IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 129 OF 2022

(Originating from the Judgement and Decree of the Ilala District Court in Civil Case No. 33 of 2022 before Hon. Nkwera SRM dated 29th July ,2022)

SYLVESTER DISMAS WAMAHE..... APPELLANT

VERSUS

AKIBA COMMERCIAL BANK PLC.....1ST RESPONDENT

BEST GROUP TANZANIA LIMITED.....2ND RESPONDENT

JUDGMENT

31st March & 18th April, 2023.

MWANGA, J.

The appellant, **SYLVESTER DISMAS WAMAHE** instituted an appeal against Judgment and Decree issued by Ilala District Court in Civil Case No. 33 whereby the respondent's suit was dismissed for lack of substance. The trial magistrate held that: -

'Looking at the case at hand since the plaintiff is the one at fault, he failed to repay the loan agreed in the loan agreement and other arrangement made by the parties (plaintiff and 1st defendant) on how to repay the loan, therefore the available relief to the defendant is the payment of the loan by the plaintiff...But all in entirely plaintiff shall repay the loan amount which is indebted up to now to the defendant'

The appellant was aggrieved by the above decision stating in the nine (9) grounds of appeal that: -

1. the trial Magistrate erred both in law and fact for holding that there was a valid loan agreement between the parties.
2. the trial Magistrate erred both in law and fact for failure to frame proper issues occasioning injustice to the appellant.
3. the trial Magistrate erred both in law and fact for failure to analyze and scrutiny the evidence presented by the parties leading to injustice.
4. the trial Magistrate erred both in law and fact for giving 1st defendant reliefs which were not pleaded in the pleading.
5. the trial Magistrate erred both in law and fact for considering the facts which were not pleaded in the 1st defendant pleading.

6. the trial Magistrate erred both in law and fact for ignoring the evidence presented by the plaintiff's witnesses.
7. the trial Magistrate erred both in law and fact for ordering to repay the loan amount indebted without proof of the same.
8. the trial Magistrate erred both in law and fact for delivering irrational and ambiguous judgement.
9. the trial Magistrate erred both in law and fact for allowing the 1st defendant to bring the list of additional documents without following the procedure.

The brief facts relating to this appeal as gathered from the available records and submission of the parties are that; the appellant had applied for a loan facility of Tshs. 20,000,000/= from the 1st respondent. However, after the analysis was made, he was advanced Tshs. 17,000,000/= payable within 24 months at Tshs. 1,020,000/= per month. This loan facility was advanced as a 'top up loan' as he had an existing loan. The loan facility was secured by a legal mortgaged of the appellant's house located at Chanika within Dar es salaam region. The letter offer was admitted in court as exhibit PE1.

It followed that, the 1st respondent slashed Tshs. 11,434,499.69 out of the credited amount of Tshs. 17, 000,000/= to the appellant's account to

cover the existing debts from that other loan facility which was previously advanced to the appellant. Consequently, the appellant remained with a balance of Tshs. 6,000,000/= in his account as a part of his loan facility. The bank statement in exhibit PE2 was tendered to show the status of the appellant account in respect of the loan amount. Through his evidence, the appellant complained that the stated sum was slashed by the Bank without his consent or any notice. As a result, it caused losses to his business and the family.

On 13th July, 2020 the appellant received a demand notice from the 1st respondent requiring him to repay the loan amount of Tshs. 34,000,000/= being an interest and principal sum, the demand which was objected by the appellant. On her part, the 1st respondent tendered offer letter and payment schedules in court as exhibit D1. The respondent also stated that, since there was an existing loan against the appellant who also took the second loan of 17,000,000/= as a top up, the same was reduced from it as part of the application fees, LD fees, loan fees, outstanding loan payment, penalty, principal sum and interests including arrears.

The records revealed that, for some times, the appellant had some discussions with the 1st respondent on the modality of payment of his

existing debt. As a matter of fact, since the appellant's business was not performing well, he was allowed by the 1st respondent to repay Tshs. 300,000/= per month instead of 1,020,000/= as agreed. Up to the conclusion of the hearing, the due debt against the appellant was Tshs. 35,600,000/=.

In the present appeal, when the matter came up for hearing parties resorted the appeal to be disposed by way of written submission, which were duly filed as agreed. The appellant submission was drawn and filed by advocate Steven Jamson Shitindi while the respondent's written submission was drawn and filed by Advocate Neema Munuo.

In his first ground of appeal, the learned counsel Mr. Steven Shitindi argued that the act of the 1st respondent slashing Tshs. 17,000,000/= without consent or notice to the appellant was in violation of the terms of contract. It was his view that, such act of the 1st respondent was a conclusive assertions that the respondent had no intention to perform the promise made in a loan agreement dated 22nd December, 2017. The counsel added that, the same is in violation of Sections 10, and 17 (b) (c) and (d) of the Law of Contract Act, Cap. 345 R.E 2019.

