IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

PC CIVIL APPEAL NO. 3 OF 2022

(Emanating from Mbarali District Court in Appeal No.10 of 2021, originating from Rujewa Primary Court in Civil Case No. 2 of 2021)

MSAFIRI GROUP .....APPELLANT

VERSUS

SUMA KIHOMBO..... RESPONDENT

JUDGEMENT

Date of last Order: 27.09.2022

Date of Judgment: 08.11.2022

Ebrahim, J.

This the second appeal. The Appellant in this appeal is a group of people who joined together and secured a loan for the purpose of buying pigs for business purposes. They secured a loan of Tshs. 5,000,000/- from Mbarali District Council. It was alleged that from the loan amount they purchased 33 pigs which were placed under the care of the Respondent. It was on 30.07.2019 when the Appellant realized that the pigs were fewer than the count of 33 and reported the matter to Village Executive Officer **(exhibit P1)**

claiming that the Respondent has sabotaged the project and caused a loss of Tshs. 3,800,000/- to the group. The matter was escalated to the Respondent's husband who in turn claimed rent from the group as exhibited in **exhibit P2**. The appellant denied to have any agreement with the Respondent's husband on rent **(exhibit P3)**. It was when the group was audited that the Appellant took the matter to court claiming against the Respondent Tshs. 4,089,000/-.

The trial court received evidence from both sides and found that there is no evidence to show how the Respondent sabotaged the project and that it was the sole responsibility of the Respondent to care for the said pigs. The trial court made another finding that the whole group is responsible to pay for the loss of those pigs and the Respondent shall only pay the lost money for the receipt.

Aggrieved, the Appellant unsuccessfully appealed at the District Court of Mbarali.

Still Aggrieved, the Appellant has preferred the instant appeal raising five grounds of appeal as follows:

1. That, both the trial and first appellate courts ignored the written contract where the respondent admitted liability and promised to pay the debt owing.
2. That, both courts failed to decide the case according to the weight of the evidence.
3. That, both courts failed to give appropriate interpretation of the minutes of the meetings.
4. That, both courts below did not give due weight to the testimony of SU1, SU3 and SU4 who participated in the resolution meetings.
5. That, both courts below did not consider that exhibit "P4" was a forged document.

This appeal was argued by way of written submission whereas the Appellant had the appearance of Ms. Dorcas Saidi, the Secretary of the group; and the Respondent preferred the services of advocate Morris Mwamwenda. Both parties filed their submissions as per the set schedule.

Before proceeding with their submission in respect of their grounds of appeal, the Appellant opted to abandon the fourth ground of appeal.

On the first ground of appeal, the Appellant faulted the two lower courts for ignoring to take into consideration **"exhibit P12"** being a written agreement showing that the Respondent admitted the claim. The Appellant referred the court to the principle set by law that where there is written agreement, no oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding or subtracting its term. They further invited the court to visit **Regulation 14(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, GN No.22 of 1964**. They further borrowed a leaf from the provisions of **section 100 and 102 of the Evidence Act, Cap 6 RE 2019** giving the same position as **Regulation 14(1) of GN No. 22 of 1964**.

The Appellant argued also that failure by the Respondent to pay the debt, contravenes the provisions of **section 37 and 73 of the Law of Contract Act, Cap 433 RE 2019** as it amounts to breach of performance in a contract. The Appellant was therefore of the firm stance that the two lower court decisions went contrary to the evidence adduced at the trial. They referred to the case of **Menard Theobard Bijuka & 2 Others Vs Didas J. Tumaini**, Civil Appeal No. 49 of 2019, CAT at Bukoba which held that *"Failure to*

consider exhibit render the decision of the Court being against the evidence on record". They also referred to the Court of Appeal case of **Michael Yohana @ Babu & Another Vs The Republic**, Criminal Appeal No. 95 of 2017 which stated that *"The decision of Courts should always be based on the evidence on record and the applicable law".*

As for the 2nd ground of appeal, the Appellant argued that the lower courts failed to evaluate and assess the evidence of each witness available on the record and give the weight it deserves. They referred to the case of **Stanslaus Rugaba Kasusura & Another Vs Phares Kabuje** (1982) TLR 338 on the position that it is a duty of the trial court to evaluate the evidence of each witness and his credibility and make findings on the contested facts. Referring to the case of **Hemedi Said Vs Mohamed Mbilu** (1984) TLR 113, they urged the court to rule in their favour by considering the weight of their evidence on record. Further, the Appellant was of the stance that the first appellate court had a duty to re-evaluate the evidence on record and arrive at its independent decision- **Deemay Daati and 2 Others Vs Republic** (2005) TLR 132; and the case of **Ndizu Ngasa Vs Masisa Magasha** (1999) TLR 202 where the

Court of Appeal insisted that "The first appellate court has a duty to re-assess the evidence of the trial court". They said in this case the District Court of Mbarali abdicated its duty.

