IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

CIVIL APPEAL NO. 56 OF 2021

(Arising from Civil Case No. 51 of 2020 from Resident Magistrate's Court of Mwanza)

SOPHIA SIMON (Administratrix of the estate of

the late MALIATABU FUGUGU KILIMULUDUBI) ..... APPELLANT

VERSUS

DOROTHEA B. ALOYCE .....1ST RESPONDENT

THOMAS PHILIPO MACHAO.....2ND RESPONDENT

JUDGMENT

16/12/2022 & 3/03/2023.

ROBERT, J

This is an appeal against the judgment and decree of the Resident Magistrates Court of Mwanza in RM Civil Case No. 51 of 2020 which was decided in favour of the two respondents herein. Aggrieved by the judgment and decree, the appellant preferred this appeal challenging the decision of the trial court.

The two respondents herein sued the appellant at the Resident Magistrates' Court of Mwanza in RM Civil Case No. 51 of 2020 alleging that sometime on 26th June, 2017 they executed a loan agreement with the late Maliatabu Fugugu Kilimulubi in which the late Maliatabu received the amount of TZS 175,000,000/= from the respondents herein jointly on a condition that he would pay back the whole amount on or before 10th July, 2018 together with interest. The loan was secured with two houses located at plot No. 460 Block KK, Temeke street, Mahina in Mwanza city. Unfortunately, the late Maliatabu passed on before honouring the terms of the agreement. As a result, the respondents sued the administratrix of his estate for recovery of their money. The trial Court entered judgment in favour of the respondents herein. Dissatisfied, the appellant preferred this appeal armed with four grounds as follows:

(1) That, the Hon. Magistrate erred in law for failure to consider the evidence on records;

(2)That, the Hon. Magistrate erred both in law and fact in holding that the testimony of PW3 be by way of an affidavit, hence denial of the right to be heard to the Appellant;

(3)That, the Hon. Magistrate erred in law and fact for failure to correctly evaluate and consider evidence on records and consequently reaching into wrong finding;

(4)That, the Hon. Magistrate erred both in law and fact in holding that the appellant had to pay Tshs. 175,000,000/= as the loan given to deceased without any cogent proof to that effect.

The appeal was argued by way of written submissions. Highlighting on the grounds of appeal, Mr. Angelo J. Nyaoro, learned counsel for the appellant opted to start by joining and arguing the 1st and 3rd grounds together. He then argued the 2nd and 4th grounds separately.

Submitting on the 1st and the 3rd grounds, Mr. Nyaoro argued that, although exhibits P1, P2 and P5 were admitted in evidence they were defective and were admitted against the law. Hence, he implored the Court to disregard and/or expunge them from the record.

Starting with exhibit P1, (the loan agreement), he argued that since the respondents were not registered and licensed as financial institutions in terms of section 6(1) of the Banking and Financial Institutions Act, No. 5 of 2006 they were prohibited to extend loan and demand interest therefrom or engage in the banking business which is defined under section 3 of the Act to include accepting and advancing loan to the public.

Further to that, he argued that the loan agreement was procured fraudulently as the appellant denied to have signed it. He argued that

although the respondents (PW1 and PW2) testified to have signed the loan agreement in the presence of the witness Advocate Lameck Merumbe, exhibit P1 does not show anywhere the name or signature of the said Lameck Merumbe (PW3) and the testimony of PW3 does not explain why his name did not appear in that agreement (exhibit P1) as Commissioner for oaths. Hence he urged the Court to disregard the evidence of exhibit P1.

With regard to exhibit P2 (Bank statement), he submitted that, it is of no evidential value and should not be part of the records because; it was admitted contrary to the provisions of section 78(1) and (2) of the Evidence Act, Cap. 6 (R.E. 2019) for admission of bankers book as evidence. He maintained that exhibit P2 was tendered by PW1 who is not a partner or officer of Mkombozi commercial bank, there was no proof from the bank that the said document was at the time of the making of the entry one of the ordinary books of the bank and that the book was in the custody or control of the bank as required by the law under section 78(1)&(2) of the Evidence Act.

He submitted further that, despite the appellant's objection regarding admissibility of exhibit P2 as shown at page 16 of the proceedings, the objection was overruled at page 18 on the grounds that, any person with

knowledge of that document can tender it as exhibit in court and since the said exhibit P2 mentioned PW1 (Thomas Philipo Machaho) he was a qualified person to tender it. He maintained further that, PW1 was not one of the persons eligible to tender the document under subsection (2) of section 78 of the Act. Hence, he urged the Court to expunge it from the list of exhibits.

