IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

PC. CIVIL APPEAL NO. 13 OF 2020

(Arising from Nzega District Court Civil Appeal No. 11 of 2019 and Originated from Civil Case No. 57 of 2019 Primary Court Nyasa.)

JULIUS KALWIGAMILA @NHWAGI.....APPELLANT

VERSUS

KITINDI MAGANGA.....RESPONDENT

JUDGEMENT

Date of Last Order: 28/10/2022

Date of Delivery: 14/12/2022

AMOUR S. KHAMIS, J:

This is a second appeal against a decision of Nyasa Primary Court in Civil Case No. 57 of 2019 where **Julius Kaligamila Nhwagi** who is the Appellant in the instant appeal, sued the **Kitindi Maganga** who is the Respondent in this appeal claiming for Tshs 12,650,000/= being as a loan advanced to the Respondent.

The record shows that in December, 2017 the Appellant advanced loan to the Respondent on consideration that respondent' will refund the said money in March, 2018.

The Respondent defaulted payment hence the Appellant filed this suit to Nyasa Primary court. Through his defense, the Respondent denied the claim of Tshs. 12,650,000/= and admitted to have borrowed only Tshs. 8,000,000/= from the appellant.

The trial court upon hearing the evidence of both parties awarded the appellant judgment on admission to the tune of Ths. 8,000,000 which was admitted by the respondent.

The Respondent was aggrieved successful lodged his appeal at the District Court of Nzega whereby the 1st appellate court quashed the decision of the trial court on the ground that the contract entered between the parties was contrary to the law and illegal. That the trial court was wrong to enforce such agreement.

The respondent was aggrieved and he has now this appeal on the following grounds:-

1. *The District Court erred in law and facts when it overwtuned the decision of the Primary Court without recourse to principle Js of equity hence playing a hug injustice to the appellant contrary to the duty of the court.*
2. *The District Court erred in law and facts by a setting aside the decision of the Primary Court ordering to pay Tshs.*

8,000,000/= to the appellant basing on wrong legal foundation.

3. *The District Court erred in law and facts by quashing the judgment of the Primary Court without taking into consideration that the reason for the primary court's decision to award Tshs. 8,000,000/= was only on the ground of admission of debt by the respondent.*

The appeal was argued by way of written submission whereby the appellant was represented by Mr. Kelvin Kayaga, Learned Advocate while the Respondent was represented by Mr. Salehe Makunga, Learned Advocate.

In support of the appeal, Mr. Kelvin argued that the rial court did not enforce the agreement when it ordered payment of Tshs. 8,000,000/= to the appellant but rather it resulted from the respondent's admission and therefore the said money was granted independent of the contract.

He argued that the award of Tshs. 8,000,000/= was not based on the agreement and if the order was enforcing the agreement, then the amount claim would be the one stipulated in the agreement.

Mr. Kayaga was of the view that the awrd of Tshs. 8,000,000/= to the appellant was not subject to evidence, the contract tendered as exhibit was not in question. He therefore argued that the ration decidendi in the case of David Charles Vs. Seni Mnumbu was misconceived by the magistrate of the 1st Appellate court.

He argued further that the stance that the appellant had no valid licence to conduct financial loan was neither proved nor among the issues raised during hearing which would require the appellant to prove the same. He cited the case of **Simon Kichelle Chacha Vs. Aveline M. Kilawe, Civil Appeal No. 160/2018** CAT Mwanza(Unreported). It was held that :-

> "It is settled law that parties are bound by the agreements they entered into and *this is the cardinal principle of the law of contract. That is there should be sancity of the contract as.....*"

The appellant's counsel prayed for the court to allow this appeal with costs.

In reply, Mr. Makungu, learned counsel for the respondent argued that the appellant's submission challenging the decision of the 1st appellate court is baseless because the decision was

justified and legally made. He argued that the law does not prohibit interest nor individual advancing loan but it restricts unlicenced individual to do financial business and that is the thing which was done by the appellant.

He argued that the is not that the Respondent admitted the debt but what is matters is from what kind of agreement that money was advanced to him, and that where the issue of licence for financial business comes into pray as the appellant did not have the same. Basing on the provision of **Section 3(1) (a) of the Business licencing Act, Cap 208 R.E. 2002** the respondent argued that it is unlawful for any person to carry on business without a valid licence.

He argued that the appellant had no licence to issue loan to the respondent therefore the agreement was void in law and cannot be enforced. In support of the argument, he cited the case of **Muungano Saccos Ltd and 2 Others Vs. Lameck Daud Libeli, Land Appeal No. 22 of 2020 High Court Kigoma (Unreported).**

He therefore prayaed for the court to dismiss the appeal with costs.

By way of rejoinder the appellant's counsel Mr. Kayaga reiterated his submission in chief and argued that the case o

Muungano(supra) as cited by the counsel for the respondent does not the submission by the respondent since the counsel for the respondent has only relied on the obita dicta of the case.

He also argued that the case of **Maurin-tan Holding Limited & Another Vs Azania Bank Tanzania Limited and Another, Misc Commercial Cause NO. 33 OF 2020 (HC) DAR ES SALAAM (unreported)** is distinguishable and irrelevant to the case at hand.

Having considered the submission for both parties together with the record of the entire record, the pertinent issue to be determined this court is whether the appellant indebted the respondent as claimed and whether the 1st appellate court was wrong to overturn the decision of the trial court.

