

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

CIVIL APPEAL NO.8 OF 2022

(C/f Civil Appeal No.13 of 2021 at the District Court of Mbulu at Mbulu, Original Civil case No.24 of 2021 at the Primary Court of Endagikot)

MWENYEKITI CHAMA CHA ENDAHUT.....APPELLANT

Vs

AUGUSTINO QELLA.....RESPONDENT

JUDGMENT

Date of last Order:15-8-2022

Date of Judgment:30-9-2022

B.K.PHILLIP,J

A brief background to this appeal is that the appellant herein filed a case against the respondent at the Primary Court of Endagikot (Henceforth "the Primary Court"), claiming for payment of Tshs 3,400,000/= being unpaid loan amount that was granted to the respondent on 12th September 2018 by Chama cha Endahut. The case was decided in favour of the appellant. The respondent was ordered to pay the aforementioned loan amount. Aggrieved by the Primary's Court judgment, the respondent appealed to the District Court of Mbulu at Mbulu (Henceforth "the District Court") where the judgment of the Primary Court was set aside with costs. Aggrieved by the judgment of the District Court, the appellant

lodged this Appeal on a number of grounds which basically challenge the analysis and re-evaluation of the evidence done by the District Court and its findings that appellant did prove his case before the trial Court to the standard required by the law. Scanty facts I have gathered from the Court's records reveal that Chama cha Endahut grants loans to its members.

The appeal was heard viva voce. Mr. Nicholas Peter, appeared in person as the principal officer of the appellant and chairman of Chama cha Endahut, whereas the respondent was represented by the learned Advocate Saimon Shirima. The appellant's submission was as follows; that at the District Court he was not accorded the opportunity to be heard. The respondent owes Chama cha Endahut a sum of Tshs 3,400,000/=. He was granted a loan to a tune of Tshs 3,000,000/= payable with interests to a tune of Tshs 400,000/=. He contended that the respondent's assertions that he took a loan to a tune of Tshs 340,000/= only is not true and exhibit (M-4) that he tendered in Court is not genuine because in the years 2015 and 2016 the loan forms were not required to be signed by hamlet chairman. The requirement for loan forms to be signed by hamlet chairman was introduced in 2017.

Moreover, he submitted that the chairman of Ayaamami hamlet betrayed Chama cha Endahut because he refused to appear in the Primary Court to give evidence in support of the appellant's after being convinced by the respondent. He prayed the appeal to be allowed.

In rebuttal, Mr. Shirima raised two preliminary points; One, that the appellant has no *locus standi* to sue. He cited the case of **Rujuna Shaubi Ballonzi , Senior Vs Registered Trustee of Chama cha Mapinduzi (1996) T.L.R. 203**. Two, that the appeal is time barred on the reason that the judgment, subject of this appeal was delivered on 29th November 2021 and this appeal was filed in District Court on 11th January 2022. Thus, the same was filed 10 days out of time because the time limit for appealing against the decision of a District Court is thirty (30) days. He went on submitting that he checked the on line filing system and found out that this appeal was filed in the High Court of Arusha on line on the 4th March 2022 that is, 65 days from the date of delivery of the impugned decision. He contended that the appeal was supposed to be filed electronically within the time limit of thirty (30) days as prescribed by the law. He cited the Judicature and Application of laws (Electronic Filing) Rules , 2018 to cement his arguments. On the merit of the appeal, Mr. Shirima submitted that the District Court accorded the appellant his right to be heard but he opted to adopt his arguments he made at the Primary Court. He went on submitting that the loan forms were supposed to be signed by hamlet chairman. The exhibits tendered by appellant at the Primary Court were contradictory and had different figures. No evidence was adduced to prove that the respondent borrowed the claimed amount of Tshs 3,400,000/= from Chama cha Endahut. He contended that the evidence adduced in Court shows that the respondent borrowed a sum of Tshs 340,000/= only. To cement his arguments he referred this

Court to page 2 of the judgment of the Primary Court and prayed this appeal to be dismissed.

In rejoinder, Mr. Nicholas Peter reiterated his submission in chief and added that he submitted the petition of appeal in this Court on the 26th of February 2022. He insisted that he told the trial Magistrate that the respondent never took a loan to tune of Tshs 340,000/=. The loan that was granted to the respondent was Tshs 3,000,000/= which he was supposed to repay with interests but did not do so.

