IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 214 OF 2019

SIMA RUGALABAMU .... APPELLANT

VERSUS

JI-TRAC TANZANIA LIMITED .... RESPONDENT

[Appeal from the decision of the District Court of Kinondoni at Kinondoni in Civil Case No. 98 of 2018]

JUDGMENT

11th & 18th May, 2022

KISANYA, J.:

This appeal arises from the judgment and decree of the District Court of Kinondoni at Kinondoni against the appellant, Sima Rugalabamu, for repayment of loan, interest thereon and costs of the suit.

Pursuant to the trial court's pleadings, on 17th June, 2016, the respondent, JI-Trac Tanzania Limited advanced to the appellant, a loan facility of Tshs. 27,000,000. It was the respondent's case that the said loan was subject to the terms and conditions agreed to in the loan agreement dated 17th June, 2016. The respondent further averred that, the tenure of the loan facility expired on 17th June, 2018, whereby the outstanding loan

and interest accrued thereon stood at Tshs. 68,074,400. The respondent went on to claim that the appellant neglected or refused to pay the said amount. Therefore, the respondent was forced to sue the appellant claiming for unpaid loan amounting to Tshs. 68,070,400 plus interest thereon, specific damages and costs of the action.

In her defence, the appellant disputed the respondent's claims. Although the appellant admitted to have signed the loan agreement referred to by the respondent, she contended that the said loan to the tune of Tshs. 27,000,000 was not disbursed.

The trial court framed three issue for determination of the suit: *One*, whether the respondent (the then plaintiff) advanced the loan to the appellant (the then defendant). *Two*, whether the appellant failed to pay the loan. *Three*, to what reliefs are the parties entitled to.

After a full trial, the trial court was satisfied that, the respondent disbursed the loan of Tshs. 27,000,000 on 17th June, 2016 and that as of June, 2018, the loan facility and interest accrued thereon stood at Tshs. 68,074,000. Upon being convinced that the appellant had failed to pay the loan advanced to her, the trial court ordered the appellant to pay the

respondent the outstanding amount of Tshs. 68,074,400 and costs of the suit.

Dissatisfied with the decision of the trial court, the appellant appealed to this Court on four grounds that:-

1. The trial magistrate erred in law and fact for failure to evaluate the evidence of the plaintiff as to how, who, when and to whom was the alleged loan granted.
2. The trial magistrate erred in law and fact by ignoring the evidence of the defendant on the alleged loan transaction.
3. The trial magistrate erred in law and fact for failure to acknowledge that the alleged loan agreement did not comply with the requirement of the law.
4. The trial magistrate erred in law and fact for acknowledging loan transaction which was marred with irregularity.

Hearing of this appeal was conducted by way of written submissions which was filed in accordance with the schedule given by this Court.

Submitting in support of the first and second grounds of appeal, Mr. Haider Mwinyimvua, learned advocate for the appellant contended that the

respondent did not adduce evidence to prove that the loan of Tshs. 27,000,000 was advanced to the appellant on 17th June, 2016 as deposed in paragraph 4 of the plaint. He went on to submit that PW1's testified in chief that she deposited Tshs. 12,000,000 in the appellant's account on 9th May 2019 and that another sum of Tshs 12, 000,000 was issued to the appellant on 17th March, 2016. The learned counsel urged me to consider that the appellant deposed to have repaid the loan advanced to her by Sumai Kazi (PW1).

Mr. Mwinyimvua further submitted that the loan agreement (Exhibit P2) did indicate how the loan would be disbursed, the duration of the loan and the mode of repayment. He was of the view that, in absence of the terms of the loan agreement, the appellant cannot be held to have breached the loan agreement. Therefore, referring the court to section 110 (1) of the Evidence Act, Cap. 6, R.E. 2019, the learned counsel argued that the respondent did not prove her case.

On the third and second grounds, Mr. Mwinyimvua submitted that the respondent did not produce evidence to prove that she was a licenced money lender as required by the Banking and Financial Institutions Act, 2006 (BFIA)

and the Business Licensing Act. He went on to argue that even if it is assumed that the respondent or Sumai Kazi (PW1) advanced loan to the appellant, the transaction which attracted interest was illegal and thus, null and void for contravening the BFIA. To bolster his argument, the learned counsel cited the case of **David Charles vs Seni Manumbu**, Civil Appeal No. 36 of 2006, HCT at Mwanza (unreported).