In the alternative, he submitted that even if PW1 was eligible to tender exhibit P2, still exhibit P2 is of no evidential value due to the following reasons; firstly, it doesn't show the bank account of the recipient and it shows variations in the names of the recipient in the bank transactions. In the transaction dated 25/4/2017 the names of recipient changed from Maliatabu Fugugu Kilimudubi to Maliatabu Fugugu Kilimulu without any valid explanations and on the transaction dated 30/5/2017 the recipient's name was Maliatabu Fugugu Kilimuludobi. Secondly, there is no any supporting evidence from recipient's bank to verify that the names mentioned in exhibit P2 bears an account in their institution and the said person is recognized as a customer of the institution. He urged the Court to disregard exhibit P2 as evidence because it is of no evidential value.

In respect of exhibit P5, he submitted that, it is of no evidential value and was admitted in Court contrary to the law. Firstly, he argued that exhibit

P5 was once rejected by the trial Court for the reasons that it was not verified by the issuing authority (see page 20 of the proceedings). The same document was tendered again by PW4 but the objection raised was not sustained and the document was admitted as exhibit P5. He argued that the trial Court having rejected the said document for the first time on 7/12/2020 it became functus officio in respect of that document. There was no room for retendering of the said document through another witness. He submitted that the said irregularity was fatal and urged the Court to expunge exhibit P5 from the record for contravening the law.

Further to that, he submitted that, there are alterations in parts of exhibit P5 which makes it unsafe for the Court to rely on it. He urged the Court to disregard exhibit P5 and consider it of no evidential value.

In response to the 1st and 3rd grounds together, Mr. Julius Mushobozi, Counsel for the respondents started his submissions by observing that, the appellant's grounds of appeal did not challenge admissibility of evidence but challenged the value of evidence adduced. Therefore, he maintained that, submissions by the counsel for the appellant on admissibility of exhibit P1, P2 and P5 were made without leave of the Court which is not only prejudicial to the respondents but also illegal and unacceptable in the eyes of the law.

Hence, he maintained that since the appellant had no leave to submit on issues of admissibility, the respondents have equally no leave to respondent on such issues.

However, Mr. Mushobozi opted to respond to the 1st and 3rd grounds in respect of the value of evidence adduced. He argued that, in civil cases the Plaintiff is required to prove his case to the balance of probability. To support his argument, he cited the case of **Happy Kaitira Burilo t/a Irene Stationery and another vs International Commercial Bank (T) Ltd**, CAT at Dar es salaam, Civil Appeal No. 115 of 2016 (unreported). On that premise, he submitted on the exhibits which the appellant had pointed out. He argued that, exhibit P1 (the loan contract) is legal and enforceable. He explained that, the argument on section 6(1) of the Banking and Financial Institutions Act is misplaced as the section doesn't prohibit the parties to make their own agreements to solve their own difficulties on their own arrangements. To support his argument, he cited the case of **Simon Kichele Chacha vs Aveline M. Kilawe,** Civil Appeal No. 160 of 2018 where the Court of Appeal faced with the same issue held that the agreements freely entered bind parties under the sanctity of contract and

can't be prohibited by public policy so far as there is no complaint of coercion, undue influence, fraud or misrepresentation.

On the allegations that the loan agreement was procured fraudulently, he submitted that, first, the allegation that the appellant (Sophia Simon) denied to have signed exhibit P1 is misplaced since in the pleadings and respondent's evidence it is Maliatabu Fugugu Kilimuludubi who is mentioned as the executor of exhibit P1 and not Sophia Simon (DW1). Secondly, the appellant (DW1) did not dispute the transaction done between the respondents and the deceased as she simply said she was not aware of the said transaction or involved with it. Thirdly, he maintained that, the burden of proof in allegations of fraud and forgery of exhibit P1 shifted to the appellant who came up with those allegations and the appellant did not provide that proof. She argued that, the burden of proof is higher than the one in an ordinary allegation. He cited the case of **Omari Yusuph vs Rahima Abdulkadir** (1987) TLR 169 to support the argument that allegations of crime in civil proceedings requires a higher degree of probability than the one required in civil cases.

With respect to exhibit P2 (bank statement) he submitted that, the document was relevant, reliable, authentic and of higher evidential value. He

submitted that the document was tendered by PW1 because after being printed and verified the bank supplied it to him (PW1) who was in possession of it for a long time even before the cause of action arose, it bears names of respondents and that of the deceased and the relevant transactions. He maintained that PW4, Janet Ngimwa, explained how the transfer of the money through TISS was done and clarified that the simple typographical errors in the names were curable and could not affect transfer of money.

