

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MOROGORO)
AT MOROGORO

CIVIL APPEAL NO. 13 OF 2021

*(Arising from Civil Case No. 45 of 2018 in the Resident Magistrate Court of Morogoro
before Hon. Kalegeya SRM 27th July, 2020)*

FINCA TANZANIA LTD..... APPELLANT

VERSUS

**MICHAEL THOMAS (The Administrator of
the estate of late Cecilia Victor)RESPONDENT**

JUDGEMENT

Last Court Order on: 21/04/2022

Judgement date on: 06/05/2022

NGWEMBE, J:

The appellant is a limited liability company, dealing among others, with banking and financial business. In the course of its business, one customer in the name of Leah John under cover or baptism of Cecilia Victor, entered into loan agreement of TZS. 8,000,000/= . Subsequently, created tensions and finally such tension landed before Hon. Kalegeya SRM. Unfortunate may be, the appellant became dissatisfied with the judgement and decree of the trial court, hence ventured, as a matter of right, to this fountain of justice. The appellant was offended by an order to refund TZS. 6,500,000/= to the respondent as special damages, payment of TZS. 10,000,000/= as general damages, and interest of 12% from the date of judgement to the date of full payment.



May be, it is important to recap, just briefly, the genesis of this appeal which goes back to the loan agreement of TZS. 8,000,000/= executed between the appellant herein and one Leah John under cover of Cecilia Victor on 16th March, 2016. Throughout, the appellant was laboring under presumption that was dealing with Cecilian Victor, who for the first time, opened an account on 14th December, 2015 and on 16th March, 2016 she managed to access loan of TZS. 8,000,000/=. The appellant, while believing that it was dealing with Cecilia Victor while in fact was Leah John, complied with all relevant requirements for that loan. Above all, she annexed her passport size photos to the loan forms. More so, she placed a title deed of a house built at Madizini Kilakala area within Morogoro Municipality owned by Cecilia Victor as collateral to her loan. Being satisfied that the customer has complied with all legal and financial requirements, the bank/appellant released TZS. 8,000,000/= into her account.

In the cause of repayment of that loan, the presumed customer (Leah John) defaulted to refund the remaining TZS. 6,500,000/=. Rightly so, the appellant invoked its statutory powers to recover such money by selling that collateral, that is, a residential house of Cecilia Victor built in plot No. 125 Block 'B'HD Madizini – Kilakala with Morogoro Municipality.

The exercise of selling that collateral, triggered the true image of Leah John, that she impersonated Cecilia Victor who profoundly, died sometimes in year 1993. In essence Cecilia Victor could not resurrect from grave after 23 years of her death. Even Jesus Christ resurrected on the third day not after 23 years. Therefore Cecilia Victor could not execute a Bank loan with the appellant in year 2016. It is well said in old



books that, once one dies he/she cannot come back to living, but the living will go to him/her. Above all, the passport size picture affixed in the application forms for that loan was of true Leah John. Moreover, the guarantors of true Leah John in that loan were Savera Thomas, (her mother) and Anna Murumba (her friend). The loan forms were also witnessed by the Street leader where Leah John was living. All guaranteed Leah John in the pretexty as Cecilia Victor to access bank loan from the appellant. Undoubtedly, all guarantors being matured and senior citizens, were sure that Leah John was not Cecilia Victor and Cecilia Victor was in grave 23 years ago (1993) to the date they guaranteed Leah John pretending to be Cecilia Victor.

It is on record that Michael Thomas on 23rd February 2018 was appointed an administrator of the estate of Cecilia Victor. The Urban Primary Court of Morogoro, appointed him as an administrator, hence responsible to step in the shoes of the deceased Cecilia Victor as if she is alive and kicking.

Michael Thomas, being energized by his appointment as an administrator of the deceased estate of Cecilia Victor, he undertook legal action against the appellant to recovery their money paid to the appellant to rescue the risk of selling the deceased house. The trial court, at the end, found the whole exercise of giving loan to Leah John lacked diligence on the side of the appellant, hence decided in favour of the respondent, as referred above.

Having such back ground in mind one may think, the whole exercise was encumbered by criminality in a form of impersonation and conmanship (Utapeli). The use of the deceased property as security in



the absence of an administrator of the deceased estate was likewise, an offence in our penal statutes.

However, on the hearing of this appeal, the appellant procured learned advocate Kay Zumo from Gema Mrina Advocate and the respondent likewise, procured an advocate E.E. Wamunza advocate. The two learned counsels appeared in this court fully armed, and professionally argued their case by way of written submissions. Briefly, the appellant argued ground one and two jointly, since they bear similar contents and proceeded to argue ground three separately.

