

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

CIVIL APPEAL NO. 51 OF 2019

(Arising from Civil Case No. 51 of 2019 Temeke District Court)

ENTREPRENEURS FINANCIAL

CENTRE (EFC BANK).....APPELLANT

VERSUS

ATHUMANI JUMA KINOTA RESPONDENT

JUDGMENT

Date of Last Order: 10/6/2021

Date of Ruling: 05/05/2022

S.M. KULITA J;

This is an appeal from Temeke District Court. Briefly facts of the case are as follows; sometimes in 2017 the Respondent herein namely **ATHUMANI JUMA KINOTA** applied for and was actually granted a credit facility of Tsh. 50,000,000/= from the Appellant, **ENTREPRENEURS FINANCIAL CENTRE (EFC BANK)** with an interest of Tsh. 32,636,966/= to be paid from 01/12/2016 to 01/11/2019. The said credit facilities were secured with the Appellant's business inventories which include the hardware shops

located at Kurasini Mji Mpya and Mbagala Charambe in Dar es Salaam. It is alleged that the Respondent defaulted to settle the loan, hence the Appellant confiscated and hold the consignment of the Appellant's stock of which the Appellant alleged to be valued at Tsh. 120,000,000/=.

The District Court decided for the Respondent. Dissatisfied with the decision of that court delivered on 28/12/2018 the Appellant herein lodged this appeal relying on the following five grounds;

1. That, the trial court erred in law and in fact by holding that the Respondent was not in default in repaying his loan advanced to him by the Appellant contrary to the terms and conditions of a loan agreement entered into by the Appellant and the Respondent dated 22/10/2016.
2. That, the trial court erred in law and in fact by holding that the Appellant cannot exercise its statutory power and right of disposition of the mortgaged property as a mortgagee without an order of the court.
3. That, the trial court erred in law and in fact by holding that the Power of Attorney dated 22/10/2016 entered into between the Appellant and the Respondent was the only document which empowered the Appellant to confiscate the Respondent's pledged goods.

4. That, the trial court erred in law and in fact by holding that, irrespective of the Respondent's failure to meet his periodic payment to pay off the loan (including interests and charges thereon) for over a year and a half, he was not in breach of the terms and conditions of the loan agreement by virtue of the fact that tenure of the loan ends on 1/11/2019.
5. That, the trial court erred in law and in fact in entering judgment in favour of the Respondent herein-above in the absence of any sufficient evidence proving the Respondent's claims.

The appeal was disposed of by way of written submissions. The Appellant is represented by Mr. Nereus B. Mutongore, Advocate, from Kilindu Giattas & Partners Company while the Respondent is represented by Mr. Bwire Benson Kuboja from Kuboja Advocates.

In his written submission in support of the 1st ground of appeal, Advocate for the Appellant, Mr. Nereus B. Mutongore submitted that the trial court erred in law and in fact by holding that the Respondent was not in default in repaying the loan advanced to him by the Appellant. He said that failure to effect the payments in monthly basis is contrary to the terms and conditions of the loan agreement entered into by the Appellant and the Respondent dated 22/10/2016. The counsel submitted that the Respondent did not

honour the repayment schedule which required him to pay Tsh. 2,296,860/= per month with effect from 1/12/2016 to 1/11/2019. The fact that he effected just sum of the first four payments in full and part payment for the 5th instalment, he was in breach of contractual terms. He alleged that, in that sense the District Court was wrong to decide for the Respondent. He said that, what the Respondent had done collides with the requirements of clause 13 of the Standard Terms and Conditions Applicable to the Loan Facilities (Exhibit D2) which governs the said contract.

In his submission in respect of the 2nd ground of Appeal that the trial court erred in law and in fact by holding that the Appellant cannot exercise its statutory power and right of disposition of the mortgaged property as a mortgagee without an order of the court. He asserted that the Appellant was not barred in law to enforce the terms and conditions contained in the Chattel Mortgage. Hence, it was right for her to attach and confiscate the Respondent's properties that had been secured for loan upon his failure to service the loan accordingly.

Submitting on ground 3 of the Appeal, the Appellant stated that the trial court erred in law and in fact by holding that the Power of Attorney dated 22/10/2016 was the only document which empowered the Appellant to confiscate the Respondent's pledged

goods. The counsel stated that it is not the only document which empowered the Appellant to confiscate the Respondent's pledged goods. Therefore, even if the said document is declared to have not carrying legal weight for being defective, still the confiscation is lawful as per Exhibits D2, D3 and D5 which entitle the Appellant to exercise its powers of sale against the Respondent in respect of the mortgaged properties.

