IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 48 OF 2021

GODWIN MDUMA .... APPELLANT

VERSUS

ADEQUATE (T) MICROFINANCE LTD .... RESPONDENT

(Arising from the decision of the District Court of Kinondoni at Kinondoni in Civil Appeal No. 84 of 2019)

JUDGMENT

2nd March & 6th April, 2023

KISANYA, J.:

This second appeal emanates from the decision of the District Court of Kinondoni at Kinondoni in Civil Appeal No. 84 of 2019. That decision was reached in appeal which arose from the Primary Court of Kimara at Kimara (the trial court) in Civil Case No. 165 of 2019.

In terms of the record, the respondent sued the appellant, Godwin Mduma claiming for debt of TZS 10,500,000. It was alleged that, on 23rd March, 2018 and 28th August, 2018, the appellant borrowed from the respondent TZS 5,696,000/= and TZS 800,000 respectively. It was further stated that parties agreed that the said loan was to be repaid within six months. The appellant was stated to have paid TZS 1,445,700/= from the first loan and paid nothing from the second loan. Therefore, the respondent instituted a suit claiming for TZS 15,530,000 being an outstanding loan and interest accrued thereon.

The appellant admitted that he owed the respondent. He stated to have failed to pay the loan due to challenges in his business. He also informed the Court that he was able to pay TZS 100,000/= per month.

At the end of the trial, the trial court magistrate found that the respondent had proved the claim of TZS 10,538,064/= instead of TZS 13,530,000/=. Consequently, the appellant was ordered to pay the respondent the said TZS 10,538,064/=.

Aggrieved, the appellant appealed to the District Court. His petition of appeal was stuffed with three grounds appeal as follows: *One*, the trial court failed to analyse and assess the evidence adduced during the trial; *two*, the trial court decision was is tainted with serious material irregularities and illegalities; and *three,* the trial court erred in law and fact on the question of burden of proof. After consideration of the evidence on record, the District Court held the view that the appellant's evidence was nothing but admission of the respondent's claim.

It is against the decisions of the two lower courts that has prompted the appellant to appeal to this Court on the following grounds:

1. *That the Court erred in facts and in law for its failure to analyse and assess the evidence adduced during the trial.*
2. *That the Court erred in fact and in law for upholding the decision of the trial court which is tainted with serious material irregularities and illegalities.*
3. *That the Court erred in fact and in law on the question of burden of proof.*

At the hearing of this appeal, the appellant was represented by Mr. Kiondo Mtumwa, learned advocate. The respondent defaulted to appear without notice. In that regard, the hearing proceeded *ex-parte* under rule 13(3) of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules.

In the course of submitting in support of the appeal, Mr. Mtumwa dropped the first and third grounds of appeal. As regards the second ground, he faulted the District Court for upholding the decision of the trial court while it emanated from the proceedings which were tainted with irregularities as follows: *First,* the Board Resolution was not tendered in evidence to prove that Omary Ibarhim was instructed to institute a suit on behalf of the respondent. *Second,* the learned trial magistrate did not read over the evidence of each witness as mandatorily required by rule 46 (3) of the Magistrate Court (Civil Procedure in Primary Courts), Rules, 1964. *Third,* the provisions of rule 54(1)(a) of the Rules were not complied with as the trial court did not satisfy itself on whether the appellant had means satisfying the decree. Therefore, Mr. Mtumwa asked the Court to quash and set aside the decision of the trial court and the District Court.

Having carefully considered the submission in respect of the second ground of appeal, the crucial issue for determination is whether the complaints in support of this ground have merit.

It is worth noting here that the trial court and District court concurred on findings of fact that the respondent proved the claim of TZS 10,538,064/=. The law is settled that second appellate court should not interfere with concurrent findings of the two courts below unless it is satisfied that the finding is based on misdirection or misapprehension of evidence or violation of some principle of law or procedure or has occasioned a miscarriage of justice. There is plethora of authorities on that position. One of them is the case of **Neli Manase Foya vs Damian Mlinga** [2005] T.L.R 167 in which the Court of Appeal stressed that:

> *"...It has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate court, concurred with the findings of fact by the Primary Court. So did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was*

> *evidence upon which both the lower courts could make concurrent findings of fact."*

