

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

PC CIVIL APPEAL NO. 06 OF 2022

(Arising from District Court of Tarime in Civil Appeal No. 37 of 2021)

BETWEEN

ADRIANO DEVELOPMENT MICROFINANCE.....APPELLANT

VERSUS

ADOYO NANDORI KAKOYO.....RESPONDENT

JUDGEMENT

3^d & 15th November, 2022.

M. L. KOMBA, J.:

This is the second appeal. Appellant successful sued the respondent in the Primary Court of Tarime at Shirati (the trial Court) where the respondent failed to pay back some of money which she rendered from the appellant Company known as ADRIANO DEVELOPMENT MICROFINANCE. It is evidenced from the judgement of the trial court in Civil Case no. 89 of 2021 dated 26/09/2021 that the claim by the appellant was proved and the respondent was ordered to pay Tsh. 4,800,000/-. The respondent was aggrieved by that the decision of the trial court and decided to appeal to the District Court of Tarime at Tarime (the 1st appellate Court) by filing two grounds of appeal arguing that the said claim worth Tsh. 4,800,000/ was not proved and that the defense was not considered.

After hearing the parties on appeal, the 1st appellate court found the appeal to be meritorious on the ground that the contract which was admitted as Exhibit P1 was a copy which was not certified as provided by law. Moreover, the 1st appellate court in its decision relied on the Evidence Act [Cap 6 R.E 2019] which is inapplicable in the proceedings originating from Primary Court. That decision aggrieved the appellant and decided to appeal before this court by filing two grounds of appeal as follows;

- 1. That the first appellate court erred in law to disregard the lending agreement which was attended and admitted as Exhibit P1 as a result the first appellate court reached erroneous and unfair conclusion.*
- 2. That the first appellate court erred in law to disregard the defaulting penalty which was agreed by the parties in their lending contract hence the court violated the doctrine of the sanctity and inviolability of the contract.*

When the appeal was called on for hearing, the appellant was represented by Mr. Daudi Mahemba, advocate while respondent appeared in person, unrepresented. When given time, Mr. Mahemba opted to argue both grounds simultaneously. He submitted that the District Court of Tarime fail to honour the contract between appellant and respondent. The contract between the parties was tendered as an Exh. P1 during hearing at trial court and was correctly interpreted. It was his submission that the first appellate Court misdirected itself declaring the contract was illegal and the same was not

admitted according to the law. He further submitted that, of the trial court judgement page 2 show the contract was tendered and that missing of original document in court file did not confer the 1st appellant court power to disregard exhibit.

Mr. Mahemba was of the opinion that when the contract was tendered the respondent did not object its admission neither its contents therefore as the contract was not objected, he pray this court to recognize that contract which is the source of all these claims between appellant and respondent. He challenges assertion by the respondent because she (the respondent) was present in person at the trial court and it is in record. Learned advocate reminded this court that Primary Court are not bound by legal technicalities in admitting document, the Rules of admission of evidence under the Evidence Act, Cap 6 are not applicable.

It is his submission that because the contract was not disputed in the Primary Court and she (respondent) did not object it, District Court was supposed to honour the contract and violate doctrine of the sanctity and inviolability of the contract. The doctrine insists that when the contract is written and signed it should be honored. He said when dispute arises, the duty of the court is to enforce the contract and not to alter or help one party to alter to interpret the contract and, in that regard, he prayed this court to borrow the wisdom

in the case of **Lulu Victor Kayombo vs. Oceanic Bay Limited and Mduing bay Limited**, Consolidated Civil Appeal 22/155 of 2020 CAT (un reported) while quote a case of **Unilever Tanzania Limited vs Benedict Mkasa t/a BEMA Enterprises**, Civil Appeal of 2009;

'strictly speaking, under our laws, once parties are freely agreed on their contract it will not be for the court to change those clauses which parties has agreed between themselves. It is not the role of the courts to re draft clauses in agreement but to reinforce those clauses where parties are in dispute'.

Mr. Mahemba adduced that, it is obvious that the Primary Court noted existance of the contract and the 1st appellate court recognized it, then the claim was on performance. In conclusion he postured that because there is the contract which was not performed, he prayed this court to reverse the decision of the District Court which did not consider terms of the contract and decision of the Primary Court to be upheld and for that matter he pray the appeal to be allowed with costs.

The respondent did not had have much to say. She was not in support of the appeal alleging that there was no contract in the trial court as adduced by the appellant. She informed the court even when he was asked to bring the contract in the District Court he failed to do so. She prayed this court to dismiss the appeal and uphold the finding as the 1st appellate court.

