

**IN THE HIGH COURT OF TANZANIA**

**AT SONGEA**

**(PC) CIVIL APPEAL NO. 06 OF 2020**

*(Originating from Tunduru District Court Civil Appeal No. 13/2020 Civil Case*

*No. 13/2020 at Nakapanya Primary Court)*

**HASAN ABDUKARIM ISMAIL ..... APPELLANT**

**VERSUS**

**SAIDI ADAM MTUPI..... RESPONDENT**

**JUDGMENT**

**Date of Last Order: 22/02/2022**

**Date of Judgment: 10/03/2022**

**BEFORE: S. C. MOSHI, J**

This is a second appeal, the matter originates from Nakapanya Primary Court as Civil Case No. 3/2020 and was appealed to District Court and registered as Civil appeal No 4/2020. The appellant was not satisfied with the Primary Court's decision, he appealed to the District Court, he was

not successful, hence he appealed to this court on one ground of appeal as follows:-.

*That first appellate court erred in law and in facts in upholding the trial court's decision which enforced an illegal contract.*

At the hearing of the appeal the appellant was represented by Mr.Zuberi Maulid whereas the appellant appeared in person. The appeal was heard viva voce.

Before arguing the grounds of appeal, Mr. Zuberi prayed to add one ground which raises a point of law and it reads thus:

*"That the first appellate court erred in law and fact for failure to exercise its revisionary and supervisory power in respect of the decision of trial court which was decided contrary to the law, it failed to determine the matter before it".*

Arguing on first ground of Appeal Mr. Zuberi submitted that, during hearing of the appeal before the District Court in appeal No. 4 of 2020 the appellant through Kaukuya, advocate argued that the contract was illegal. The illegality of the contract relates to; first the interest, he referred to the

testimony of Pw2 Yasin Daim Mawilo, who testified that the appellant borrowed Tshs 5,000,000/= from the respondent and, that it would be returned or paid back with interest, he was to pay back Tshs 18,000,000/=. He said that, the law does not allow an individual to lend money with interest, advocate Kaukuya at the district court cited statutory laws and case laws to that effect. Secondly, the contract was witnessed by a court clerk on behalf of the magistrate, and the clerk was brought as a witness. After learning that the contract was illegal, the court should have decided on the illegalities of the contract.

On Second ground, he contended that, the appellate district court erred by upholding the trial court's decision while trial court's decision was coated with many illegalities; the appellate court was supposed to either quash the decision or re – evaluate the evidence.

He said that, before the trial court, the respondent's claim against the appellant and another was for Tshs 8,000,000/= (eight million). The claim did not elaborate the genesis of 8 million, whether it arose from a contract or other claims. The evidence shows that they had entered into deferent phases contract, the 1<sup>st</sup> one, of 18 million, which couldn't be enforced, 2<sup>nd</sup>

one and third one which was witnessed by a Primary Court Magistrate, at Mangaka, and it was marked "C".

He argued that, however, the Primary Court did not consider if the claim was proved but it ventured into extraneous matters, as seen at page 9 and 11 of the typed judgment. The court proceeded to hold that the claim now was Tshs 12,000,000/= and not Tshs 8,000,000/= which was in the statement of claim. Where did the court get the legal authority to decide on 12,000,000/=. Reading through the record, it is clear that parties did not enter into the Tshs 12,000,000/= contract, they had already entered into another contract before the Mangaka Magistrate which was of Tshs. 8,000,000/= later on was reduced to Tshs 5,000,000/=. However, the court, contrary to the law held that it could not consider the last contract because after Revision No 1/2020 the court nullified the proceedings of Mangaka Primary Court hence the contract also was nullified. The contract was not related in any way with Civil Revision No. 1/2020. The District 1<sup>st</sup> Appellate court was duty bound to satisfy itself on the legality of the procedure and decision. This being the 2<sup>nd</sup> appellate court it has a duty to satisfy itself of the correctness of the procedure and decision as the 1<sup>st</sup> appellate court failed to exercise this duty.

In Reply, the Respondent submitted on first point among other things that, he lent money to the appellant so he could solve his personal problem as he had embezzled farmers fund. On 21-3-2017 he lent him Tshs. 18,000,000/=, and security was a farm measuring 50 acres and a house at Tinginya farm. The appellant said he would pay back on 30/11/2017. However, on 30/11/2017 he did not pay him back, the appellant said that he was not paid for the cashew nut. In January 2018 the appellant deposited Tshs 3,500,000/=, he later deposited Tshs 1,500,000/=. The appellant said that he would pay the rest after selling ufuta (sesame seeds), and in June, he paid Tshs 1,000,000/=. By then he had paid Tshs 6,000,000/= and he had not yet paid Tshs 12,000,000/=. They entered into another contract, exhibit B, now the security now was a farm. The appellant started to brag that he would not pay. He opened a case at Mangaka, the appellant promised him that, in that season he would pay Tshs 8,000,000/= and the rest Tshs 4,000,000/= he would pay later on. The appellant came again and said that the situation was not good, he would give him two tones of cashew nut worthy Tshs 5,000,000/=; 11/12/2018 it was received in court. However, he convinced the District

court and the case was nullified they advised them to open the case at the relevant geographical area.

He stated further that, he opened a claim of Tshs 8,000,000/= which was appellant's capacity to pay in that season. The case was heard, the magistrate asked for exhibits. So the magistrate decided as he did, basing on all the contracts, he based on that contract that they made before the lawyer and gave him his right.

Regarding interest, he said that he does not own a loan institution. The appellant looked for him and asked to borrow money. The appellant came to him to ask for money in tears. He never asked for interest, even the contract does not show interest.

Regarding the District court's decision, he believed that all records were in the file so the District Court could not decide before perusing through the Primary court's record. The contract is not illegal (Exhibit B).

He prayed the court to dismiss the appeal with costs and uphold the Primary court's decision.

Now reverting back to the points of appeal, on first ground of appeal; the respondent instituted a civil case at Nakapanya Primary court suing the appellant and another for a total of Tshs. 8,000,000/, the sum rose from

an agreement between the parties through which the appellant borrowed Tshs.18,000,000/=. The agreement was entered in March 2017, and it was to be paid back in November, 2017. However, the appellant did not honour the agreement. Thereafter the parties modified their agreement and they agreed that the appellant would continue to pay in instalments, by 2019/2020 the parties agreed that the appellant would pay back Tshs. 8,000,000/= only, by then the appellant had already paid back Tshs. 7,550,000/=. Prior to this last agreement, among the documents which varied the initial contract was a contract dated 15/10/2018 where the parties agreed that the appellant was to pay back the remaining Tshs. 12,000,000/=.

Therefore, the claim before the court was for Tshs. 8,000,000/= only. Which as indicated above, the amount was not disputed.

Having said that, it is my view that, the court erred in its analysis of evidence by referring to a contract which was not subject of dispute, the contract had been varied, and the parties unanimously as by the date that the appellant was testifying agreed that the appellant was to pay Tshs.8,000,000/= only. Therefore, there was no need to consider its

legality because it had been superseded by another agreement which is subject of the suit.

As relating to the second ground of appeal which was raised orally at the hearing of the appeal. It is my view that it is misconceived, as there is no irregularity on the record that warrants quashing the proceeding or decision of the trial court. The misdirection in analysis of evidence does not call for quashing the evidence. This ground has no merit.

All said and done, I dismiss the appeal. In view of the nature of the case, each party will carry its own costs.

Right of Appeal is Explained.



  
**S.C. MOSHI**

**JUDGE**

**10/03/2022.**