IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)
AT DODOMA

DC CIVIL APPEAL NO. 3 OF 2021

(Original Civil Case No. 53 of 2017 in the Resident Magistrate Court of Dodoma at Dodoma)

OSWALD ONESMO MARO..... APPELLANT

VERSUS

TANZANIA POSTAL BANK .....1ST RESPONDENT

MAJEMBE AUCTION MART LIMITED.....2ND RESPONDENT

JUDGMENT

22/11/2022 & 01/12/2022

KAGOMBA, J

This appeal originates from a dispute pertaining to implementation of a loan agreement entered between OSWALD ONESMO MARO (henceforth "the appellant") and TANZANIA POSTAL BANK PLC (henceforth "the 1st respondent"). The 1st respondent loaned the appellant a sum of Shillings Five Million only (Tsh. 5,000,000/=) pursuant to the loan agreement which was tendered and admitted in evidence as exhibit P1 before the Resident Magistrate Court of Dodoma at Dodoma (henceforth "trial Court").

The appellant defaulted on loan repayment schedules which necessitated the 1st respondent to institute loan recovery measures in the course of which the 1st respondent engaged the 2nd respondent and both, allegedly, closed a workshop supposedly owned by the appellant, before realizing that the same was owned by some third parties. Thereafter, the 1st respondent instituted Civil Case No. 199 of 2017 at Chamwino Urban Primary

Court (henceforth "Primary Court") seeking a court order to compel the appellant to pay Shillings Two Million Nine Hundred and Ten Thousand only (Tsh. 2,910,000/=) being the outstanding debt as of the date of filing that case.

After trial, the Primary Court decided the suit in favour of the 1st respondent. It ordered the appellant to pay the 1st respondent the sum of Shillings Two Million Eight Hundred and One Thousand Five Hundred Thirty-Nine only (Tsh. 2,801,539/=) being the amount proved to be the outstanding debt. By way of an *obiter dictum,* the Primary Court stated that the appellant had an opportunity to file a civil case against the 1st respondent for the loss occasioned by the act of the 1st respondent to illegally close his workshop. The said judgment of the Primary Court was admitted by the trial Court as exhibit P3.

Pursuant to the *dictum* of the Primary Court, the appellant filed in the trial Court Civil Case No. 53 of 2017 against the 1st respondent and MAJEMBE AUCTION MART who was added as the 2nd respondent. In that case, the appellant sought orders of the trial Court for (i) specific damages to the tune of Tshs. 46,390,992/=, (ii) opening of the appellant's workshop and payment of Tshs. 12,000,000/=, being compensation for properties locked in his workshop (iii) hand over of the appellant's ledger book and Tax Identification Number (TIN), (iv) general damages as assessed by the Court, (v) costs of the suit and (iv) any other relief(s) as the trial Court would deem fit and just to grant.

After trial, the trial Court found that the appellant had failed to prove his claims and that, after all, since the appellant was complaining about his

properties being taken by the respondent, the matter was supposed to reported to police as a criminal case. For these reasons, the trial Court dismissed the suit, a decision which annoyed the appellant, hence this appeal.

Before this Court the appellant has raised two grounds of appeal, stating that;

1. the Honourable Magistrate erred in law and fact for failure to evaluate properly evidence adduced by the appellant.

2. the Honourable Magistrate erred in law and fact for holding that the petitioner (sic) failed to prove his claims on balance of probabilities.

On the date set for hearing of the appeal, Mr. Francis Steven, learned Advocate appeared for the appellant, while Mr. Emmanuel Mwakyembe, also a learned Advocate appeared for the respondent.

Mr. Steven submitted on both grounds of appeal jointly. He contended that, during trial, the appellant successfully proved his case on balance of probabilities. He vehemently opposed the trial Magistrate's holding that a closure of the appellant's workshop was to be dealt with criminally. He submitted that the matter was genuinely and purely civil because it originated from a loan agreement entered between the appellant and the 1st respondent.

In expounding the above contention, Mr. Steven relied on the judgment of the Primary Court, (exhibit P3), as well as the testimonies of PW1 Oswald Onesmo Maro and PW2 Julietha Maro. He contended that the trial Court over-relied on exhibit D1, being a letter dated 24th May, 2017 allegedly written by Julieth Maro which showed that the workshop in question was no longer belonging to the appellant, an exhibit and testimony which PW2-Julitha Onesmo Maro totally disowned.