As for the 3rd and 4th grounds of appeal they argued that the 1st appellate court did not consider that exhibit P4 was a forged document. They further argued that both lower courts did not consider exhibit P5, P6, P7 and P8 which carried their case in proving their claim. They prayed for the appeal to be allowed with costs.

Responding to the arguments by the Appellant, counsel for the Respondent raised an issue that the appeal is incompetent for not being accompanied with a copy of decree appealed against. He also raised an issue that the Appellant said that the Law of Contract is Cap 433 whilst it is Cap 345. He also faulted the Appellant for not appending the reference pertaining to **section 37 and 73 of Cap 345** hence making the Appellant's submission incompetent.

With respect to the Counsel for the Respondent as correctly stated by the Appellant in their rejoinder, appeal originating from the Primary Court to the High Court is governed by the provisions of

section 25(3) read together with subsection (4) of Evidence Act, Cap 6 RE 2022 which requires the appeal to be filed at the District Court from the decision in respect of which the appeal is brought. That, the District Court shall dispatch the petition together with the records of proceedings of the Primary Court and the District Court to the High Court. Therefore, the High Court shall obtain a copy of the decree from the records of the lower court and as such there is no such requirement to attach a copy of judgement and decree as alleged. The Respondent's assumption is a misapprehension of the law.

As for the mistake done by citing the law of Contract Act as Cap 433 instead of Cap 345, it was a mere slip of the pen which can be accommodated under the oxygen principle and it does not cause injustice to any party. More so, it does not render none existence of the **Law of Contract Act, Cap 345 RE 2019**. Thus, I subscribe fully to the holding of the Court Appeal in the cited case of **Ottu on behalf of P.L. Assenga & 109 Others Vs Ami Tanzania Limited**, Civil Application No. 35 of 2011 CAT- DSM that mere false description of the law does not make that law inexistent.

Again, since the Appellant cited the existent provision of the law of this country, it was not mandatory for her to append a reference in her submission.

All in all, the Respondent's counsel observations above are misguided and have no merits in so far as the competence of the present appeal before this court is concerned.

Responding on the first ground of appeal, counsel for the Respondent contended that the Appellant failed to prove her case for failure to base their litigation on breach of contract which they only referred on evidence whilst the case was on a claim of a debt.

Reverting to the provisions of the law cited by the Appellant in her submission on the second ground of appeal, counsel for the Respondent argued that the Appellant failed to show which point the Respondent was invited to refer as the law is too wide. He argued also that the cited law allows the admission of oral evidence as to the same facts **(subsection 6 of Section 100 of the Evidence Act).**

Referring to **section 110(1) of the Evidence Act, Cap 6 RE 2022** that whoever desires a court to give him/her a legal right on the existence of facts must prove those facts exists; Counsel for the Respondent said that the Appellant failed to prove the allegation on number of pigs and the issue of forged receipt.

He prayed for the appeal to be dismissed with costs.

The Appellant rejoined on the issue of contract that the Respondent on his own free will promised to service the outstanding loan due to the sabotage she did to the project.

Rejoining further, the Appellant averred that the gist of their submission on the proof of the case based on **Regulation 6 of GN No. 22 of 1964** on the position that in proving a case in a civil case, it is sufficient for a court to decide in favour of the weight of evidence of a party which is greater than the other. The Appellant rejoined also that their reference to **Regulation 14(1) of GN No. 22 of 1964** and **section 100 and 102 of the Evidence Act, Cap 6 RE 2019** was in bringing a point that no oral evidence shall be admitted to vary a content of agreement of parties which has been reduced into writing. They lastly added that the evidence adduced by their witnesses at the trial court as **per section 110 of**

the Evidence Act, Cap 6 RE 2019, much as is not applicable in Primary Court, proved the existence of facts and that there was no need of investigation on the issue of forged receipt as the same was admitted by the Respondent. They reiterated their previous prayers.

I have carefully considered the rival submissions of both parties. Verily, going through the grounds of appeal, it is obvious that the Appellant is challenging the evaluation of evidence and weight accorded to it including their tendered exhibits.