As for the 4th ground the Appellant's Counsel submitted that the trial court erred in law and in fact by holding that, the Appellant was in breach of the contractual terms for failure to service the periodic payment of the loan while according to the terms and conditions of the loan agreement, tenure of the loan ends on 1/11/2019. He further stated that the testimonies of PW1, PW2 and DWI clearly confirms that the Respondent had breached the terms and conditions of the loan agreement. He said that the terms of the loan required the Respondent to service the loan in accordance with the schedule timeline agreed upon, the 1/11/2019 being the last instalment.

In the 5th and last ground the Appellant's Counsel submitted that, the trial court erred in law and in fact in entering judgment in favour of the Respondent herein-above in the absence of any sufficient evidence proving the Respondent's claims. The counsel

averred that the Respondent relied upon Exhibit P2, which is a mere document listing the alleged confiscated consignment, while the Appellant relied upon exhibit D9, a confiscation form which is a reliable document in proving what was actually confiscated.

Mr. Mutongore submitted that Exhibit D9, which is a certified copy of confiscation form consists the name of the Respondent, the name of the Ten Cells Leader with his signature, the name of the representative of the Appellant with his signature, the name of the Local Government Officer who officiated over the confiscation exercise and the name of the representative of the Auction Company with her signature. The said Confiscation Form was duly signed and stamped by the local Government Officer of Mbagala Charambe. The counsel submitted that there was no dispute that the confiscation process took place and that it was properly conducted as the Appellant adhered to the required legal steps prior to conducting the said confiscation.

Challenging the authenticity of Exhibit P2 which was tendered at the District Court by the Respondent herein, the Appellant's counsel submitted that it just contain the list of names and description of items that the Respondent alleges to have been confiscated by the Appellant from his hardware. He asserted that the said document does not bear the name of a person who prepared it nor the date

it was prepared. It also has no name of the Respondent as the victim, nor the names of witnesses and persons who had conducted the confiscation. The Counsel alleged that, generally, there is nothing which proves the authenticity of that said document.

Furthermore, the Counsel submitted that there is no way that the said listed items can be valued at TZS 120,000,000/= as alleged by the Respondent. He said that the Respondent's mere words and averments that the item were valued at TZS 120,000,000/= without providing any proof, like receipts or invoice for the purchase of those listed items cannot make the court relying on that Exhibit marked P2. He said that, that the claimed sum being a special damage requires a support of evidential proof.

Mr. Mutongore concluded by praying the appeal to be allowed with costs.

Replying the Appellant's submission in respect of the 1st ground of appeal, the Respondent's Counsel, Mr. Bwire Benson Kuboja, Advocate submitted that there is nowhere in the loan agreement the term "Default" has been defined, but generally it means omission or failure to do what is anticipated, expected or required to be done in a given period of time. He said that the term includes the act of failure to pay a debt when due. The Counsel submitted

that the loan was to be repaid within 36 months, from 1/12/2016 to 1/11/2019. He said that on 5/7/2017 when the Respondent's business goods were confiscated by the Appellant, the time to repay the loan was not due as the loan agreement was supposed to be due on 1/11/2019. It is the submission of the Appellant's Counsel that the Respondent had not lost interest to repay the loan to warrant the Respondent to confiscate his business goods or in any way to term him a defaulter.

Replying the 2nd ground of appeal, the Respondent's Counsel submitted that the Mortgage Chattel dated 22/10/2016 does not expressly warrant right to the Lender (Appellant) to attach and confiscate the mortgaged properties without order of the court. The Appellant was therefore precluded to attach and confiscate the Respondent's business goods for lack of the court order.

As for the 3rd ground Mr. Kuboja, Advocate submitted that there is nowhere in the judgment it has been stated that the only document empowered the Appellant to confiscate the Respondent's goods is the Power of Attorney dated 22/10/2016 as alleged by the Appellant. He asserted that the said document of which the trial court referred to be important for the Appellant to attach and confiscate the said goods, was found to be defective due to the

irregularities that it had, hence, the Appellant lost all powers vested to her via the said Power of Attorney.