In submitting the first two grounds, she vigorously attacked the trial court for failure to join Leah John as co – defendant as per third party notice. Rightly so to speak, she pointed out some basic principles governing the law of negligence which are; duty of care; breach of that duty of care; and the breach must cause harm to the innocent party.

Proceeded to argue a bit with inordinate reference to Cecilia Victor instead of Leah John and vice versa. But concluded in the first two grounds by insisting that, the respondent herein ought to pursue criminal action against Leah John instead of suing the bank.

Submitting on the third ground, she rightly pointed out an essential elements required to proof criminal cases, such proof must always be beyond reasonable doubt. Also attacked the trial court for its decision that the appellant had a duty to take an undertaking against Leah John into criminal justice based on impersonation and alike. Rested by a clear prayer that the appeal be allowed.



In turn the learned advocate E.E. Wamunza argued just briefly, but concise and direct to the point, that Leah John was joined as a third

party to the suit. Insisted that, the trial court was right to advice the appellant to institute a criminal case against Leah John for the offence she committed against the appellant. Some counts were pinpointed by the trial court including, but not limited to impersonation, forgery and alike.

Proceeded to argue eloquently on the basic elements of banking and the governing principles of issuing bank loans, which unfortunate were not followed by the appellant in granting such loans to Leah John. Insisted that the title holder of the property used as collateral could not resurrect from grave she went therein since 1993, and miraculously resurrect in year 2016 with a view to access bank loan to the appellant. Leah John was/is a conman which is a criminal offence.

Lastly, she labored much on the principles of negligence by citing many relevant principles articulated by the founding father of neighbor principles. Lord Atkin's in the case of **Donoghue Vs. Stevenson 1932 AC 562** is considered as the founding father of principles of negligence associated with duty of care to thy neighbors. Rested by inviting this court to dismiss this appeal with costs.

In rejoinder the learned counsel, submitted by reiterating to her submission in chief and insisted on the failure of the trial court to join the third party in the suit, with a view of holding her liable and responsible to indemnify the appellant/defendant in case of liability against the respondent/plaintiff.

Having briefly summarized the strong arguments of learned advocates, I may begin my consideration by pointing out that, this is one among cases which has exhausted my mind, not because of its



seriousness and tricks involved therein, but because it involves many unanswered questions. The question is, why tag of war between innocent parties, while the source of all those troubles is left freely enjoying the fruits of her criminal acts. If both parties agree that Cecilia Victor died in year 1993, it goes like a day followed by night, that she could not be alive and kicking in year 2016. Therefore, whoever acted as Cecilia Victor in year 2016 committed a criminal act capable of being prosecuted in a court of law.

Another important question, good for thought, is who were the parties in the alleged loan agreement? Obvious this question is answered by perusing the available records. That parties were the appellant as lender and Leah John under cover or pretext of Cecilia Victor, who demised way back to 1993. Therefore, Leah John can never be Cecilia Victor, likewise, Cecilia Victor can never be Leah John because Cecilia Victor is no longer alive. It means Leah John had pre planned to commit illegal act against the appellant and to properties left by Cecilia Victor. Thus, her act proves *actus reus* and *mens rea* which are fundamental elements in criminal justice. Since Leah John is yet to be arraigned in court and be afforded right to be heard, I rest to discuss more on this point.

Equally important is the process of giving loan to Leah John. It is on record that, loan form and agreement was witnessed or guaranteed by her mother, friend and her street chairman. The question is, whether the appellant invited them as its witnesses during trial? If not, why the appellant fails to take an undertaking against them for failure to bring Leah John to court or assist her to refund bank money?



Another equally important question is why the appellant has appealed against the trial court's judgement, instead of complying with the trial court's advice to pursue criminal trials against not only Leah John, but also her mother, friend and the street chairman? In this appeal there are many more questions than answers, which have exercised my mind.

Having so said, now I turn to determine the well-argued grounds of appeal. The appellant's advocate has argued jointly grounds one and two due to its similarities. However, the contents of the two grounds are contradictory in nature and in contents, for obvious reasons, that in ground one, the appellant is complaining against the trial court for failure to join Leah John as a necessary party, simply means the trial court failure to join Leah John as a third party or necessary party. However, the content of ground two is against the trial court for failure to hold Leah John liable despite being joined successfully under third party procedure. Without laboring much on these two grounds, the answer is in the record itself, that the appellant/defendant issued third party notice to join Leah John, which same was admitted in court, but the appellant failed to serve her and she never appeared in court. As such, I don't see how could the trial court order Leah John to refund the respondent? I think Leah John must be arraigned in court to answer criminal accusations.