As alluded earlier on, this is the second appeal. It is trite law that on a second appeal, the second appellate court is discouraged to interfere with the concurrent findings of facts by the two courts below except in rare occasions where it is shown that there has been a misapprehension of the evidence or misdirection causing a miscarriage of justice - **Nchangwa Marwa Wambura v. Republic,** Criminal Appeal No. 44 of 2017 CAT at Mwanza, (unreported); **Musa Hassani v. Barnabas Yohanna Shedafa (Legal Representative of the late Yohana Shedafa)** Civil Appeal No. 101 of 2018 CAT at Tanga (unreported); and **Amratlal Damodar and**

Another v. H. Lariwalla [1980] TLR. 31. In **Amratlal Damodar** for instance, it was held that:

> *"Where there are concurrent findings of fact by two courts/ the Court of Appeal, as a wise rule of practice/ should not disturb them unless it is clearly shown that there has been misapprehension of evidence/ a miscarriage of justice or violation of some principle of law or procedure."*

From the position of the law above, it is my considered view that the second appellate Court will only interfere with findings of fact of lower courts in situations where a trial court had omitted to consider or had misconstrued some material evidence; or had acted on a wrong principle of the law, or had erred in its approach in evaluation of the evidence.

That being said, as the main complaint is that the lower court among other things ignored the written contract where the liability was said to be admitted; in order to address the issue, I find it apt that I visit through the evidence on record.

As the records would reveal, the Appellant was the plaintiff at the trial. The chairman of the group (Msafiri Group) one **Alphonce Mapunda** testified as **SM1.** He said they obtained a loan of Tshs. 5 million on 03.01.2019 and on 10.01.2019 they spent Tshs. 1,536,300/-

for food for the animals and Tshs. 561,300/- for the animals' shelter. He testified also that there is no receipt for the purchase of pigs and the same were not handed to the Respondent in writing. It was on 30.02.2019 when they went to visit the project at the new house that the Respondent had moved in when they realized that the pigs were fewer than 33. He said the Respondent told them that she had left some of the pigs at the previous rented house. They visited at the end of each month and found that the pigs were still not in the number they bought and it was on the meeting of 30.07.2019 that they decided to go to the old house where they could not find the remaining pigs and the landlord informed that the Respondent took all the pigs when she moved to her new house. This was when they decided to report to **WEO- Exhibit P1. SM1** said the Respondent on 31.07.2019 admitted to pay the money and her husband was involved. The husband raised a claim for rent – **exhibit P2** but they refused to pay him – **exhibit P3**. However, following an audit query, it was discovered that the Respondent has caused another loss of Tshs. 359,000/- which she admitted to pay- **Exhibit P4** (Bank Receipts). Responding to questions by the court, SM1 said they realized the reduction in

number of the pigs after 40 days. He also said that the Respondent has paid Tshs. 70,000/- and the remaining balance is Tshs. 4,089,000/-. **SM2, Ayubu Pamba, WEO,** tendered minutes of the meeting which discussed the loss of the pigs and other subsequent meetings same was admitted in court as **exhibits P5 – P11.** Of interest is **"exhibit P12"** which was tendered by SM2 claiming to be an agreement entered on 26.06.2020 between the Appellant and the Respondent for payment of the debt. **SM3** testimony was brief that they obtained a loan and that the Respondent could not show them the missing pigs.

Testifying as **SU1**, the Respondent admitted to be the caretaker of the pigs and that they only bought 13 pigs for the price of Tshs. 715,000/-, and they paid one Kriss Tshs. 200,000/-. Explaining further, she said they used Tshs. 13,000/- for transport, advanced to themselves loan of Tshs. 1,700,000/- and remained with Tshs 945,000/-. From the remaining balance, SU1 explained further that they purchased *pumba* polish for Tshs. 60,000/-, transport Tshs. 22,000/-, *pumba mahindi* Tshs. 80,000/-, *busta* Tshs. 30,000/-, *mifupa* Tshs. 36,000/-, *damu* Tshs,16,800, *chokaa* Tshs.16,800/-,

dagaa Tshs. 90,000/-, *water and madumu* Tshs. 72,000/- and *madumu ya kulishia* Tshs. 14,000/-.