He submitted further that, before adducing evidence PW4 who was the banker on 16/3/2021 had made and filed in the Court the certificate of authenticity in respect of the bank statement. He cited the case of **Lia Ulimwengu vs National Bank of Commerce and another,** Misc. Land Appeal No. 79 of 2021, HCT at Dsm where the Court reasoned at page 13 that the oral verification of the bank statement was enough to exert authenticity to it.

Without affecting his submissions on admission of the bank statement above, he submitted that, the appellant has narrowly interpreted section 78(1), (2) of the Law of Evidence. He argued that, when the said provisions are read in line with section 18 of the Electronic Transaction Act it is obvious that section 18(1) prohibits any rule of evidence (Section 78 inclusive) to

deny admissibility of electronic evidence and section 18(2) requires the reliability of document to be in conformity which was established by PW1 and PW4 in their testimony and there was no any cross-examination on that particular material fact from the appellant.

In a brief rejoinder to the 1st and 3rd grounds, Mr. Nyaoro insisted that the issue of admissibility of evidence is well covered in the 3rd ground of appeal as far as it questions the manner in which the alleged pieces of evidence found themselves in the court. Hence, he maintained that no leave was required in order for the appellant to submit on admissibility of evidence.

With regards to the defects and lack of evidential value of exhibit P1, P2 and P5, he submitted that the case of **Simon Kichele Chacha** (supra) is distinguishable from the present case. He maintained that, in Simon Kichele's case there were no major contentious issues. First, it was not disputed by the parties that the appellants entered into the contract with the respondents, it was not disputed that the appellant repaid some amount of money and lastly, the appellant deposited his certificate of title as security. The only contentious issue was the chargeable interest whereas in the present case exhibit P1 (loan agreement) is totally questionable, there is no

evidence as to the deposited title deed as security to secure the loan as claimed by the respondents.

With regards to admissibility of exhibit P2, he reiterated that the provisions of section 78(1) and (2) of the Evidence Act was not complied with. He maintained that the certification of exhibit P2 (Bank statement) and its authenticity was supposed to be done before tendering the document and not thereafter as it was done by PW4 at page 45 of the proceedings. To support his argument, he referred the Court to the case of **Stanley Murithi Mwaura vs The Republic**, Criminal Appeal No. 144/2019 (unreported).

He implored the Court to disregard the argument that section 18 of the Electronic Transaction Act prohibits any rules of evidence (s. 78 inclusive) from denying admissibility of evidence.

Ahead of determining the merits of the two grounds of appeal above (the 1st and 3rd grounds), I am enjoined to deal with a challenge taken up by Mr. Mushobozi, Counsel for the respondents, against the submissions by the counsel for the appellant on admissibility of exhibit P1, P2 and P5 for reasons that the two grounds above did not challenge admissibility of evidence but evaluation of evidence.

It is basic that, the appellant cannot argue a ground of appeal which is not specified in the memorandum of appeal unless leave is granted by the Court to that effect. However, in the present case, counsel for the appellant maintained that no leave was required for the appellant to submit on admissibility of evidence since the 3rd ground of appeal allowed the appellant to discuss the manner in which the evidence in question found itself in Court. The third ground reads as follows:-

> *"That, the Hon. Magistrate erred in law and fact for failure to correctly evaluate and consider evidence on records and consequently reaching into wrong finding"*

Certainly, going by the wording of the 3rd ground of appeal, it is clear that the appellant faulted the trial Court for failure to evaluate and consider evidence on record. Generally, a ground of appeal challenging the evaluation and consideration of evidence on record does not necessarily extend to challenging the admissibility of evidence. It is typically used to challenge the weight or credibility given to evidence by the trial Court rather than its admissibility. On the other hand, a challenge to the admissibility of evidence seeks to exclude the evidence based on the applicable rules of evidence by showing that the evidence was improperly admitted.

However, in the circumstances where the argument is to the effect that the trial Court relied on the evidence which was improperly admitted, as it is in the present case, the Court may consider admissibility of evidence as part of a broader challenge to the evaluation and consideration of the evidence. That said, I will now proceed to consider issues raised in this ground in a broader term by examining the admissibility of evidence as well as the weight and credibility given to the evidence. I have also considered that the respondent's submissions reacted to all issues raised including issues raised against admissibility of evidence.

