent gave a security of original card of the motor vehicle make Suzuki with Registration Number T466 BEG.

Unfortunately, the matter went bending and the respondent repaid only one Million Shillings (Tsh. 1,000,000/=) out of the alleged loaned amount of 15,000,000/=. There remained unpaid amount of 14,000,000/= which is now a source of this turmoil.

In this appeal, the appellant marshalled three grounds of appeal to wit; **first,** that, the first appellate court wrongly declared the loan

agreement as forged one with the allegation being not proved beyond reasonable doubt. **Second,** that, the first appellate court wrongly ordered the respondent to pay Tsh. 6,000,000/= without giving reasons for the order. **Third** and Lastly that, the first appellate court failed to analyse the evidence on record and thus, reached to erroneous decision.

Pursuant to the order and agreement of the parties, this appeal was argued by way of written submissions. Both parties abided to the schedule save that, the appellant did not file rejoinder. Probably, she had nothing to rejoin. The appellant appeared in person, unrepresented whereas, the respondent had the service of Simon Shirima, learned Counsel.

Submitting in support of the first ground of appeal which raises the complaint that the court erred in declaring the contract as forged, he argued that, forgery is an offence under section 333 of the Penal Code [Cap 16 R.E 2019], therefore, it was supposed first to be proved against the one alleged to have forged. That, raising it in the course of judgment, vividly denied the right of the appellant being heard on the ground. Lastly that, the first appellate court had no basis for declaring the contract of the parties as forged one.

Counteracting, Mr. Shirima supported the first appellate court on the decision that, it was proper for the court to infer the said contract as being forged. To substantiate his argument, Mr. Shirima, said that, the appellant was duty bound to bring the one who witnessed the signing of the contract as a material witness, the duty which she did not fulfil. To fortify his argument, he cited the case of **Hemed Said versus Mohamed Mbilu** (1986) TLR 15 where the court observed that, where for undisclosed reasons, a party who fails to call a material witness on his side, the court is entitled to draw inference that, if the witnesses were called, they would have given evidence contrary to the party's interest. Also, he cited the case of **Jeremia Shemweta versus The Republic** (1985) TLR 228 on the issue of doubts casted being resolved in favour of the appellant as he considers the contract being tainted with doubts.

It is noteworthy that, the respondent in the first appellate court was trying to allege that the contract between him and the appellant was forged. This is in accordance with ground 3 of the fronted grounds of appeal in the first appellate court as learned from the impugned judgment at page three. Such kind of allegation required the respondent to prove it to the standard required. In my view, it was not enough to

only claim that the contract was forged without first substantiating as per the dictates of the law, to be specific sections 110 and 111 of the Evidence Act, [Cap. 6 R.E 2022]. With regards to the criminality nature of the alleged offence of forgery, hopefully the standard of proof is higher than the ordinary standard in civil case which is the balance of probability.

Regarding the issues of civil cases involving allegations of crimes, The Court of Appeal of Tanzania has already set the threshold for taking off. In the case of **Yeriko Mgege versus Joseph Amos Mhile**, Civil Appeal No. 137 of 2017 (Unreported) the following was observed:

> *"We understand the appellant is trying to impute that the signature was forged. If that is what the appellant forestalled, we think, under the principle of he who alleges must prove embodied in section 110 of the Evidence Act, Cap. 6 of the Revised Edition, 2019, it was incumbent upon him to prove. And because this averment imputes a crime, its proof must be to a standard higher than that in normal civil cases".*

This principle enumerated by the Court of Appeal as above, has been the stand of our court of record since time immemorial in our court system. See the cases of **Ratilal Gordhanbhai Patel v. Lalji Makanji**

[1957] E.A 314 and **Omari Yusuph v. Rahma Ahmed Abdulkadr** [1987] T.L.R 169.