The Respondent testified further that, they were supposed to take turns to care for the said pigs. However, after two months the animals became weak and 6 of them died. She said she kept on informing the chairperson but they were not forthcoming hence she had to bury them. In another two months three more pigs died and they remained with four weak pigs. As for agreeing to pay the claimed amount, SU1 said the whole group agreed to pay and she paid Tshs. 70,000/- in total. She testified also that the amount of money owed to her is Tshs.359,000/- only for the slips of which she has already reduced. **SU2, Erasto Kihombo** is the Respondent's husband. He testified that the pigs brought to his house by the Appellant were only 13 and at first 6 pigs died of which they had to bury them as the village government ordered do. There after three more died. The remaining four were taken by the Appellant. He denied to have admitted to pay the claimed amount and that he does not know about 33 pigs. **SU3, Saidi Amani Kanyamara** testified that in March 2019 he was called by the Hamlet Chairman of Kibaoni "A" and tasked to go to the Respondent

house as there was strong foul smell from pigs' carcass unearthed by dogs. He said, he found the said carcass and ordered Mr. Kihombo to dig a deeper hole to bury them and he left. Responding to cross examination questions, he said at Kihombo's house he found, Mr. Kihombo, the Respondent and the Hamlet Chairman. **SU4**, **Abdallah Yusuph Ngaliba** testified to have been called by the Respondent and her husband to witness six pigs who were dead and that he ordered for them to be buried.

Having briefly gone through the evidence on record, I shall address the 1st, 2nd and 3rd grounds of appeal together. In so doing I shall be guided by the principle of evidence as set out under **Regulation 1(2) of the Schedule to the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, GN. No 22/1964** read together with **Regulations 1(3), 2(3) and 6** of the same law. The cited laws state thus:

1.(2) 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.*

(3) The facts which must be proved are called ***"the facts-in-issue"****; and the responsibility for proving facts is called* ***"the burden of proof"****.*

2.(3) Where the defence to any civil case is that there are other facts than those proved by the claimant and that ***such other facts will excuse him from liability to meet the claim****, or where* ***any fact is especially within the knowledge of the defendant, the defendant must prove those other facts.***

6. In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, ***but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other***". (Emphasis is mine)

Admittedly, the amount of money that the Appellant alleges to claim from the Respondent is Tshs. 4,089,000/-. Thus, in terms of **Regulations 1(2) and (3)** above, the question is whether the Appellant managed to prove such a claim.

As alluded earlier, the case was mainly testified by SM1 and SM3 being members of the group. SM2 (VEO) was mainly into showing the registration of the group and that he sat on a number of meetings of the group and tendered minutes of such meetings i.e., exhibits P5 to P11. He also tendered exhibit P12- an agreement to pay the debt.

The Appellant complained that neither the trial court nor the 1st appellate court considered exhibits PW5 to PW12. Before going into the mentioned exhibits, let me focus on the evidence adduced in court by the Appellant's side vis à vis the evidence of the Respondent's side.

Indisputably is the fact that the Appellant was advanced a load of Tshs. 5,000,000/- where they started a project of herding pigs.

SM1 while saying that they purchased 33 pigs; admitted that they had no receipt for such purchase neither did they hand over those 33 pigs to the Respondent in writing. He only said that they used Tshs. 1,536,300/- to buy the pigs and their food; and Tshs. 561,500/- to build a shelter for the said pigs making the remaining balance of Tshs. 2,902,400/-. SM1 did not say what did the group do with the said remaining balance? In essence, the transactions were done orally. SM1 explained that they went to the Respondent's house and each time they found that the pigs were few and the Respondent told them that she had left them at the other house. The other person to corroborate his testimony was SM3 who in essence simply testified on the loan received and that they purchased 33 pigs. Again, they went to the Respondent's house on 30.07.2019 but could not find any and that the Respondent said she would pay.

To the contrary, the Respondent admitted to have received 13 pigs only and 9 pigs died for being weak and poor handling which was not her doing but due to lack of supervision occasioned by the whole group. The fact that there were 13 pigs was supported by SU2 in his testimony. SU2 said at first 6 pigs died and the village

authority had to intervene requiring him to dig a deeper hole. The fact that there were pigs' carcasses was supported by SU2, SU3, and SU4. SU3 and SU4 were the village leaders who witnessed those carcasses.

Explaining the use of the advanced loan including provisions for the said pigs, SU1 said that among the amount used by the whole group was Tshs. 1.7million which they divided between members, Tshs. 715,000/= was used to but pigs, Tshs. 200,000/- they paid Kriss and Tshs. 650,600/- was used to but provisions for maintenance of those pigs including food, water and shelter. Thus, in simple mathematics, the remaining balance was Tshs. 1,934,400/-.

From the above evidence therefore, and in terms of **Regulations 1(2) and (3) of GN No. 22 of 1964,** it is clear as day light that SM1 testimony together with the testimony of SM3 does not prove their claim of Tshs. 4,089,000/- against the Respondent as even the Appellant could not tell the court where the remaining balance of Tshs. 2,902,400/- went.