In his submission to counter the 4th ground of appeal the Respondent's Counsel stated that, as the Respondent had not defaulted to repay the loan, the Appellant had no powers to attach and confiscate the Respondent's business goods. The Counsel further submitted that the attachment and confiscation were prematurely executed by the Respondent as the time to repay the loan was not due. He said that according to the loan agreement executed between the Appellant and the Respondent on 22/10/2016 the said loan was to be paid within the duration of 36 months, effectively from 1/1/2016 to 1/11/2019. He said that the act of the Appellant to attach and seize the Respondent's goods was unjustifiable and illegal, hence null and void.

Submitting in reply to the 5th ground of appeal in which the Appellant alleges that the trial court was wrong to enter judgment in favour of the Respondent in the absence of sufficient evidence to prove his claims, Mr. Kuboja stated that it was the trial court's findings that the act of the Appellant to attach and confiscate the Respondent's goods was illegal for being done without order of the court.

Further submitting on the 5th ground of appeal, the counsel stated in respect of the authenticity of Exhibit P2, the document listing the confiscated goods, that the trial court didn't order the Appellant to pay the amount of money valued as per the said Exhibit, but to release to the Respondent the goods that had been confiscated from him.

Having gone through the rival submissions of both parties as well as the original record, the analysis follows as hereunder;

Starting with the 1st & 4th grounds, whether there was default in repaying the loan by the Respondent and whether there was a breach of contractual terms. The said grounds are hereby collectively analysed as hereunder;

While the Appellant's counsel alleges that the Respondent defaulted in repaying the loan advanced to him by the Appellant, the Respondent's Counsel disputes the allegation by stating that the loan settlement tenure of 36 months from 01/12/2016 to 01/11/2019 had not yet expired, hence it was wrong for the Appellant to attach and confiscate the Respondent's properties prior to the expiry of that periodic term.

Upon going through the record it came into my knowledge that the terms and conditions of a loan agreement entered into by the

Appellant and the Respondent dated 22/10/2016 (Exh. D2) requires the Respondent to service the loan in monthly basis from 1/12/2016 to 1/11/2019 as per the payment schedule (Exh. P3) that was made and agreed by both parties. Therefore, the trial court erred in law to declare that, in the matter at hand, it is not a breach of contract if the loan is not serviced on the monthly basis.

As for the 2nd ground of Appeal that the trial court erred in law and in fact by holding that the Appellant cannot exercise its statutory power and right of disposition of the mortgaged property as a mortgagee without an order of the court, it is my finding that, according to the nature of the contract, litigation is not something mandatory in case of breach of contract.

The Lender is not bared to enforce the terms and conditions contained in the chattel mortgage. The parties' contractual terms are governed by the loan agreement termed "***Standard Terms and Conditions Applicable to Loan Facilities***" exhibit D3. **Clause 13** of the said contract which has been signed by both parties holds the heading ***Event of Default*** which provides for a breach of contract. **Clause 13.1(a)** states that, in the event that a Borrower (Respondent) fails to repay the principal amount or any instalment of interest or other sum on its due date, the Lender shall

be entitled to recall the facility and enforce any of the securities pledged towards the payment of the facility.

Therefore, in case of breach of contract, which includes failure of the Borrower to service the monthly loan payment, the Lender (Appellant) has the right to attach and confiscate the Borrower's (Respondent's) properties which were secured for that said loan. It was not necessary for the Lender to institute a civil case before the court against the said defaulted Borrower.

Regarding the issue of attachment being done by the agent, Auctioneer, through the Power of Attorney which is the 3rd ground, the trial Magistrate challenged it by stating that the said deed was defective in its contents, hence relied on that ground as well in deciding for the Respondent. But the issue is whether, the Power of Attorney dated 22/10/2016 was the only document which empowered the Appellant to confiscate the Respondent's pledged goods.

My comment is that, whether the said Power of Attorney was defective or not, it doesn't go to the root of the case. The said Agent/Auctioneer was there for executing the confiscation on behalf of the Appellant. Even if the said Agent/Auctioneer had a defective Power of Attorney, I don't see any miscarriage of justice.

In fact, I don't see its essence in relation to the said confiscation and attachment. As long as the said agent (Broker) did so on behalf of and for the instructions of the Appellant, the said attachment and confiscation cannot be unlawful just for the reason that the said agent had no Power of Attorney.