Regarding proof of the appellant's claims, Mr. Steven contended that exhibit P3-the Judgment of the Primary Court, and the testimony of PW3-Agness Samson, a local leader at Uhuru Street did prove his client's case on balance of probabilities. He prayed the Court to grant his prayers of specific damages of Tsh. 46,390,992/= and enter judgment in the appellant's favour.

Mr. Mwakyembe for the respondents, opposed the appeal. He argued that the appellant's claim that the respondents illegally closed his workshop and seized ledger book, TIN certificate, lease agreement and business license, constituted a crime, hence it should have been dealt with criminally.

Mr. Mwakyembe relied on exhibit D1, to argue that the workshop in question was proved by the appellant's sister, Julieth Maro, to belong to one Rashid Jumbe and not to the appellant. He added that according to exhibit P3, the appellant's sister was identified as Juliet Oswald Maro and not Julitha Oswald Maro as named by the appellant's advocate. He also argued that the appellant failed to prove his ownership of the workshop, saying that it was one of the reasons which led the trial court to dismiss the appellant's claims.

He supported his contention by citing the case of **City Coffee Ltd V. The Registered Trustees of Ilolo Coffee group** (2019) T.L.R 182.

He opposed the appellant's argument that the Primary Court judgment (exhibit P3) proved the appellant's claims, arguing that the said decision only gave the appellant an option to claim, which claims should to be subjected to court's scrutiny. In this connection, Mr. Mwakyembe referred to the case of **Mwajuma Mbegu V. Kitwana Amani** (2004) T.L.R 410 to enjoin this Court, being the first appellate Court, to re-evaluate the trial Court's evidence and come up with its own findings. He added that the amounts of monies claimed by the appellant came from the blues and were not proved. Finally, he prayed the Court to dismiss the appeal with costs for being devoid of merit.

In his rejoinder, Mr. Steven reiterated PW2's denial of authoring exhibit D1 and emphasized that while, admittedly, the workshop was a loan security, the question was on illegality of its closure by the respondents.

Regarding the Primary Court's judgment, which the respondent's advocate said it did not give the appellant automatic right to claim, Mr. Steven rejoined that the said judgment was used to prove that the case in hand was of a civil nature and not a criminal case.

Having heard the rival submissions and after scrutiny of the records of the lower court, this initially Court found that additional evidence was required to enable it pronounce its judgment as there were controversies in evidence that could impede a fair and just decision. Accordingly, the court

made an Order under Order XXXIX rule 27(1)(b) of the Civil Procedure Code [Cap 33 R.E 2019] requiring PW2 Julitha Maro, DW1 Absalum Agael and DW2 Epapo Mwego to appear before the Court for that purpose. PW2- Julitha Maro did appear and was interrogated by the Court with regard to her denial of exhibit D1, which DW1 Absalum Agael and DW2 Epapo Mwajo alleged she authored. The said witness continued to distance from authorship of exhibit D1. While DW1 Absalum Agael was present in Court on 08/11/2022 and was warned to appear to adduce additional evidence on 22/11/2022, the witness never bothered to appear and did so without any notice to the Court. Hence, the court had to finalize this judgment based on available evidence.

Having summarized the background of this matter and the rival submissions by the learned advocates, the main issues for determination by this Court are: **Firstly,** whether this matter constituted a criminal case as determined by the trial court. **Secondly**; whether, based on the evidence on record, the appellant did prove his claims against the respondents by balance of probabilities during trial.

In determining the above issues, this Court being the 1st appellate Court has to re-evaluate the evidence adduced during trial and come up with its own findings on several matters contested by both sides.

From the background of this case, I think it would befit the ends of justice to premise this judgment on the principle that each case must be decided on its own set of facts and obtaining circumstances. (See **Athumani Rashid vs. Republic** (Criminal Appeal 110 of 2012) [2012] TZCA 143 (25 June 2012).

Regarding the first issue for determination, there is no dispute that the appellant had taken a loan from the 1st respondent and the two parties signed a loan agreement (exhibit P1) to that effect, which contained the terms and conditions of the loan. It was after the appellant had defaulted loan repayment that the respondents issued a demand notice and went after the workshop as a means to recover the same. Further, it's the modality of recovery of the loan, including the alleged closure of the workshop and collection of appellant's business documentation, which the appellant found to be contrary to the agreed terms, leading to the appellant's claims.