On the other hand, the respondent vehemently stated that no fraud was committed by the respondent as there was an existing contract with the appellant where he was advanced a loan of Tshs. 20,000,000/= which was to be paid on a period of 24 months at a monthly repayment schedule of 1,200,000/=. However, the respondent contended that, since the appellant defaulted to pay the loan and the fact that the loan facility of Tshs. 17,000,000/=was a top up loan, the agreement was valid and no fraud was committed.

In the second ground of appeal, the appellant submitted that the issue was whether the loan agreement was valid in law and, not whether there was loan agreement. It was the learned counsel view that, failure to frame proper issues occasioned injustice on his part. To the contrary, the counsel for the respondent indicated that, issues were framed on 12th October, 2021 and agreed by all parties.

With reference to the third ground of appeal, the counsel submitted that since the respondent has confessed to have slashed Tshs. 11,434,499.69 from the account of the appellant without any good cause, the same cannot be cured by the fact that the appellant had existing debt. In view of the

counsel for the respondent, the trial court considered the existing loan, bank charges and penalties. Hence, the evidence was analyzed accordingly.

For the fourth and fifth grounds of appeal, the counsel argued that the reliefs given to the respondent were not proper as the same were not reflected in the pleadings. The respondent refuted such claim citing Order XX Rule 4 and 5 that the decision was based on issues raised and the reasons for the decision. The counsel argued further that, even the documents were tender after the closure of the appellant's case.

Regarding the sixth and seventh grounds of appeal, the counsel stated that the trial court ignored evidence of the appellant. Also, that the respondent has not proved the awarded amount by the trial court, the fact which was equally disputed by the respondent. The counsel reiterated his earlier position that, the appellant is entitled under the law to repay the loan amount outstanding.

As to the 8th and 9th grounds of appeal, the appellant was stating that the judgement of the trial court was irrational and ambiguous. It was submitted further that, allowing the respondent to file additional list of documents after closure of the appellant case was unlawfully as at that moment hands of the appellant were tied. To the contrary, the counsel stated that the appellant

filed lists of additional documents on 18th February, 2022 and the appellant closed his case on 2nd March, 2022. It was the counsel view that, Order XX1 rule 12 of the CPC allow parties to produce documents at any time as the court shall think right.

I addition to that, the counsel reiterated that if at all the 1st respondent had a claim against the appellant, he ought to raise a counter claim in his written statement of defence as parties are bound by their pleadings. The counsel cited the case of **Nico Insurance (T)Ltd Versus Philipo Paul Owoya, Tibu Sinjene and Abillahi Mohamed**, Civil Appeal No. 151 Of 2017 quoted with approval in the case of **Peter Koranti & 48 Others and the Attorney Gneral**. That, parties are bound by their pleadings. See also the case of **Makori J.B Wassaga and Joshua Mwaikambo and Another** (1987) TLR 88.

I have gone through the evidence on record and relevant submission of both parties in support and against the grounds of appeal. In no doubt, as rightly submitted by the counsel for the appellant parties in civil litigation are bound by their pleadings. In the case of **The Registered Trustees of Roman Catholic Archdiocese of Dar es salaam Vs Sophia Kamani,** Civil Appeal No. 158 of 2015 (Unreported) the court held that;

"...it is trite principle of law that parties are bound by their pleadings. In civil litigation, it is through pleadings where parties established their cases they intended to prove. So, it is the duty of the parties to establish their case to clearly and categorically establish their cases before adjudication. In that context therefore, pleadings are road map so to say to any given civil litigation which should show the destination the parties to the case intended to reach'

In another case of **African Banking Corporation Vs Sekela Brown Mwakasege,** Civil Appeal No. 127 of 2017, the court quoting the Indian case had this to say;

"No amount of proof can substitute pleadings which are the foundation of the claim of a litigating party".

Apart from that, in the case of **Makoni J.B Wassanga and Joshua Mwakambo & Another** [1987] TLR 88 the court had also this to say: -

"In general, and this I think elementary, a party is bound by his pleadings and can only succeed according to what he has averred in his plaint and in evidence, he is not permitted to set up a new case".

I now turn to determine the first issue as outlined above. After thorough perusal of the evidence on records and pleading of the parties in support of their respective stances, I wish to point out from the outset that, there are some issues which are no longer disputed by the respective parties. That is,

the appellant and respondent entered into loan agreement which I may refer it as as loan term I Tshs. 20,000,000/= and loan term II Tshs. 17,000,000/=. Again, the appellant is not disputing that he has an existing loan that was advanced by the 1st respondent and that the same were not fully repaid before he was advanced the second loan term II.

Now, the real issue for determination was whether action of the 1st respondent to deduct or slash the amount of Tshs. 11,434,499.69 out of Tshs. 17,000,000/= advanced by the 1st respondent to recover the appellant's existing debt without due notice or prior agreement was the breach of agreement.