As for the 5th ground of appeal, that, the trial court erred in law and in fact in entering judgment in favour of the Respondent herein-above in the absence of any sufficient evidence proving the Respondent's claims, I have the following to say; According to the evidence in records the repayments in instalments by PW1 (Respondent) started to be deposited on 1/12/2016 and they were successfully affected in five consecutive times as per the contractual instalment sum of Tsh. 2,296,860/= per month, which means that he was through up to 1/4/2017. The next instalment (6th instalment) was supposed to be deposited on 1/5/2017 of which he paid Tsh. 1,000,000/= out of Tsh. 2,296,860/= when that time attained.

The issue here is, why the Appellant is issued a notice of default to the Respondent on 21/04/2017? In real sense, it has no justification and the Appellant's witness said nothing on that during trial. The fact that the Appellant issued a Notice of Default to the Respondent on that 21/04/2017 while there was no default at all

in the repayment of the said loan by the Respondent, the implication is that the Appellant was not careful in her records or she did so under the influence of malice. The trial court was therefore right to decide for the Respondent.

In fact, even if it happens that the Borrower defaults to service the term loan, attachment and confiscation is supposed to be the last resort after all necessary measures to rescue the Borrower's business has been marked failed completely. The Lender, like Appellant should not take it as an advantage to confiscate the Borrower's properties which were secured for loan. She is duty bound to advise him accordingly as her client before effecting the said attachment and confiscation.

As for the complaint on Tsh. 120,000,000/= by the Appellant, though it was so alleged by the Respondent during trial, the judgment does not transpire the remedy of Tsh. 120,000,000/= to be paid to the Respondent by the Appellant as alleged by the Appellant's Counsel. That said sum was alleged to be the value of the properties that the Appellant was alleged to have confiscated from the Respondent's hardware.

Actually the trial court was right for not relying on Exhibit P2 and the said sum of Tsh. 120,000,000/= claimed by the Respondent as

specific damages. The said document (Exhibit P2) has nothing to prove that the properties listed therein are the ones which were taken by the Appellant from the Respondent's hardware. The said Exhibit P2 has no date that it was prepared, it has no signatures or names of persons who participated in the confiscation, it also doesn't transpire as to who witnessed the said confiscation.

On my side I can agree with the Appellant's submission that Exhibit D9 which is also a list of properties alleged to have been confiscated from the Respondent's hardware. The said document has been signed by the Local Government Leader (Ten Cell Leader) one E. Ambrose, the Bank (Appellant's) representative one Nelson Manyama and a Representative for the Auction Company one Catherine Omary. The document also consists name of the client (Respondent), though he has not signed, it is undisputable that he was present during the confiscation.

It is the principle of law that the one who alleges must prove. It has been incorporated in our law of evidence, including sections 110, 111, 112 and 115.

Section 110 of Tanzania Evidence Act [Cap 6 RE 2002] provides about Burden of proof which states;

"110.-(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist,

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"

Section 111 states about the person on whom burden of proof lies. The said section provides;

"The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side"

Section 112 is about burden of proof of particular fact which states;

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person"

Basically the burden of proving fact lies upon a person who is in knowledge of that fact. This has also been provided under **section 115 of the Tanzania Evidence Act [Cap 6 RE 2002]** which states;

"In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him"

In the matter at hand it has been rightly decided by the trial court that the Appellant should release the confiscated goods, but it was not specified as to whether those listed in Exhibit P2 or Exhibit D9. The fact that Exhibit D9 looks to be a genuine document, obvious it is the one whose list of properties are supposed to be released by the Appellant. Basically, the properties that have been confiscated by the Appellant from the Respondent's hardware are valued at the sum that the said Appellant was claiming from the Respondent, which includes the principal sum, interests and costs. From the aforesaid analysis, here is my findings;

Generally, the matter was rightly decided for the Respondent. Since there was no proof of breach of the loan contract by the Respondent, as it was also correctly settled by the District Court, it is hereby declared that the Appellant's invasion and confiscation of the stock of goods in the Respondent's hardware was unlawful. The Appellant should release to the Respondent, all confiscated goods listed in Exhibit D9. They should be in the same quality as they had been taken.

It is further ordered that the Respondent should continue paying back his outstanding balance with interest as per the loan agreement, without penalty, from the time that the term loan service had stopped regarding arising of this litigation at Temeke District Court.

The schedule of repayment by the Respondent to be reformed.

In upshot the appeal is dismissed, save for the issue of mode of servicing the loan by the Respondent, of which he will be affecting it in monthly basis as it was so contracted until the remaining debt is settled.

As the Appellant is the one who defaulted the loan contract, she has to bear the costs.

Order accordingly.



S.M. KULITA

JUDGE

05/05/2022

