

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT TABORA

CIVIL APPEAL CASE NO. 4 OF 2021

*(Originating from Civil Case No.14/2020 from Resident Magistrate Court
Tabora)*

SEBASTIAN EZEKIEL ENOCK/ A SEBASTIAN KIHONYI

GENERAL SUPPLY.....APPELLANT

VERSUS

1. NATIONAL MICROFINANCE BANK NMB

2. DOLPHIN GENERAL BUSINESS

ENTREPRISES CO LTD

.....RESPONDENTS

JUDGMENT

Date: 05.08.2022 & 7.10.2022

BAHATI SALEMA, J.:

This appeal originated from Civil Case No 14 of 2020 of the Resident Magistrates Court of Tabora. The case was filed by the appellant, **SEBASTIAN EZEKIEL ENOCK/ A SEBASTIAN KIHONYI GENERAL SUPPLY**

against the respondents. It was a case of breach of contract. After a full hearing, the court entered in favour of the respondent since he failed to prove on the balance of probabilities.

The appellant being dissatisfied by the decision paraded four grounds of appeal on the following grounds that:-

1. *The trial Magistrate grossly erred in law and facts by making a judgment based on weak evidence adduced by the Respondent, that the appellant has only deposited in two months only without considering the records of the transaction made by the appellant,*
2. *The trial Magistrate erred in law and facts disregarding the strong evidence adduced by the appellant, that he had deposited more than twenty-four million on the account of the Respondent,*
3. *The trial magistrate grossly erred in law and facts by not including the documentary evidence tendered by the appellant concerning the manner in which he has been paying his loans which tendered the court to order the appellant to pay costs.*
4. *The trial magistrate grossly erred in law and facts for refusing to consider that the appellant has been defamed, and suffered emotional injuries and inconvenience, as the result of the act of the respondent to announce the selling of the mortgaged property before elapse of the contract of 18 months.*

The facts of this case can be summarized from the pleadings as follows; on 13th August 2019, the appellant herein secured a loan from the 1st respondent to the tune of TZS 50,000,000/= with its interest of TZS. 8,720,431.99/= to be paid within 18 months thus from 14th September 2019 to 14th February, 2021 and mortgaged his two houses as security of the loan.

That, the appellant managed to pay only two (2) installments of the said loan hence led to the 1st respondent to issue a 60 days demand notice to pay the said debt which they both failed to settle the matter hence the 1st respondent instructed the 2nd respondent to proceed with other measures to recover the said loan which led to the institution of the Civil Case No.14/2020. The appellant filed a case at the Resident Magistrates Court of Tabora intending to challenge the auctioning of his mortgaged house and proceed to this appeal which the court granted the respondent.

When the appeal was set for hearing, the appellant was represented by Mr. Ally Maganga, learned counsel while the respondents were represented by MacAnjero Ishengoma, learned counsel. With leave of the court, they prayed to dispose of by written submission which this court granted.

This court has considered the submission made by both parties.

I have carefully considered the submissions of the parties, I will now deliberate on the parties contending submissions on the grounds of appeal. The issue is whether the grounds are meritorious.

Starting with the first issue is that the trial Magistrate grossly erred in law and facts by making a judgment based on weak evidence adduced by the respondent, that the appellant has only deposited in two months only without considering the records of the transaction made by the appellant.

Before going into the merits of the appeal, I shall be guided by the principle that; in a civil suit, he who alleges is the one responsible for proving the allegations. This principle has been encompassed in sections 110 (1) (2) and 112 of the Law of Evidence Act, Cap.6 [R.E 2019]. It was further held in the case of **Anthony M. Masanga vs. Penina (Mama Mgesi) and Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (CAT) (unreported) that;

"The party with legal burden also bears the evidential burden on the balance of probabilities."

In this case at hand, there is no dispute that the parties entered into the contract. The laws of the Contract Act, Cap.345 [R.E 2019] under section 37(1) provides that,

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

Having scrutinized court records, I would say that during the trial, the appellant under registered Power of Attorney given to one Daniel Samson Butemba summoned only one witness Ramadhan Mussa who appeared and testified as PW1. PW1 testified to the court that he knew nothing about the loan agreement in this court and did not tender any document to support his allegation.

On the other hand, in his defence DW1, Prudence Kweyamba in his testimony testified that in August, 2019 the defendant secured a loan of TZS 50,000,000/= with consideration of the interest of TZS 3,262,246.22/ for 18 months. According to the evidence by the respondent, the plaintiff made only two payments in September and October, 2019 which was not denied whatsoever by the plaintiff. The defendant in his testimony also submitted that the plaintiff had a standing debt of TZS 38,523,763.87 on 16/4/2020.

On this ground, the appellant complained that the trial magistrate erred in law and facts by making a judgment based on weak evidence on the reason the respondent's witness as quoted in the judgment made by

the trial magistrate on 11/03/2021 page number 4 of the judgment the statement made by DW1 that;

"He said that the plaintiff (appellant) had a standing debt of TZS. 38,523,763.87 as he was supposed to commence payment on September, 2019 so 8 months passed without payment"

As alluded to earlier, in this matter at hand, the appellant never adduced any evidence to support his claim and instead relied on the respondent's evidence. Therefore since the evidence of the respondent was admitted, I find the trial magistrate evaluated the evidence before him and came to a conclusion. I thus find no merit.