In **Ratilal Gordhanbhai Patel versus. Lalji Makanji** (supra), the principle was articulated by the erstwhile Court of Appeal for East Africa in the following terms:

> *"Allegations of fraud must be strictly proved. Although the standard of proof may not be as heavy as beyond reasonable doubt, something more than a mere balance of probability is required".*

The principle was reiterated by the Court in **Omari Yusuph versus Rahma Ahmed Abdulkadr** (supra) in which, without referring to the Patel case above, the Court observed:

> *"... it is now established that when the question whether someone has committed a crime is raised in civil proceedings, that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases..."*

In view of the foregoing authorities, it is obvious that the burden of proof of forgery in civil cases is heavier than the balance of probabilities generally applied in civil matters. Thus, the respondent in the first appellate court might have applied the same standard to prove

that the alleged contract between him and the appellant was forged and the signature appended thereto is not his as asserted by the appellant.

Reading on the record of the first appellate court, nowhere the respondent dared to prove that, the alleged contract was forged in the standard required as stated above. It was quite wrong for the first appellate court to infer that the contract between the respondent and the appellant was forged without first following due required procedures to satisfy himself on the forgery or not of the said contract without requiring the respondent to prove on its correctness basing on the well settled principle of law that the one who alleges must prove. For the endeavoured stated above, I find this ground of appeal meritorious. I sustain it.

The second and third grounds will be dealt with jointly. I say so because they are all about tightness of evidence and justifiability. And in fact, they do not detain me much. I have gone through the record of the trial court and the following were observed. **One,** there was the agreement of lending money between the respondent and the appellant. **Two,** the respondent agreed to have been indebted the amount of Seven Million (7,000,000/=). **Three,** in order to secure the loan, the appellant gave the original card of the vehicle make Suzuki with

Registration No. T 466 BEJ. If the picture remains painted yellowish like that, it means, the only disputed amount is seven million of which need be proved through the standard of balance of probability. Now, the obvious wanting question is, whose duty to prove on the balance of probability that the said 7,000,000/= was loaned out or not?

Under The Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations (Section 18) provides as hereunder:

> *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, but 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.*

In cases of civil nature, the law requires the court to be satisfied that, the weight of the evidence of the one party is greater than the weight of the evidence of the other. This simply means that, a party who wants the court to decide in his favour must be able to show the court that he has his evidence tight compared to that of the other party. All evidences of both parties might be heavy but, the one having heavier evidence than the other must win the case. The assessment of the weight of evidence is done by the court upon analysis of the evidence presented before it.

Before the trial Primary Court, the appellant submitted a contract showing that, the respondent was indebted 15,000,000/=. Among the said indebted amount of money, the respondent has already paid 1,000,000/= the fact which is not in dispute. Up to that juncture, basing on the contract (Exhibit M-1) which the respondent failed to substantiate as being forged as said above, and the vehicle registration card which was given as the security of the loaned money the fact which also is not in dispute, the evidence of the appellant stands a greater chance of being believed than that of the respondent. Thus, the burden of proving otherwise lies on the shoulders of the respondent.

The respondent, has adduced during his submission that, even if he was loaned such amount by the appellant still, the appellant had no capacity of lending money because she is not an institute licenced with doing such financial provision.

With respect to the respondent, it is my considered view that, this argument is misplaced. I say so because, reading between the lines of the said contract nowhere it is indicated that the finance loaned to the respondent by the applicant was commercial oriented. It was only for sanctity between them, the relationship governed by the law of contract.

With regard to private arrangements on loaning and lending money, the Court of Appeal of Tanzania in the case of **Simon Kichele versus Aveline M. Kilawe,** Civil Appeal No. 160 of 2018 (unreported) observed that:

> *"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in* ***Abualy Alibhai Azizi v. Bhatia Brothers Ltd*** *[2000] T.L.R 288 at page 289 thus: -*
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> > *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."*

The contract which is freely entered by the parties in consideration of section 10 of the Law of Contract [Cap. 345 R.E 2019] cannot be easily invalidated because, it signifies the intension and willingness of the parties to be bound by their own agreements. In the circumstances and the extent of analysis, these two grounds also are hereby sustained for being meritorious.

For the foregoing reasons, this appeal has merits. The decision and orders of the first appellate court are hereby vacated. The decision and orders of the trial primary court are upheld for being legally justifiable. Costs to be bone by the respondent.

It is accordingly so ordered.

DATED at A**RUSHA**, this 26th August, 2022

J. C. TIGANGA

JUDGE