

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 18 OF 2018

(Originated from Civil Case No. 205 of 2013 before Hon. Mujaya- RM, in
the District Court of Ilala at Somara)

BETWEEN

MASABO MUBILIGIAPPELLANT

AND

GEORGE MKOMA.....RESPONDENT

JUDGMENT

MRUMA,J.

The brief fact of the case as can be deduced from the available records is that the Appellant Masabo Mubigili borrowed from the Respondent George Mkoma Tshs 40,000,000/= which was payable within twelve months from the day of borrowing and carried an interest rate of 5% per month which means that for the period of 12 months, the Appellant had to pay Tshs 40,000,000/= as the principal sum plus Tshs 24,000,000/= as accrued interest. In total after twelve months the

Appellant was liable to pay Tshs 64,000,000/= being the principle sum plus interest. The Appellant defaulted as a result of which the Respondent George Mkoma instituted Civil Case No. 205 of 2013 before Ilala District Court at Ilala seeking for the following orders;

- a) For an order compelling the Defendant (ie the present Appellant) to pay "a loan facilitated to him" by the plaintiff (the present Respondent) of Tshs 30,000,000/= via an agreement dated 1st January 2010.
- b) For an order of payment of a total sum of Tshs 2,000,000/= being general damages for defendant's unlawful act of withholding plaintiff monies unreasonably.
- c) That the Defendant be compelled to pay interest of 5% per month from the date of default i.e 31st December 2010 to the date of filing the suit;
- d) For payment of interest on (a) and (b) above at the commercial rate of 20% per annum computed on the accruing from the date of filing the suit to the date of judgment.

- e) For payment of interest at the court's rate of computed from the date of Judgment to the date of payment in full;
- f) Costs to be borne by the Defendant.
- g) Any other order of relief as the court may deem fit and just to grant.

On 7th March 2014 court. (E. Mwakalinga esq, RM) entered judgment on admission against the Appellant and in favour of the Respondent for Tshs 9,000,000/= and proceeded with the trial on the disputed claims. On 26th May 2017 trial was concluded and the court (Mujaya Esq RM) entered judgment in the Respondent's favour and decree thus;

- a) That the Defendant (ie Appellant) should pay the Plaintiff (ie Respondent) Tshs 30,000,000/= which was unpaid out of Tshs 40,000,000/= which he borrowed from the Respondent.
- b) That the Appellant pay the Respondent Tshs 24,000,000/= as general damages.

- c) That the Appellant pay to the Respondent interest at the rate of 5% per month as agreed by the parties.
- d) That the Appellant pay to the Respondent interest at the rate of 5% per months from the date of filing the suit to the date of judgment.

The Appellant was aggrieved by the above decision of the District Court and has appealed to this court on the following grounds;

1. That the learned trial Magistrate misdirected in fact and in law in failing to make proper analysis of both oral and documentary evidence which clearly proved that the Appellant was not indebted by the Respondent.
2. That the learned trial Magistrate misdirected herself in fact and in law for concluding that there was a valid written loan Agreement between the Appellant and Respondent while there was none.
3. That the learned trial magistrate misdirected herself in fact in law for conclude that the Appellant

did not honour the contract obligation while there was no such contract to be honoured.

4. That the learned trial Magistrate misdirected herself in fact and in law for concluding that the Appellant was bound to pay interest while the Respondent is not legally authorized to charge interest in money lending.
5. That the learned trial Magistrate misdirected herself in fact and in law for ordering the Appellant to pay general damages without any justification for such payment.
6. That the learned trial Magistrate misdirected herself in fact and in law for not observing rules of admissibility of documentary evidence as well as weight of evidence adduced in Court;
7. That the learned trial Magistrate misdirected herself in fact in law for excluding documents and testimonies of some witnesses to purposely deny rights of the Appellant on the claimed sum.

8. That the learned trial Magistrate misdirected herself in fact and in law for ordering payment of money which were already paid by virtual of orders of the same court.

9. That the learned trial Magistrate Misdirected herself in law and in fact for not observing that the Rules of procedure in handling Civil matters resulting to denial of the Appellant's rights.

This appeal was initially assigned to his lordship Kulita J. Upon his transfer to another working station it was re- assigned to me. On 25.5.2022. I directed the Appeal to be canvassed by way of written submission. On behalf of the Appellant Mr. Nickson Ludovic, learned counsel submitted in support of the appeal, and on behalf of the Respondent, Mr. Daniel Bushele John opposed the appeal. I am grateful for both counsel for their brilliant submissions for and against the appeal.

Mr. Ludovick submitted in general that the nature of the evidence adduced by the Respondent in proving his claims did not establish that there was a loan agreement between the Appellant and the Respondent. Learned counsel further contended that the learned trial Magistrate in evaluation of evidence clearly misconceived the facts and the law

applicable. On the facts, the learned counsel submitted that exhibit D1 (collectively) clearly showed that the Appellant had paid the money he had borrowed together with interest of Tshs 9,000,000/= therefore it was wrong on the part of the trial magistrate to ignore such evidence for reason that it indicated that the Appellant started to repay his loan way back in 2008.