In her WSD, the 1st respondent pleaded that, at first, the appellant was advanced loan facility of Tsh, 20,000,000/= on 18th July,2016 and also Tshs. Tshs. 17,000,000/= on 22nd December,2017. The loan facilities were secured by a house located at Chanika zingiziwa "hati ya mauzo na manunuzi wa kiwanja". As I have noted above, the 1st defendant exercised recovery measures where to total of Tshs. 11,434,499.69 were slashed from the loan term II that was advanced to appellant.

There is evidence that, the appellant has not repaid the loan facility of Tshs. 20,000,000/=. As a result, he wrote several letters to the 1st

respondent asking for reduced amount of interest and principal sum to be repaid as his business was not performing well. The loan facility letter of Tshs. 17,000,000/= dated 22nd December,2017 was tendered and admitted in court as exhibit P1.

In the WSD of the 1st respondent, the 1st respondent asked the court to dismiss the case with costs, the plaintiff to pay the outstanding loan amount of Tshs. 34,150,000/= plus accrued interest and penalties or in alternative and order the eviction of the plaintiff from the mortgaged property. That was granted to the respondent without proof of her case. There was no counterclaim that was raised against the appellant's case.

The appellant in his second ground of appeal is complaining about the issues drawn by the court that they were wrongly framed. As a result, the trial court arrived at erroneous decision. The issues disputed are seen at page 14 of the typed proceedings as follows: -

1. Whether there was a loan agreement between the parties
2. Whether there was a breach of that loan agreement
3. To what reliefs the parties are entitled to.

Considering the rival submissions, one has to look at Order X1V rule 1, of CPC. The relevant provision of Order XIV reads as follows: -

> ***"Order XIV 1. Framing of issues***
>
> ***(1) Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other".***

On the basis of the available evidence, what the appellant is alleging is that his loan facility Tshs. 17,000,000/= was slashed to recover his debts without a notice or agreement. Therefore, one of the issues to be drawn was whether that amount to breach of agreement. To my view, the issues drawn above were too general taking into account that the appellant had loan facility term I and term II.

I hasten to state that, the issues are backbone of the suit. The object of framing the same is to pinpoint the point required to be determined for proper trial and right decision of the cases and to ascertain the real dispute between the parties. As shown in order XIV, rule 1 above, the real issue must be that; one asserting and other side denying so as to guide the parties in the manner of adducing evidence and for right decision. The issues must, therefore, be sufficiently expressive of the matter in dispute, specific, perfect comprehensive unambiguous, crystalized distinct and clear covering the

requirement or essential ingredients of the provision of law applicable so as to sufficiently direct the attention of the parties as to what evidence is required to be led. Failure to do that, the framed issues will be liable to be set aside.

In the case on hand, the trial court framed the issues which are general, misleading and confused, hence failed to lead necessary evidence on the ingredient. Thus, instead of dealing with the case of the appellant the trial court proceeded to rule out that it was the appellant who was supposed to pay the respondent without any proof of the respondent's case. In fact, the respondent did not raise any counter claim against the appellant subject of proof. Section 110 (1) of the Evidence Act, requires that: -

> *"**whoever desires any court to give judgment as to legal liability dependent on the existence of facts which he asserts must prove that those facts exist."***

Similar view was held in the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another, Civil Appeal No. 99 of 2004 (CAT-unreported)** when applying the provision of Section 110 of the Evidence Act, where it was stated that: -

> ***"...it is an elementary principle that he who alleges is the one responsible to prove his allegations."***

It may be remembered that, the appellant required a loan facility of Tshs. 17,000,000/= to boost his business. It is not indicated in the agreements (the loan facility letter (Exhibit P1) dated 22/12/2017 and loan facility letter dated 18/07/2016) whether the same shall be subjected to reduction in order to recover the existing debt. Again, there was no explanations offered as to why the appellant was advanced a loan facility of Tshs. 17,000,000/= while he is alleged to have defaulted to repay the existing debt.

The evidence that the appellant business was struggling can be seen at his letter to the 1st respondent in exhibits D2, D4, D5 and D6. If at all the 1st respondent was intending to fulfill his obligation under the agreements, knowing that the loan facility sought by the appellant was for purpose of boosting his business which was not progressing well, the 1st respondent ought not to slash the amount so advanced.

Furthermore, if the 1st respondent felt that the appellant had defaulted to pay the loan term I, why the appellant then did not exercise her rights under the agreement, which was to sell the mortgaged property (a) vitu vya ndani kwenye biashara (b) nyumba yenye hati ya mauziano iliyopo Chanika-Zinguziwa. To put the matters right, the recovery measures exercised by the

1st respondent was not agreed by the parties, hence in violation of the terms of the agreement.

For the foregoing, I allow the appeal with costs. I proceed to quash and set aside the whole judgment and decree of Ilala District Court in Civil Case No.33 of 2021.

Order accordingly.

H. R. MWANGA

JUDGE

18/04/2023

COURT: Judgement delivered in Chambers this 18th day of April, 2023 in the presence of advocate Neema Munuo for the respondents, also holding brief for the advocate Steven Shitindi for the Appellant.

H. R. MWANGA

JUDGE

18/04/2023