Starting with exhibit P1, (the loan agreement), counsel for the appellant raised two issues in respect of this exhibit. First, he argued that, the respondents were prohibited by law to extend loan and demand interest therefrom as they were not registered and licensed as financial institutions in terms of section 6(1) of the Banking and Financial Institutions Act, No. 5 of 2006. In handling this issue, I wish to seek guidance from the Court of Appeal decision in the case of **Simon Kichele Chacha vs Aveline M. Kilawe** (supra) where the appellant in that case argued that the respondent had no valid licence to advance loan with interest to the appellant under the Banking and Financial Institutions Act, the Court of Appeal, based on the

principle of sanctity of contract, decided that, parties were bound by the agreement they freely entered since the contract had all attributes of a valid contract and was not prohibited by the public policy. The Court of Appeal quoted with approval the decision in the case of **Abualy Alibhai Azizi vs Bhatis Brothers Ltd** (2020) TLR 288 at page 289 that:

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation and no principle of public policy prohibiting enforcement".*

Guided by the decisions alluded to above, this Court finds and holds that, parties in the loan agreement (exhibit P1) are not prohibited from performing the contract solely on grounds that the respondent was not registered and licensed as a financial institution at the time of the alleged contract. The contract is considered to be inviolable under the principle of sanctity of contract and parties are expected to fulfil their obligations as specified under the contract.

The other issue raised in connection to exhibit P1 is that, the loan agreement was procured fraudulently as the appellant denied to have signed the alleged agreement and the name or signature of the Commissioner for oaths is not indicated in the agreement. Having examined records of this

matter, it is obvious from the testimony of PW1 and PW2 that the alleged agreement was executed by the late Maliatabu Fugugu Kilimulubi. There is no evidence to support allegations of signature fraud or any falsification of the contract document. In the circumstances, I find no reason to expunge or disregard exhibit P1.

Coming to exhibit P2 (bank statement), the issue is that, as an entry in a banker's book, exhibit P2 was admitted contrary to the provisions of section 78(1) and (2) of the Evidence Act, Cap. 6 (R.E. 2019) as it was tendered by PW1 who is not a partner or officer of the bank (Mkombozi commercial bank).

It is not disputed that a bank statement is part of the banker's book under section 76 of the Evidence Act. Section 78 and 78A of the Evidence Act, (Cap. 6 R.E. 2019) recognizes a copy of an entry in a banker's book and a print out of entry in a banker's book respectively as admissible evidence where it is proved by a partner or officer of the bank orally or by an affidavit that the book was at the time of making of the entry one of the ordinary books of the bank and that the entry was made in the usual and ordinary course of business and that the book is in the custody and control of the bank.

It should be noted that although section 18 of the Electronic Transactions Act deals with admissibility of electronic evidence (data messages), it doesn't apply in banker's book since this type of electronic record has a special regime for its admissibility and authentication under part IV of the Evidence Act, particularly section 78A of the Act.

Therefore, since in the present case the trial Court admitted the bank statement as exhibit P2 without prior proof from the partner or officer of the bank that it was one of the ordinary books of the bank made in the usual and ordinary course of business and was in the custody and control of the bank, this Court finds that exhibit P2 was improperly admitted as exhibit by the trial Court. That said, I hereby expunge exhibit P2 from the records of this matter.

However, even after expunging of the bank statement, this Court finds that by signing exhibit P1 (loan agreement), Maliatabu Fugugu Kilimulududi acknowledged each transaction which advanced a total of TZS 175,000,000/= from the respondents to him as indicated in the terms of loan agreement and agreed to honour the agreement by paying the whole amount borrowed together with interest.

With respect to exhibit P5, the question for consideration is whether it was proper for the documents (forms) to be tendered by PW4 and admitted in Court having been rejected earlier by the trial Court in the same proceedings when tendered by PW1 on grounds that it was not verified by the issuing authority.

In the case of **Bibi Kisoko Medard vs Minister for Lands, Housing and Urban Development and another** (1983) TLR 250, this Court decided that:

> *"In matters of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio."*

Applying the principle above in the present case, this Court finds that, once a Court has made a decision regarding the admissibility of an exhibit, it is generally considered functus officio, which means that its jurisdiction in the matter is exhausted and it cannot revisit that decision.

The procedure for admitting documents in evidence is for the trial court to hear arguments for and against the admissibility of the document being tendered in evidence. Once a court finds that a document fails the test of admissibility such a document, as a general rule, is considered tendered and

rejected thereby making it inadmissible in the same proceedings and the defect cannot be cured during the said trial.

In the present case, the documents admitted in evidence as exhibit P5 were previously rejected in the same proceedings for lack of verification, which means, there was doubt about the authenticity or accuracy of the said documents. Admitting such documents in the same proceedings was not appropriate as the Court had already determined that the documents failed the test of admissibility. That said, I proceed to expunge exhibit P5 from the record of this matter.