Mr. Mwinyimvua also faulted the trial court for admitting the loan agreement while the stamp duty was not paid on it under section 5 of the Stamp Duty Act, Cap. 189, R.E.2019.

He concluded his submissions by praying that this Court allows the appeal, quash and set aside the decision of the trial court, declare that the loan agreement is illegal and invalid; and award costs in favour of the appellant.

Ms. Shamimu Kikoti vehemently contested the appeal. With regard to the first and second grounds, she contended that the fact that the exhibits (P1 to P4) tendered by the respondent were not disputed by the appellant, the matter was proved on the balance of preponderance. She went on to submit that the appellant admitted to have signed the loan agreement and

that the trial court considered that the loan agreement was signed after the respondent had disbursed the loan in three installments. The learned counsel contended further that the respondent gave evidence which was more credible than evidence adduced by the appellant. Referring me to section 110(1) of the Evidence Act and the case of **Bakari Mhando Swanga vs Mzee Mohamed Bakari Shelukindo and Three Others**, Civil Appeal No. 389 of 2019, CAT at Tanga, she argued that the respondent proved her case on the balance of probabilities.

Responding to the third and fourth grounds, Ms. Kikoti argued that the allegations on the legality of the lending company was not raised during trial. She submitted further that the terms and conditions of the loan agreement were duly stated in Exhibit P2.

That said, the learned counsel for the respondent urged me to dismiss the appeal with costs.

Rejoining, Mr. Mwinyimvua reiterated his submission in chief that the loan agreement relied upon by the respondent's counsel did not prove who, where, when and how the loan was advanced, its tenor and repayment. He contended that the case of **Bakari Mhando** (supra) is much relevant on the

appellant's case on the reason that it underlined on compliance with requirement of the relevant laws.

It was Mr. Mwinyimvua's submission that the third and fourth grounds of appeal were raised during trial and that the respondent failed to produce relevant documents to prove that she was a licenced lender as provided for under section 7 of the BFIA.

I have carefully examined the record and taken into account the submissions for and against the appeal. I propose to first address, the third and fourth grounds of appeal in the manner they were tackled by the learned counsel for the parties. It is my considered views that, the third and fourth grounds give rise to two complaints; *first,* that the loan agreement was illegal because the respondent failed to prove that he was authorized or licenced to conduct the business of lending; and *second*, that the loan agreement was wrongly admitted because the stamp duty was not duly paid on it.

The first complaint should not detain this Court. I have shown herein issues which were framed for determination of the suit. As rightly observed by Ms Kikoti, the issue whether the respondent was licensed to conduct the business of lending was not raised during the trial. Indeed, there was no

need of framing that issue due to the fact paragraph 1 of the plaint in which the respondent averred that she was dealing with micro-finance business was not disputed by the appellant. Much as the issue whether the respondent was conducting the business of lending in accordance with the law was not framed during trial, the respondent was not duty to produce evidence to prove that fact. Therefore, the loan agreement cannot be declared a nullity basing on the foresaid ground.

The second complaint hinges on admission of the loan agreement (Exhibit P2). It is Mr. Mwinyimvua's argument that the loan agreement was not admissible in evidence because the respondent had not paid the stamp duty. The law is settled that the power to determine admission of any evidence is vested in the trial court. In that regard, a party to the suit cannot challenge admission of exhibit basing on the ground which was not raised during trial. [See also the case of **Shihoze Semi and Another vs R** [1992] TLR 330.

In the present case, Exhibit P2 was admitted without being objected by the appellant who was duly represented by Mr. Mwinyimvua. Guided by

the settled position of law, the appellant is barred from objecting Exhibit P2 at this stage.

At this juncture, it is apparent that the third and fourth grounds of appeal are devoid of merit.

I now revert to the first and second grounds of appeal. From the submissions made by the parties' counsel, these two grounds raise the issue whether the appellant proved her case on the balance of probabilities.

As alluded earlier, the appellant did not dispute that she signed the loan agreement. However, she contended, in the written statement of defence, that the loan of Tshs. 27,000,000 agreed to in Exhibit P2 was never disbursed by the respondent. In terms of section 110 of the Evidence Act, the burden to prove existence of certain facts lies on the persons who alleges on existence of the said facts. Therefore, it is the respondent who was charged with the duty to prove that the loan of Tshs. 27,000,000 disbursed to the appellant.

