

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

PC CIVIL APPEAL NO 02 OF 2022

(Arising from Civil Appeal No 46 of 2021 of the District Court of Musoma; Originating Civil Case No 83 of 2021 at Kukirango Primary Court)

AMINA ALLY SOLISI (Administratrix of the Estate of

Late MAANYA ALLY SOLISI APPLICANT

VERSUS

NEWTON KITUNDU PUNUNTA RESPONDENT

JUDGMENT

2nd & 26th August, 2022

F. H. MAHIMBALI, J.

The appellant is the administratrix of the estate of the late Maanya Ally Solisi. She was sued at the trial court that the deceased Maanya Ally Soli had borrowed money from the respondent worth TZS: 650,000/= and wrote a post-dated cheque for that amount. Unfortunately, the respondent could not present the said cheque for encashment on the due date until when the deceased met her demise, thus sued the appellant for the said payment.

The trial court ruled that failure by the respondent to present the said Bank cheque for encashment is himself to blame as the deceased had discharged her obligation. This finding did not amuse the respondent. She successfully challenged it before the District Court. Now the appellant being discontented by the findings of the first appellate court, challenges it before this Court as second appeal.

- 1. That the first appellate court erred in law and fact by misapprehending the principles of negotiable instruments, as whenever a cheque is drawn, signed and delivered to the holder, the amount due is to be discharged by the drawee (bank) as if it is the holder of the funds of the drawer: thus, the appellant's liability was already transferred and discharged.*
- 2. That the first appellate court erred in law and fact by failure to consider that it was incumbent upon the respondent to prove his diligence into clearing a cheque as it was drawn, signed and delivered to him but unfortunately, he negligently failed to claim payment through time limitation therefore it extinguished liability of the appellant to pay.*
- 3. That, the first appellate court erred law in fact for reversing the trial court's decision on the basis of assumption and not the evidence on record.*
- 4. That, the first appellate court erred in law and in fact for interfering with the trial court's findings while there is no any error apprehension.*

During the hearing of the appeal, the appellant first prayed her grounds of appeal be adopted to form part of her appeal submission and added that there is no evidence that the deceased was indebted but just a written bank cheque. It could even be a grant. Secondly, from when the bank cheque check was written to when was presented, it lapsed a lot of time. As check is dated 24/1/2021 but came to claim in case June 2021, she prayed that the appeal be dismissed with costs. The decision of the trial court – Kukilango be restored.

The respondent on his part too prayed that his reply to the grounds of appeal be adopted to form part of my submission and this appeal be dismissed with costs insisting that the first appellate court ruled in justice. The decision be upheld.

I have digested the evidence by both parties at the trial court, the findings of the two lower courts below, the grounds of appeal, the reply there to and the submissions thereof, there are pertinent issues to be considered by this Court. Whether the deceased was indebted by the respondent as claimed. The statement of claims at the trial court reads:

"Mdai anamdai mdaiwa Tsh 650,000/= ambayo ilitokana na marehemu kuniandikia check ili anilipe pesa yangu lakini kabla sijaichukua akafa. Hivyo naomba mdai ambae hayupo, msimamizi wa mirathi anilipe Pamoja na fidia Tsh 350,000/="

According to the rules of evidence in Primary Court, it 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 (see **Rule 1 (2) of the Magistrates' Courts (Rules of Evidence in Primary Courts GNos. 22 of 1964 and 66 of 1972)**). The issue now is whether the respondent as claimant established his claims at the trial court. He was charged to establish whether he lended money to the deceased as claimed. In his claims at the trial court, he had no any evidence to establish the said claims nor any witness to support his claims. It is therefore himself to blame and no others. A mere presentation of bank cheque cannot be said it established all the facts claimed in the statement of claim that he advanced money to the deceased. It could even be a grant as argued by the appellant. However, as he failed to

present it to the said bank for encashment (for reasons best to himself), he is equally barred by law (**See section 31 and 32 of the Bill of Exchange Act, Cap 215 R.E 2019**).

In my considered view, looking at the bank cheque as it is cannot firmly establish that there is any such proof of the alleged claims.

That said, the appeal succeeds. The first appellate court's decision is quashed. The decision of the trial court is hereby restored. Each party to bear its own costs.

DATED at MUSOMA this 26th day of August, 2022.



F. H. Mahimbali

Judge

Court: Judgment delivered this 26th day of August, 2022 in the presence of both parties and Mr. Gidion Mugo, RMA

Right of appeal is explained.

F. H. Mahimbali

Judge