From the above analysis, therefore, I respectfully differ with the finding of the learned trial Magistrate that the appellant's claim was not a civil but a criminal matter. It is evident that the relationship of the appellant and the 1st respondent was that of banker- customer in which the appellant was a debtor and the 1st respondent was the creditor. Applying this set of facts, the appellant's claims, which are based on loan agreement (exhibit P1) were, by and large, civil in nature and not criminal. For this reason, the first issue is answered in the negative.

Turning to the second issue, for the appellant to succeed in his claims of damages and other monetary compensations against the respondents, in my view, he was required to prove the that; (i) he was the owner of the workshop that was closed, (ii) the respondents illegally closed his workshop and, or collected his belongings therefrom, (iii) the said act of the respondents occasioned loss and, or damages to him, and (iv) the amount of loss and, or damages so claimed was duly quantified and proved, save for general damages which are awarded by the Court.

For purpose of this appeal, and for the reasons to be unveiled shortly I shall not labour on each of the mentioned sub-issues above. However, I think it is appropriate that I make the following observation on the outset. While the appellant produced exhibit P3 as a proof of his ownership, the respondents relied on exhibit D1 to argue that the ownership had changed hand from the appellant to one Rashid Jumbe. According to exhibit D1, the workshop and properties therein belonged to the said Rashid Jumbe and not to the appellant. However, despite exhibit D1 being admitted without objection from the appellant, PW2-Julitha Maro told this Court, under oath, that the exhibit in question was unknown her and is a forgery. For this reason, I call upon criminal investigation authorities to investigate the alleged forgery of exhibit D1 and take appropriate action.

According to Mr. Steven, the reason that prompted the monetary claims raised by the appellant, inclusive of the specific damages amounting to Tshs.36,390,992/= was the manner the said recovery was done. It defied the loan agreement. The learned advocate made himself clear on this point.

As I have stated, for the appellant to succeed in his claims he has to prove the same, especially when specific damages are being claimed. In the case of **Zuberi Augustino v. Anicet Mugabe (1992) T.L.R 137** it was stated thus:

> *'It is trite law, and we need not cite any authority, that special damages **must** be specifically pleaded and proved'.*
> [**Emphasis added**]

As intimated above, Mr. Mwakyembe in his opposition to the appellant's claims stated that the same were unfounded and lacked proof. For this reason, I had to scrutinize the evidence adduced by the appellant in this regard. PW1-Oswald Onesmo Maro, the appellant, tendered "Valuation Report" and record of sales which were collectively marked as exhibit P4, to show the loss of Tshs. 46,390,992/=which he had incurred. My perusal of the trial court records could not lead me to any Valuation Report. Rather, there is enclosed in the court file an "Accounts Report". However, the report is neither numbered nor endorsed as an exhibit. There similar defects in other exhibits too.

Rule 4(1) of Order VIII of the Civil Procedure Code [Cap 33 R.E 2019] mandatorily requires every documentary exhibit to be endorsed by the presiding Judge or Magistrate. It provides:

> *"4.-(1) Subject to the provisions of the sub-rule (2),* ***there shall be endorsed on every document which has been admitted in evidence*** *in the suit the following particulars, namely-*
> *(a) the number and title of the suit;*
> *(b) the name of the person producing the document;*
> *(c) the date on which it was produced; and*
> *(d) a statement of its having been so admitted; and*
> *(e)* ***the endorsement shall be signed or initialed by the judge or magistrate".*** *[Emphasis added].*

In the **SGS Societe Generale De Surveillance SA & Another v VIP Engineering & Marketing Limited & Another**, Civil Appeal No. 124 of 2017, CAT at Dar es Salaam, the Court of Appeal stated on page 12 of its typed judgment that:

> *"the importance of this requirement is, in our view, geared towards avoiding tempering with documents tendered in court".*

I said in the outset that each case has to be determined according to its own set of facts and obtaining circumstances. In this case, there has allegation by PW2-Julitha Maro that exhibit D1 was not authored by her and was forged. While I emphasize on criminal investigation to be carried out on this matter, I find it unsafe to rely on, yet, another document that is neither numbered nor signed as an exhibit by the trial Magistrate.

Since the appellant's case is heavily dependent on the said Accounts Report, as I see it, and since the appellant is not to blame for the said serious defects in the exhibits, I find this a fit case for **retrial** for end of justice to be met. Ordered accordingly.

Dated at **Dodoma** this 01th day of December, 2022.

THE HIGH COURT OF TANZ

ABDI S. KAGOMBA
JUDGE