In his evidence in chief, the respondent, through PW1 stated that she deposited Tshs. 12,000,000 in the appellant's account with NBC Bank, while cash money amounting to Tshs. 5,000,000 was issued to appellant. PW1's

evidence suggests that the foresaid amount was disbursed on 17th March, 2016. However, the respondent did not produce evidence to prove the cash money disbursed to the appellant on 17th March, 2016. It is not known as to why PW1 did not bother to ensure the payment or disbursement is witnessed by another person. As regards the money deposited in the appellant's account, the pay in slip (Exhibit P1) shows that Tshs. 12,000,000 was paid into the appellant's account on 9th May, 2016. Yet, the bank's stamp appearing on Exhibit P1 suggests that the said amount of money was deposited on 13th March, 2019. In that regard, the respondent contradicted herself on the date when the loan was disbursed to the appellant. If it is taken that the money was deposited on 13th March, 2019 endorsed by the bank teller (Exhibit P1), the appellant's complaint that the case was instituted at the time when the loan had not disbursed cannot be ignored.

Further to this, evidence of PW1 and the date 9th June, 2016 appearing on Exhibit P1 imply that the appellant and respondent entered into the loan agreement at the time when the appellant had already disbursed a total of Tshs. 17,000,000 and that Tshs 10,000,000 was paid at the time of signing the loan agreement. However, the respondent had stated in the plaint that

the loan was availed to the appellant on 17th June, 2016. This is reflected in paragraph 4 of the plaint which reads as follows:

> *"That on 17th June, 2016, the plaintiff availed to the Defendant the a loan facility of Tanzania Shilling Twenty Seven Million Only (Tshs. 27,000,000) subject to terms and conditions specified in the loan agreement dated 17th June, 2016 issued by the Plaintiff and accepted by the Defendant."*

It was in the reply to written statement of defence when the respondent claimed that the loan was disbursed in three instalments and that the appellant signed the loan agreement on 17th June, 2016 to acknowledge receipt of Tshs. 27, 000,000.

Be as it may, the loan agreement (Exhibit P2) does not support the respondent's averment in the reply to written statement of defence and evidence of PW1. It is gleaned from Exhibit P2 that the appellant agreed to take the loan of Tshs. 27,000,000 at the interest of 20% per annum. Nothing suggesting that the appellant acknowledged receipt of the loan of Tshs. 27,000,000. The fact that the loan agreement was signed when the appellant had already received the amount of loan does not feature in Exhibit P2.

It is the position of law that, an evidence other than the document itself or its secondary evidence cannot be given in proof of the terms of contract which have reduced in writing. This requirement is underlined under section 100(1) of the Law of Evidence Act, as follows:-

> *"When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."*

Therefore, since the terms of the loan agreement entered by the appellant and respondent was reduced into writing (Exhibit P2), an oral evidence cannot be given to state the terms which do not appear thereon. In that regard, PW1's evidence that the appellant acknowledged receipt of loan advanced to her before signing the loan agreement cannot prove the respondent's contention that the loan of Tshs. 27,000,000 was disbursed to the appellant. As a result, I am satisfied that the respondent did not prove

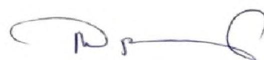
on the required standard that the loan agreed to Exhibit P2 was disbursed to the appellant.

Even if it is assumed that the loan was disbursed to the appellant, Exhibit P2 does not state the time within which the loan was to be repaid. Further to this, the loan agreement does not display whether the parties agreed that the loan would be repaid daily, weekly, monthly or annually. In the absence of the said terms, it is hard to tell whether the appellant defaulted to pay the loan alleged to have given to her.

That said, I am of the considered view that the respondent did not prove her case on the balance of probabilities. I, therefore, find merit in the first and second grounds of appeal.

For the reasons stated, the appeal is partly allowed to the extent shown above. Accordingly, the judgment and decree of the trial court are hereby quashed and set aside. The appellant shall have her costs.

DATED at DAR ES SALAAM this 18th day May, 2022.



S.E. Kisanya
JUDGE

Court: Judgment delivered this 18th day of May, 2022 the presence of Mr. Haider Mwinyimvua, learned advocate for the appellant and Mr. Stephen Mtui holding brief for Mr. Deogratias Mahinyila, learned advocate for the respondent. B/C Zawadi present.

Right of appeal explained.

S.E. Kisanya
JUDGE
18/05/2022