The third ground is simply intended to challenge the trial court for failure to use appropriate standards of proof, in determining the suit before it. Due to the contents of this ground, I expected the learned advocate for the appellant to assist the court by pointing out those appropriate standards of proof, which the trial court failed to apply.



However, in pages 4 to 6 the learned advocate formulated a different ground and argued it extenso. For clarity, ground 3 as per Memorandum of Appeal is quoted here under:-

"that, the trial court erred in law and in fact by using inappropriate standard of proof to determine the case at hand contrary to requirement of the law"

However the appellant argued strongly on the following ground:-

"That the trial court erred in law and in fact for failure to properly evaluate the evidence of the appellant on the required balance of probability"

The two grounds, to the best are different in content and in form, the first ground is questioning the improper use of standard of proof while the latter is related to improper evaluation of evidences of the appellant. More so, the first ground ought to provide the required standards, which the trial court failed to apply in its decision, while the latter invites this court to consider propiate, consideration and evaluation of the appellant's evidence done by the trial court. Therefore the two issues are difference. The appellant ought to argue grounds in the memorandum of appeal not other wise.

It is known that the standard of proof in criminal case is different from the civil action. Repeatedly, the proof in criminal cases is beyond reasonable doubt, but proof in civil suits is on balance of probability. In Civil suits the one with strong evidence against another will win. Section 110 to 113 of the Evidence Act provide foundation of that principle.



It is I think, settled in our jurisdiction that proof in civil cases is on balance of probabilities. In the case of **Mathias Erasto Manga Vs. Ms. Simon Group (T) Ltd, Civil Appeal No. 43 of 2013** had this to say:-

"The yardstick of proof in civil cases is the evidence available on record and whether it tilts the balance one way or the other. Departing from this yardstickis going beyond the standard of proof in civil cases"

Considering the evidences testified by PW1 at page 24:-

"Leah John was born in year 1979 while the title deed of the plot of land of Cecilia was secured in year 1985. The offer was secured on 1972. I am sure that the bank noted that the title deed was for Cecilia Victor Kimweli. From 1985 to 1979 is only 9 years, there is no way Leah John of 9 years would have been with title deed. By then she was nine (9) years old"

The evidence of PW5 is worth quoting hereto:-

"By looking at the documents Finca Bank had, no mandate of issuing a loan to Leah John because of the following reasons:-

- 1. The offer of that title was issued in between 1972 or 1970s while Leah John was born in 1979. There is no way Leah would have owned a plot before she was even born;*
- 2. The owner of the plot one Cecilia Victor Kimweli was born in 1953 and passed away in 1993. By then there was no voter's identification card. To make matters worse, even the*

date of birth is indicated on the voter's card, even her passport size photo is appended to the letter, there is no any girl of 1979 have owned a plot of land in 1972"

PW5 lamented bitterly in his evidence, that as police investigator failed to receive proper cooperation from the appellant to net their customer called Leah John.

In turn the defence witness DW1 Leah Ndewoya at pages 45 & 46 of the proceedings, narrated on how they ended up giving loan to Leah John purported to be Cecilia Victor. In fact, Cecilia Victor Kimweli died several years ago before the event, any careful person would observe clearly that the appellant was conned by Leah John.

Upon analyzing the available evidences as were recorded during trial, I have no slight doubt, the appellant had a duty to authenticate its customer, verify the documents availed to them, including the age of their customer Leah John against the tendered documents related to the alleged collateral. Authenticate the truthfulness of the alleged guarantors including the street chairman. Above all, the appellant had an ample opportunity to cooperate with law enforcers (Police) to net their customer who conned them.

While approaching to the end, I agree with the appellant's submission in page 4 that, Leah John cannot escape accusations on impersonation contrary to section 369 (1) of the Penal Code. The question is who should be the complainant in that case? Obvious and rightly I agree with the trial court, the complainant must be the appellant whose money landed into a conman, in the name of Leah John.



As an obita dicta, I have seen complaints of similar nature is increasing nowadays. Many banks have been conned by money mongers. Such trend if let uncontrolled may lead into a national financial crisis. Therefore, banks and their workers must not only trust but verify if their customers are trustful.

Having so said and done, I find no cogent reasons to depart from the trial court's decision. Henceforth, this appeal is dismissed with costs.

I accordingly Order



P.J. NGWEMBE

JUDGE

06/05/2022

Court: Delivered at Morogoro in Chambers on this 6th day of May, 2022 in the presence of advocate Kay zumo for appellant and E.E. Wamunza Advocate for Respondents.

Right to appeal to the Court of Appeal explained.



P.J. NGWEMBE

JUDGE

06/05/2022