Starting with the 1st issue on whether the appellant indebted the respondent as claimed. The statement of claims at the trial court reads:-

> *"mnamo Mwezi 12/2017 huko maeneo ya Kijiji cha Kayongwa, Kata ya Shigamba, katika Wilaya ya Nzega nilimpatia mdaiwas fedha kiasi cha Tshs. 12,650,000/= Milioni Kumi na Mbili na laki sit ana elfu hamsini kwa ahadi kuwa angenirudishia mwezi 3/2018, Lakini hadi sasa*

hajanilipa fedha hizo. Hivyo naomba anilipe deni langu Tshs. 12,650,000/= Pamoja na gharama zaz kufungua shauri hili."

The rules of evidence in Primary Court, provides that where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim (see Rule 1 (2) of the Magistrates' Courts (Rules of Evidence in Primary Courts G.Nos. 22 of 1964 and 66 of 1972).

Now the issue that comes to my mind is whether the appellant as claimant established his claims at the trial court. the appellant was duty bound to establish whether he indebted the respondent as claimed.

In his claims at the trial court, he testified to the effect that he indebted Tshs. 12,650,000 to the respondent at different times without any interest. To prove his claim the appellant tendered seven agreements whereby only one agreement was admitted as exhibit P1 the rest were objected.

The respondent in his defence testified that the appellant only advanced him Tshs. 8,000,000/= and no Tshs. 12,650,000/= as claimed by the respondent.

Basing on the evidence on record it is quite clear that the appellant has been able to establish the fact that he indebted the respondent the fact that was corroborated by the testimony of the respondent himself who admitted to have borrowed only Tshs. 8,000,000/ form the appellant. But the controversy remain between parties is on the difference of Tshs 4,650,000/=on the amount advanced to the respondent and amount claimed by the appellant.

The law is very cleat under Rule 1(2) (a)(ii) (supra) that the claimant need not to prove any fact which the defendant admits.

In the instance case the evidence is clear that the respondent admitted to have been indebted by the appellant Tshs. 8,000,000/= and denied the rest of the claim. Therefore, there appellant was support to give prove on disputed claim. This is per Rule 44 of the **Magistrate's Courts (Civil Procedure in Primary Courts) Rules G.N No. 310/1964 &119/1983** which provides that: -

> *"At the first hearing of a proceeding the court shall ascertain from each party whether he admits or denies the allegations made against him by the other party and shall record all admissions and denied and shall decide and record what matter are in issue?"*

In the instant case the decision of the trial court based on the admission facts of the respondent that he borrowed Tshs. 8,000,000/= form the appellant.

According to the evidence on record the appellant was not able to prove the difference of Tshs. 4,650,000/= the appellant had no any evidence to establish the said claims nor any witness to support his claims.

In my considered view, looking at the evidence on record, I am of the view that the appellant indebted the respondent Ths. 8,000,000/= which was not disputed. In the circumstances the appellant was therefore duty bound to prove the claim of Tshs. 4,650,000/=. In the trial court the appellant failed to prove what he alleged at the trial as per **section 110 of TEA**.

Coming to the issue whether it was wrong for the 1st appellate court to quash the decision of the trial court. The District Court's decision based on the fact that the trial court was wrong to enforce the agreement which in law was illegal as the appellant did not have licence to issue loan on interest hence the agreement was contrary to **section 3(1) of the Business Licence Act, Cap 208**.

With due respect, I wish to differ with the reasoning of the 1st Appellate court Magistrate, because going through the record I

have not find any claim of interest. The evidence shows that the appellant lent the respondent money as a relative. It happened that the respondent was in need of such amount of money and the respondent afforded to lent him. The testimony of the appellant reveals that the appellant lent the respondent without any interest.

However, there is also no evidence on the record to suggest that the appellant was conducting business of lending people money apart for the respondent. In the circumstance, lending money to the respondentt can't be concluded as a business. Hence the need of licence does not rise in his case.

Therefore, I am of the view that the trial Court was right to to order the respondent to pay the money that the appellant lent him as there is no dispute that there was loan agreement between the parties as such the said agreement was legally binding to the parties in accordance with **Section 10 of the Law of Contract Act, [Cap 345 R.E 2019]** because there was free consent of the parties, offer and acceptance and. parties had capacity to contract.

The case of **Simon Kichele Chacha vs Aveline M. Kiwale (Supra)** the Court of Appeal emphasized on sanctity of contract. It was held:-

"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in ***Abualy Alibhai Azizi v. Bhatia Brothers Ltd [2000] T.L.R 288 at page 289*** *thus: -*

> *The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."*

In the case at hand, parties do not dispute that they entered into the loan agreement, therefore the respondent is duty bound to perform his obligation and pay the debt since he does not dispute the fact that he took the loan from the appellant then must pay the debt.

In the light of the above, I am of the firm view that the 1st appellate court misconceived the provision of **Section 3(1) of the Business Licence Act, Cap 208**, hence was wrong to quash the decision on the trial court.

In the upshot, I hereby quash the decision of the District Court and uphold the decision of the Trial Court. Accordingly, the appeal is allowed with no order for costs.

It is so ordered.

AMOUR S. KHAMIS.

JUDGE

14/12/2022

ORDER

Judgement delivered in open Court in presence of Mr. Kelivin Kayaga, advocate for the appellant and in absence of the respondent.

Right of Appeal is Explained.

AMOUR S. KHAMIS.

JUDGE

14/12/2022