On the second ground of appeal that the trial Magistrate erred in law and facts disregarding the strong evidence adduced by the appellant, that he had deposited more than twenty million on the account of the respondent.

As properly stated by the respondent's counsel that the onus to prove his claims shifted to the appellant who failed to prove if he had paid the loan installments in compliance with the agreed terms. This court finds the appellant's ground of appeal is baseless and unsound due to the fact that what he alleges in his petition of appeal are hearsay stories since he was not the one who testified before the trial court.

The court upon scrutiny of the court records has noted that the appellant PW1, Ramadhan Mussa who appeared and testified before the court acknowledged knowing nothing about the loan agreement which existed or entered between the appellant and the 1st respondent, and he had no idea if the appellant took a loan from the respondent and defaulted, not only that he was also unaware of the amount paid by the appellant, the balance unpaid, or any loan terms existed and bounded the appellant and 1st respondent.

Based on the testimony of the appellant's witness who was incredibly it is clear that the trial court was right to disregard it since it contravened with the mandatory provision of law as per section 62 (a),(b) and (c) of the Evidence Act, Cap.6 [R.E 2019] as the facts that, the said witness did not see, hear or witness any term(s) or agreement of acquiring the said loan from the respondent, hence makes the said witness incredible and unreliable.

It is abundantly clear that the burden of proof over this matter was supposed to base on the party who alleges the fact as being provided under section 112 of the Evidence Act, Cap 6 [R.E.2019]

In this matter at hand, the appellant failed to prove if he paid the loan installments as agreed into the loan terms, nor the twenty million Tanzanian shillings as being claimed in the appellant's appeal was paid,

whereby the respondent's witnesses proved the same by tendering the loan agreement entered between the appellant and 1st respondent together with the bank statements of the appellant loan's account, which were admitted as Exhibit D1 & D4 which were the only proof to justify the existence of the contractual relationship between the appellant and the 1st respondent.

Thus it is my view that the appellant failed to substantiate his claims thus making this ground fail.

On the third ground of appeal, the trial Magistrate grossly erred in law and facts by not including the documentary evidence tendered by the appellant concerning the manner in which he has been paying his loans which tendered the court to order the appellant to pay costs.

As stated previously, according to the record of the trial court, the appellant did not tender any document(s) to prove any claims or did not dispute the loan taken, and the existence of the loan agreement concerned these two parties, apart from coming up with mere words to support his argument. This also lacks merit.

As to the last ground of appeal that the trial Magistrate erred in law and facts for refusing to consider that the appellant has been defamed, suffer emotional injuries and inconvenience as the result of the act of the

respondent announcing the selling of the mortgaged property before elapse of the contract of 18 months.

It is the principle of the law that, where parties agree on the terms of the agreements, the duty of the court is to enforce the agreement made by those parties. This has been enunciated in the case of **Nhombe Mbulangwa V Chibaya Mbuyape** HCD 1967 No. 378 held that,

"Courts do not make agreements for parties but enforce agreements which they have made."

The record reveals that the appellant secured a loan of TZS.50, 000,000/= and the respondent submitted that the appellant had paid for only two months and had to pay the remaining sum of TZS 38,523,263./= as per trial court findings. This was also articulated in the case of **Mohamed Idrissa Mohamed v Hashim Ayoub Kaku**, Civil No 34 1993 TLR HC in which the court held as follows;

"Where a party to the contract has no good reason not to fulfill an agreement he must be forced to perform his part for an agreement must be adhered to and fulfilled."

Similar to the case of **David Charles v Seni Manumbu**, Civil Appeal No 31 of 2006 HC

"The only institutions from which people borrow money to be repaid with interest are banks and financial institutions which meet conditions which are imposed in part 11 of the Banking and Financial institution Act, Cap.342."

The evidence adduced and tendered before the trial court reveals that the appellant was obliged to pay the said loan installments as agreed and having analyzed all the grounds of appeal, it is observed that the appellant is the one who breached the agreement due to failure to perform his promises without justifiable cause of which bar the appellant from any entitlements or damages.

Therefore it is my considered view that the appellant's claims over defamation are baseless since there is no proof of how the respondents defamed the appellant apart from following all necessary procedures in demanding what was right as agreed and signed into the loan terms of agreement of which the appellant mandated the respondent to auction the mortgaged properties in case of his default.

I have gone through the cases referred by the appellants and noted that the case of **Haji Associates Company (T) Ltd & Others V/S John Mlundwa**, [1986] T.R.L. 107 is distinguishable to the circumstances of this appeal.

Therefore from the reasoning thereof, I wish to clear the atmosphere by using simple logic since there was no tangible evidence from the appellant and the appellant is the one who breached the loan agreement due to failure to perform his promises without justifiable cause; and the appellant is barred from any entitlements or damages. I uphold the trial court's findings and dismiss the appeal in its entirety with costs.

Order accordingly.

Court: Judgment delivered under my hand and seal of the Court in the Chamber, this 7th day of October, 2022 in absence of both parties, via virtual court.



A. BAHATI SALEMA

JUDGE

07/10/2022

Right to Appeal is hereby explained.



A. BAHATI SALEMA

JUDGE

07/10/2022