On the law, it was the submissions of the learned counsel that sections 6 and 7 of the Banking and Financial Institutions Act, 2006, and section 4 of the Microfinance (serving and Credit Cooperative Societies) Act, GN No. 675 of 2019 prohibits interest in personal lending of money therefore any agreement between the Appellant and the Respondent which included an interest clause was not enforceable in law.

As stated in his submissions, learned counsel delved into both factual and legal matrix of the case with regard to the purported loan agreement of Tshs 40,000,000/= carrying an interest of 5% per month.

As stated herein before apposition to the Appellant's appeal was pursued by the Respondent's counsel Mr. Daniel Bushele John. In his brief submission the primary issues considered are.

- a) That there was a legal and enforceable agreement between the parties.

- b) That the learned trial magistrate properly evaluated the evidence adduced and came to a correct conclusion that the Appellant had defaulted in repaying the money he borrowed from the Respondent together with interest as agreed.
- c) That the trial magistrate was justified in awarding general damages of Tshs 24,000,000/= as that was within the discretion of the court.
- d) That the learned trial magistrate was right to order the Appellant to pay to the Respondent Tshs 30,000,000/= following his admission of Tshs 9,000,000/=

Furthermore the counsel for Respondent submitted that considering the fact that the appellant had initially conceded to have a contract with the Respondent despite any shortfall the agreement might have, Appellant cannot exonerate himself from liability to pay the money he borrowed.

As can be discerned from the records, the trial court records went missing and efforts to reconstruct the same were futile as parties could

not avails court with their records and particularly the pleadings that is to say the plaint and the written statement of Defence etc. In such circumstances, this court could order the case to be retried before the same court that heard it before. However, using documents and records that could be obtained together with the submissions of the counsel for the parties, I think it will not be in the interest of justice to order this matter to be tried denovo and my reasons are as follows; First, the legality of the contract itself; there is not dispute that the money lending business is a regulated business. **Section 6(1) of the Banking and Financial Institution Act, 2006** prohibits a person who has no hence to engage in banking business. The said provision says:

6(1)" A person may not engage in the banking business or otherwise accept deposits from the general public unless that person has a licence issued by the Bank in accordance with the provisions of this Part."

The terms banking business is defined under section 3 of the Act to mean.

" the business of receiving funds from the general public through the acceptance of deposits payable upon demand or after a

fixed period or after notice or any similar operation through the acceptance of deposits payable upon demand or after a fixed period or after notice or any similar operation through the frequent sale or replacement of bond.....or other securities....."

I note from the records (and to be precise from the copy of the judgment of the trial court), that the Respondent who testified as PW1 is on record to have told the court that the Appellant and Respondent entered into a loan agreement whereby the Appellant was given a loan of Tsh 40,000,000/= by the Respondent. The loan carried an interest of 5% per month and it was repayable within a period of twelve months. This in my view is a banking business and the Respondent had no business licence to do that business. **Section 24 of the Law of Contract Act [cap 345 RE 2019]**, provides that;

"Where any part of a single consideration for one or more objects or any one or any part of any one several considerations for a single object is unlawful, the agreement is void."

Section 23 of the same Act explains what considerations and objects are lawful and what are not. Subsection (1) (a) of section 23 of the Act provides that;

"The consideration or object of an agreement is lawful, unless it is forbidden by law."


The "*object*" of the parties agreement in this case was a loan given by the Respondent to the Appellant. Such loan is forbidden by section 6 of the Banking and Financial Institutions Act.

Secondly, on the evidence adduced as reproduced at page 2 of the typed judgment the Respondent is on record to have told the court that at the time he instituted this matter the outstanding amount was Tshs 27,000,000/= This amount is not specified whether it was the principle sum the interest or both the principle sum plus interest. Such explanation was crucial in a circumstance where the interest chargeable was 5% per month which must have constituted a relatively big amount of money. That notwithstanding in its judgment the District Court ordered the Appellant to pay the Respondent Tshs 30,000,000/= as claimed in the plaint in total disregard of the Respondent's own evidence that the outstanding amount was Tshs 27,000,000/= only.

Regarding general damages in which the trial court awarded Tshs 24,000,000/= to the Respondent as, it is my view that this was wrong. It is trite law that general damages are damages that the law presumes to follow from the type of wrong complained of. They are payable where there is evidence that the plaintiff has suffered bodily injury or pain or his names or business has been tarnished and the value of the damages suffered cannot be estimated easily. In such circumstances court has legal discretion to estimate and assess the amount payable as general damages to the Plaintiff. But as I have endeavoured to explain above, in the present case the whole claim of the Respondent was based on an illegal contract which is not enforceable in law. He cannot therefore be entitled to general damages. I find this appeal to have merits.

That said, the Appellant's appeal is allowed with costs. The judgment and orders of the District Court of Ilala in Civil Case No. 205 of 2015 are quashed and set aside.




Hon. A. R. Mruma

Judge

12/9/2022

12/9/2022

Coram: Hon. A. R. MRuma,J

For the Appellant: Absent

For the Respondent: Mr. Benedict Pius Kajitule H/b Mr. Daniel Bushele
for the Respondent.

Cc: Dephina.

Court:

Judgment delivered in presence of Mr. Christopher Kajitule holding
brief of Mr. Daniel Busuele advocate for the Respondent who is absent
and in absence of the Appellant this 12th day of September 2022.

R.F.A. Explained.




Hon. A. R. Mruma

Judge

12/9/2022