After close follow-up of submission by parties, this court has the duty to determine whether the appeal is meritorious. Am aware that this is the second appeal and the practice is that the Court should, in a very exceptional circumstances, interfere the finding of the lower courts when it is clearly shown that there was misapprehension of the evidence, miscarriage of justice or violation of some principles of law or procedure by the courts below **(see, Joseph Safari Massay vs Republic**, Criminal Appeal No. 125 of 2012, **and Felix s/o Kichele & Another v. Republic**, Criminal Appeal No 159 of 2005 **and Julius Josephat vs Republic**, Criminal Appeal No, 03 of 2007 (all unreported).

Reading records of the 1st appellate court at page 4 of the judgement the Magistrate relied on section 167 of the Evidence Act to expunge the contract which was the base of the claim by the appellant. It was the argument of Mr. Mahemba in his submission that Primary Court are not bound by legal technicalities in admitting document, the Rules of admission provided in the evidence Act, are not applicable and pray for the court to order performance of the same as it was objected during the trial. To the contrary, the respondent in her submission supported the decision of the 1st appellate court appealing that there was no proof of existing of the contract.

This contradicting submission prompted me to visit the Evidence Act, especially at the application section which reads;

*'S.2 Except as otherwise provided in any other law this Act shall apply to judicial proceedings in all courts, **other than primary courts**, in which evidence is or may be given but shall not apply to affidavits presented to any court or officer not to arbitration proceedings.'*

From the excerpt above, it is obvious that the Evidence Act is not applicable in the Primary court. This being the matter originating from the Primary Court, the cited cases above on second appeal are distinguishable in the sense that, in this appeal there is a point of law which need to be determined which is whether the Magistrate applied the Evidence Act in deciding the appeal.

My careful perusal in the proceedings led me to the following passage at page 4 of the 1st appellate court judgement;

'In accordance with the case supra cited the trial court was supposed to receive and admit as exhibit the original contract and if the same no whereabouts to be found the said copy must have been certified. In my perusal of the file of trial court that was not done.....due to the discrepancies cited here in above it is just and fair to say that there was no any contract had ever been tendered...'

The trial court Magistrate cited the case of **Diamond Trust Bank Tanzania Limited vs Mwakibe Chalicho Matiko**, Commercial case No. 42 of 2019

(unreported) which cited the provision of the Evidence Act while elaborating importance of certifying secondary evidence. The requirement of the secondary documentary evidence to be certified traces its root in Evidence Act and according to the principle in the second appeal, this is the point of law which qualifies to be interfered by this court.

Having set the position of the law with regard to second appeals; I have gone through the records of both the trial court and the first appellate court. It is on record that during her submission in chief on 10/08/2021, the respondent admitted a claim to the tune of Tshs 1,350,000/=. For sake of reference the respondent stated the following in Swahili:

'Sina deni la 4,950,000/= natambua deni la 1,350,000/= iliyobaki toka April, 2021 ndio sijalipa.'

In unofficial translation it means the respondent in this appeal admitted to be indebted 1,350,000/= by the appellant and not 4,950,000/=

Basing on such admission and the contents of a contract between parties herein which was tendered in court and admitted as exhibit P1, the trial court found there was a contract which was not disputed by the respondent.

It is the position of the law that Primary Court are not bound by the Evidence Act and that the contract which was tendered and not objected by the respondent need to be performed. Procedures in tendering and admission of

the documentary evidence at the primary court are determined by court itself, this is according to rule 45 of the Magistrates' Courts' (Civil Procedure in Primary Courts) Rules GN. 310 of 1964.

'Rule 45. Order of evidence (1) The evidence shall be given in such order as the court directs: Provided that, unless the court otherwise directs, the claimant shall first state his case and produce the evidence in support of it and the defendant shall then state his case and produce the evidence in support of it.'

The exhibit P1 was tendered and according to trial court record, it was admitted by the court. That mean Regulation 45 was adhered to. This is the position of the law, which, I wish to be clear. It is the duty of the court to enforce performance of the contract which parties agreed are performed and not otherwise. Parties in this appeal are bound by their contract. See of **Unilver Tanzania Limited V. Benedict Mkasa t/a BEMA Enterprises** (supra).

In the upshot, the appeal is allowed, I quash and set aside decision of the 1st appellate court and up hold the decision of the trial court in Civil Case no. 89 of 2021.

No order as to costs.

Right of appeal explained.




M. L. KOMBA

Judge

15th November, 2022

Court: Judgement delivered in chamber this 15th day of November, 2022 in the presence of respondent who appeared in person while Mr. Mahemba, Advocate of the appellant remotely connected via teleconference from his Chamber.


M. L. KOMBA

Judge

15th November, 2022