In the instant appeal, the second ground of appeal suggest that the concurrent findings of the two courts below is based on violation of some principle of law or procedure. Having examined the record, I have noted that the illegalities or irregularities in the trial court's proceedings pointed out Mr. Kiondo were not raised and determined by the District Court. It is a principle of law that, a matter which was not raised and determined by the first appellate court cannot be entertained by the second appellate court unless it involves a point of law. I am fortified, among others, by the decisions of the Court of Appeal in the cases of **Hassan Bundala @Swaga vs R,** Criminal Appeal No. 385 of 2015, **Sadick Marwa Kisase vs R,** Criminal Appeal No. 323 of 2018 and **Peter Ephraim @Wasambo vs The DPP**, Criminal Appeal No. 386 of 2018 (all unreported). For instance, in **Peter Ephraim @Wasambo** (supra), it was held that:

> *"We considerately agree that this ground is new as was not raised before the two lower courts. It is a settled principle that a matter which was not raised and determined by the High Court cannot be entertained by this Court on the second appeal unless it involves a point of law."*

As for the first complaint, this Court is invited to find that a board resolution was not tendered in evidence to prove that Omary Ibrahim was instructed to institute a suit on behalf of the respondent. It is my considered opinion that the issue whether the said board resolution was not tendered in evidence or otherwise is based on fact and not law. Since that issue was not raised and determined by the District Court, I will not entertain it.

Next for consideration is the complaint that the learned trial magistrate recorded the evidence in contravention of rule 46 (3) of the Magistrate Court (Civil Procedure in Primary Courts), Rules, 1964. In terms of the said provision, the trial magistrate of the primary court is required to read the evidence to the witness after recording the same and certify at the foot of the evidence that he or she has complied with that requirement. Rule 46(3) of the Rules stipulates:

> *"The substance of such evidence shall be recorded in Kiswahili by the magistrate, and after each witness has given evidence the magistrate shall read over his evidence to him and shall record any amendments or corrections. The magistrate shall certify at the foot of such evidence, that he has complied with this requirement"*

I examined the record at hand. Having done so, I agree with Mr. Kiondo that the above provision was not complied with. Now, the issue is on the recourse to be taken. This a procedural irregularity, the test is whether the appellant was prejudiced. This is pursuant to section 37 (2) of the Magistrates' Courts Act [Cap. 11 R: E 2019] which reads:

> "*No decision or order of a primary court or a district court under this Part shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, or any process or charge, in the proceedings before or during the hearing, or in such decision or order or on account of the improper admission or rejection of any evidence, unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice*."

In view of the above, the appellant was supposed to demonstrate how he was prejudiced by the primary court's failure to comply rule section 46(3) of the Rules. This stance was taken in the case of **Garende Nyabange vs Nyanzara Kyarata**, PC. Matrimonial Appeal No. 10 of 2020, HCT at Musoma (Unreported), when my brother, Hon. Kahyoza, J held as follows:

> "*I am of the firm view that appellant did not establish that the omission to comply with rule 46(3) of the PCPR, occasioned any injustice as he did not complain about the authenticity of the record. Thus, I find that the violation of rule is 46(3) of the PCPR is not fatal. It is an irregularity, which is curable under section 37(2) of the Magistrates' Courts Act, [Cap. 11 R.E.2019].*"

Reverting to this case, Mr. Kiondo did not demonstrate how the appellant was prejudiced by the primary court' failure to comply with rule 46(3) of the Rules. Neither the District Court nor this Court was not told whether the authenticity of the primary court's record was questionable. For instance, it was not stated whether the appellant's evidence was wrongly recorded. On that account, I am of the firm view that the omission to comply with rule 46(3) of the Rules did not prejudice to the appellant.

Last for consideration is the third complaint that the trial court did not observe the provision of rule 54(1)(a) of the Rules. At the outset, I find it appropriate to appreciate what the provision of rule 54(1) (a) of the Rules provides. It reads:

> *"After pronouncing its decision, the Court shall examine the person against whom the decision was given–*
>
> *(a)where the decision contains an award or order for the payment of money or compensation in kind, as to his means of satisfying the award or order and as to his attachable property;*

The above provision provides for inquiry as to means of satisfying the decision of the primary court. As it was with the second complaint, the appellant did not demonstrate how he was prejudiced by the trial court's failure to conduct an inquiry on his means of satisfying the award issued in favour of the respondent. Considering further that it was not stated whether the respondent had not applied to execute the decision, I hold the view that the omission cannot render the decision subject to this appeal to be declared a nullity. Thus, the third complaint lacks merit as well.

Eventually, the second ground of appeal is devoid of merits. Given that the other grounds of appeal were dropped by the appellants, I find the appeal lacking merit and I dismiss it in its entirety. I make no order as to costs because the matter proceeded *ex-parte*.

DATED at DAR ES SALAAM this 6th day of April, 2023.

S.E. KISANYA
JUDGE