Having analyzed the submissions made by the parties, let me embark on the determination of the merit of this appeal. Upon perusing the Court's records, I noted that the issue on the appellant's *locus standi* was not raised at the trial Court. It was raised on appeal at the District Court. However, the District Court did not deal with it completely. Its judgment is based on the documentary evidence tendered at the trial Court. Let me point out on the onset that to my understanding the issue on *locus standi* of party to a case is normally raised at the earliest possible time once the case is filed in Court before it is heard on merit. That is why even in the case of **Rujuna Shaubi Ballonzi** (supra), the issue on *locus standi* was raised at the beginning of the case. What I am trying to explain here is that raising the issue of *locus standi* at appellate stage denies a party the opportunity to address it properly. Also, it is noteworthy that this Court is not supposed deal with new issues which were not raised at the trial. In the case of **Raison Paulo Simkonda Vs Jesinala Nalavwe, Land Appeal No.12 of 2020** (unreported) this Court

refrained to entertain an issue on *locus standi* raised in appellate stage and had this to say;

"With regard to the first complaint, this court find this ground is a new issue which was not neither raised nor determined by the first appellate tribunal. It is settled principle of the law that a new issue which was neither raised by the trial court nor on appeal by court below, cannot be entertained on the level of an appeal. Therefore, the issue of locus stand as raised by the advocate for the appellant can be said to be of no worth to be considered and determined by this Court at this stage. There is a chain of authorities to support the position. See cases of George Mwanyingili vs. Republic, Criminal Appeal No. 335 of 2016, unreported, luma Manjano vs. Republic, Crimninal Appeal No. 211 of 2009, unreported, Sadick Marwa Kisase vs. Republic, Criminal Appeal NO. 83 of 2012, unreported."

I wish to point out that am alive that an issue on point of law can be raised at any stage in particular the one which are concerned with the Court's jurisdiction and the facts pleaded are sufficient enough to enable the appellate Court to determine the same. There is a plethora of authorities to that effect. One of them is the case of **Zaidi Baraka and two others Vs Exim Bank (Tanzania) Limited , Civil Appeal No.194 of 2016** (unreported) in which the Court of Appeal held as follows;

"There is consistent judicial pronouncements that a point of law can be taken into cognizance and adjudicated upon at any stage of proceedings provided that the facts admitted or proved on the record enable the court to determine the point of law in question. Since therefore, limitation is a legal issue and since in this case, the claim was based on ascertained facts, the appellants were not precluded from raising it in this appeal. In the case of the DPP v Bernard Mpagala and 2 Others, Criminal Appeal No 29 of 2001 (unreported) for example, the Court observed as follows:

*"Admittedly, limitation is a legal issue which has to be addressed at any stage of proceedings **as it pertains to jurisdiction.**"*

-See also the cases of Shabir Tayabali Essaji v Farida Seifudin Essaji, Civil Appeal No. 180 of 2017 and Venant Kagaruki v. Permanent Secretary, Ministry of Finance and another, Civil Appeal No. 103 of 2007 (both unreported)".

(Emphasis is added)

From the foregoing, I will not entertain the issue on *locus standi* at this stage since it has nothing to do with the jurisdiction of the trial Court. In addition the facts admitted/ proved on the record are not enough to enable this Court to determine the same. Thus, it is the finding of this Court that the issue on the appellant's *locus standi* has been wrongly raised. It is hereby dismissed.

The next issue is whether or not this appeal is time barred. The relevant provisions of the law governing the procedure for filing appeals originating from the Primary Courts is Section 25 (3) of the Magistrate Court's Act, (Henceforth "the MCA") which provides as follows;

Every Appeal to the High Court shall be by way of petition and shall be filed in the District Court from the decision or order in respect of which the appeal is brought ;

Provided that , the Director of Public Prosecution may file an appeal in the High Court and where he so files an appeal, he shall give notice thereof to the District Court and the District Court shall forthwith dispatch the record of proceedings in the Primary Court and the District Court to the High Court."

The time for filing such an appeal is thirty (30) days .(See section 25 (1) (b) of the MCA). In this appeal the impugned decision was delivered on

29th November 2021 in the presence of the parties. Counting from 30th November 2021 the thirty (30) days for filing the appeal expired on the 29th December 2021. The Court's records show that the filing fees for this appeal was paid on 29th December, 2021 through payment control number 991400573217. To my understanding the date of payment of the filing fees is the appropriate date when the appeal is termed to have been filed in Court. Therefore it goes without saying that the petition of appeal was lodged on line on or before the 29th of December 2021 before the expiry of thirty (30) days after the date of the impugned decision since, practically one cannot obtain the payment control number without filing the relevant documents online. In addition, the Court's records shows that the hard copy of the petition of appeal was lodged in the District Court on 11th January 2022. Thereafter, the records of appeal were dispatched to this Court pursuant to section 25 (4) of the MCA and received in this Court February 2022. In the up short, the Court's records reveal that this appeal was properly filed on line within the time prescribed by the law. It is noteworthy that when it comes to issues pertaining to procedure for filing a matter in Court, the Court's records prevail over the oral submission or allegations made by the parties.

Having made the finding that the appeal is not time barred, let me proceed with the determination of the merits of the appeal. The District Court overturned the Judgment of the Primary Court on the reason that the appellant did not prove its case to the standard required by the law. The District Court magistrate made a finding that the respondent's signature in Exhibit M-1 which was tendered by the appellant in proving that the

respondent took a loan to a tune of Tshs 3,400,000/= was forged because it looks different from respondent's signature in Exhibit M-4 which was tendered at the trial Court by the respondent in proving that he took a loan to a tune of Tshs 340,000/= and the respondent's signature found in a case file in which the respondent was charged with a criminal case.