On the other hand, the Respondent said that there was Tshs. 1.7million that was used by the whole group and the Appellant did not challenge that assertion even on cross examination. It is

the cardinal principle of the law that failure to cross examine a witness on important facts ordinarily implies an admission of such fact – see the case of **Shadrack Balinago Vs Fikiri Mohamed and 2 others, Civil Appeal No. 223 of 2017 (CAT)**. It follows therefore that, the group used Tshs. 1.7million among themselves.

As intimated earlier, The Respondent claimed that the said pigs died due to mismanagement caused by all the group members. Apart from SM1, SM3 only said that he went to the Respondent's house in July 2019 whilst SM1 said they witness the decrease in number of pigs from March 2019. However, no other witness as a member of the group was called to confirm that indeed and in the presence of SM1 or at other various dates from March to July 2019, they witnessed the decrease on a number of pigs. More so, there is in fact no cogent proof that the Appellant bought 33 pigs and not 13 pigs as claimed by SU1 and SU2 considering the fact that there are a lot of expenditure or un-explained amount by the Appellant that is rounded in the claimed amount. If at all, I find the fact claimed by the Respondent that the pigs died has more cogent proof in terms of **Regulations 2(3) of GN. 22/1964** which

requires the appellant to prove a fact that he claims to have knowledge with.

The Appellant further claims that the lower courts neither considered the minutes tendered by SM2 nor exhibit P12. Starting with the minutes, as it is the minutes on its own cannot be a conclusive proof of the claim as the same only evidence the fact that the issue was discussed. The Respondent being a member also participated in a meeting like any other member and signed. However, the exactly discussion was confirmed by the chairman and the secretary. Hence, it can merely be used to show that the issue was discussed but not a proof that indeed the Respondent admitted to the claim and promised to pay the same.

From the promise and admission, it brings the court to **exhibit P12**. First of all, **exhibit P12** is not a contract as stated on the grounds of appeal. It does not fulfil criterions for a valid contract including consideration. One would call a mere agreement entered after the beginning of the dispute. However, the court has a duty to see and observe as to whether the same was just and fair without any blemishes vis a vis the evidence adduced in court by the Appellant themselves. The said exhibit P12 states that it has been

agreed by the Respondent to pay Tshs. 4,089,000/- being part of the money borrowed by the group. However, as stated earlier there is still uncounted money from the borrowed amount that the Appellant does not dispute to have used e.g., Tshs. 1.7 million that the Respondent said was loaned to all members. Again, the agreement does not show how did Tshs. 4,089,000/- came about because the agreement is supposed to be explicit and speak for itself. I join hands with the Appellant that the law i.e., **Regulation 14(1) of GN No. 22/1964** provides that no oral evidence shall be given to vary the written terms in an agreement. Nevertheless, the same law i.e., **Regulation (1)(a)** of the same law allows oral evidence to contradict the same agreement where there is duress, fraud or mistakes in writing down what was agreed. By parity of reasoning, it can clearly be seen that from the amount that the Appellant has spent on the loaned amount Tshs. 5,000,000/- there is no justification of claiming against the Respondent Tshs. 4,089,000/-. If at all, the evidence of the Appellant does not prove the claim at all but rather as correctly observed by the trial court, they are trying to pin the whole debt to the Respondent. Again, the agreement speaks on the 3rd

person and there is nowhere that the Respondent in her own recorded words signed to have agreed to pay the claimed amount and put her house as collateral. If at all, there is no signature of a witness for the Respondent to show that indeed, she called her witness to witness her agreeing to the listed terms. All the purported witnesses were village leaders who appeared for all parties while there would be no blemish if the Respondent had her own witness. In short, the agreement falls short of the independent witness of the Respondent in considering that the Appellant side was witnessed by Chairman, secretary and the treasurer. The village leaders were supposed to witness the whole agreement after each party has signed together with their own chosen witnesses.

From the above therefore, I also find that there was no such clear and fair agreement to be considered as a proof of admission of the claim.

The issue of forgery of receipt need not detain me as the same did not form basis of the decision at the lower court and SM1 agreed that the Respondent paid some money regarding the lost amount

of the receipt amounting to Tshs. 359,000/=. Of which as per the evidence on record, Tshs. 70,000/- has already been paid.

That being the position therefore, I join hands with the position illustrated in the cited case of **Amratlal Damodar (supra)** that as the 2nd appellate court I find no reason to interfere with the concurrent findings of the lowers court. As a result, I dismiss this appeal with costs.

Accordingly ordered.

THE HIGH COURT OF TANZANIA

R.A. Ebrahim

Judge

Mbeya

08.11.2022