In addition to the above, the District Court Magistrate also made a finding that adverse reference was supposed to be drawn against the appellant for failure to call on Paskali S.Gidasa, the respondent's guarantor for the loan in question.

The Court's record reveal that the appellant alleged before the trial Court that the respondent is a member of " Chama cha Endahut". He had been granted loan by " chama cha Endahut" more than once. The first loan was to a tune of Tshs 1000,000/= payable with interests of Tshs 100,000/=. The respondent managed to pay back the principal sum of Tshs 1000,000/= only. Interests to tune of Tshs 100,000/= remained unpaid .On 12th September 2018 the respondent was granted loan to tune of Tshs 3,000,000/= which was payable within three months with interests to tune of Tshs 300,000/=. Thus , the respondent was supposed to pay to "Chama cha Endahut" a sum of Tshs 3,400,000/= which included the unpaid interests in the first loan (Tshs 100,000/=). The appellant tendered before the trial Court documents evidencing that the respondent was a member of " Chama cha Endahut" and that he took a loan to tune of Tshs 3,000,000/= (Exhibits M-1, M-3, M-5).

On the other hand, the respondent's defence was to the effect that he was not a member of " Chama cha Endahut". He borrowed a sum of Tshs 340,000/= from Mr. Nicholas Peter personally and was supposed to pay back a sum of 1,000,000/= including interests. He had already paid back the sum of Tshs 1,000,000/= as agreed. His witness one William Silvery, chairman of Ayamaami hamlet tendered in Court a loan form dated 26th September 2016 (Exhibit M-4) and alleged that is the only loan form he signed for the respondent.

As alluded at the beginning of this Judgment the trial Court entered judgment in favour of the appellant which was reversed by the District Court. I have perused the Court's records and am of a settled opinion that the judgment of the trial Court is correct as I will elaborate hereunder;

First of all, the testimony of Mr. Nicholas Peter was consistent and logical. For instance, it makes sense when one says that interests for a loan of Tshs 3,000,000/= repayable within three months is Tshs 300,000/=. On the other hand, the respondent's testimony was not consistent and the allegations he made were illogical. For instance, his allegation that he took a loan to a tune of Tshs 340,000/= only and he was supposed to pay back a sum of Tshs 1,000,000/= including interests is illogical. The pertinent question here would be what was the interest rate?. The respondent also alleged that he was given the loan by Mr. Nicholas personally not "chama cha Endahut" and was not a member of " Chama cha Endahut" Whereas the loan form he tendered in Court for his defence that he received a loan to tune of Tshs 340,000/= (Exhibit M-4) is in the letter head of " chama cha Endahut" .

The above aside, Exhibit M-3 shows that the respondent was a member of "Chama cha Endahut". He paid his membership fees 15th September 2015. Exhibit M-1 shows that the respondent was granted a loan to a tune of Tshs 3,400,000/= on 12th September 2018. Exhibit M-1 is duly signed and stamped by the chairman of Ayamaami Hamlet, secretary and Chairman of Chama cha Endahut, and the respondent's picture is affixed thereon. Exhibit M-5 is signed by the respondent and indicates that the respondent received a loan from Chama cha Endahut and has to pay back a sum of Tshs 3,400,000/= which includes interest to a tune of Tshs 300,000/= and the previous unpaid interest to a tune of Tshs 100,000/=. It is the finding of this Court that exhibits M-1, M-3 and M-5 tendered by the appellant are credible and genuine.

On the other hand, Exhibit M-4 tendered by the respondent is not duly signed by the officers of "chama cha Endahut". Thus, it is not credible. In fact the District Court erred to rely on the same in its decision. Also, it was wrong for the District Court to rely on the records found in another case file in which PW2 (Mr. William Silvery) was charged with a criminal case, since the same were not part of the evidence in the appellant's case. The fact that appellant did not call the respondent's guarantor in the loan in question is not fatal and did not weaken the appellant's case since he tendered in Court sufficient documentary evidence to prove his case.

Last but not least, it is imperative that parties into a contract have to fulfill what is agreed therein. In the cases of **Simon Kichele Chacha Vs Aveline M. Kilawe, Civil Appeal No. 160 of 2018, (CA)** (unreported) Court of Appeal had this to say on the sanctity of contract;

" The principle of sanctity of contract does not give room to excuses for non-performance of an agreement which has been entered into by the parties thereto under their free will and sound mind"

In the final analysis, it is the finding of this Court that this appeal has merits. The decision of the District Court is hereby set aside and the judgment of the Primary Court is upheld. The respondent shall to pay the appellant the sum of Tshs 3,400,000/= as ordered by the Primary Court. The costs this appeal shall be borne by the respondent.

Date this 30th day of September 2022



A handwritten signature in blue ink, appearing to read "B.K. Phillip".

B.K.PHILLIP

JUDGE.