Coming to the second ground of appeal, Mr. Nyaoro faulted the trial Court for ordering the testimony of PW3 to be by way of affidavit and denied the appellant the right to cross-examine the witness. He argued that, although Order XIX Rule 1 of the Civil Procedure Code, Cap. 22 (R.E. 2019) gave the trial court power to order any particular fact or facts to be proved by affidavit, the proviso to that provision prohibits the Court to make an order authorizing the evidence of such witness to be given by affidavit where either party bona fide desires the production of a witness for cross examination, and that such witness can be produced.

He argued that despite the appellant's bona fide desire to call PW3 for cross-examination the trial Court dismissed their prayer on grounds of sickness of the witness while there was no evidence that his sickness affected his ability to testify in Court or to speak. On the foregoing, he implored the Court to expunge the evidence of PW3 from the records for being procured contrary to the law and disregard exhibit P1 for failure to procure attesting officer as a witness as required under section 70 of the Evidence Act.

In response to the second ground of appeal, on the issue that PW3 was not summoned for cross-examination, Mr. Mushobozi agreed that, PW3 (Lameck Merumbe) did not appear physically for cross-examination. He maintained that the respondent's counsel applied successfully for Mr. Lameck Merumbe, the attesting officer in exhibit P1 to produce evidence by way of affidavit on the grounds that he was seriously sick. PW3's affidavit was not controverted by the appellant through counter-affidavit. He explained that PW3 explained in paragraph 7 of his affidavit that, he was unable to attend in Court due to the accident he experienced in November, 2020. He attached copies of medical documents to form part of the affidavit. PW3 underwent operative surgery to fix a fractured bone and he was advised to attend clinic in every 3 months. He agreed that the last clinic attendance

date was indicated to be 18/3/2020 while an accident took place on 21/11/2020 and letter was written on 1/3/2021, hence, he submitted that logic indicates that the year of the clinic was typographically mistaken to be 2020 instead of 2021.

He maintained further that, for the appellant to challenge the contents of an affidavit he ought to have filed the counter-affidavit, the submissions from the counsel could not be used to challenge what is stated in the affidavit. He referred the Court to the case of **Ludovick Michael Masawe versus Samson Herman**, Civil Application No. 259/08/2021, CAT at Mwanza (unreported) at page 3 where the Court insisted that the person who didn't file counter-affidavit to contest the facts stated is regarded to have not contested the facts stated.

In terms of what the Court should have done when the witness was unable to attend for cross-examination, he submitted that the trial Court had discretion to order attendance of the deponent in Court unless the deponent was exempted from personal appearance in court under Order XIX Rule 2(2) of the CPC. He insisted that any challenge against the affidavit of the witness ought to have been done by the counter-affidavit and not otherwise.

He submitted further that, the allegations that exhibit P1 should not be given weight since the attesting witness was not called to testify as required under section 70 of the Evidence Act is a misdirection. He maintained that section 70 should be read together with section 71 and 74 of the Act.

He argued that section 70 of the Act only applies to documents which are required by law to be attested. Any document, even if attested, if not required by law to be attested is considered by law to be unattested under section 74 of the Act. This, according to him, means that the testimony of attesting officer on attested document which is not required by law to be attested has no effect to the document tendered. He argued further that, section 71 requires that where attesting officer is incapable of giving evidence in court the other proofs will be considered as evidence that he attested.

He maintained further that, exhibit P1 is a simple contract made from individual's arrangements as held in the case of **Simon Kichele Chacha** (supra) which was not required by any law to be attested unlike contracts for transfer of land or mortgage. Hence the appearance of the attesting officer was not mandatory and cannot affect the evidential value of exhibit P1. For the sake of argument, he maintained that even if exhibit P1 was

required by law to be attested still section 71 of the Evidence Act excludes the circumstances where the attesting officer is incapable of giving evidence. However, in the present case PW3 gave her testimony by way of affidavit.

In rejoinder, Mr. Nyaoro argued that, Order XIX Rule 1 of the CPC requires that on an application by the appellant, the witness (PW3) was required to be produced for cross-examination. There is no requirement to file a counter-affidavit as alleged by the respondent. He maintained that the trial Court denied the appellant the right to cross-examine the witness whose testimony was the center of the dispute.

On the argument that exhibit P1 did not require attestation under section 74 of the Evidence Act, he submitted that, exhibit P1 being an agreement between parties required attestation and the attesting officer was required to be called as a witness, failure of which rendered the document of no evidential value. To buttress his argument he referred the Court to the case of **Asia Mohamed vs Mgeni Seif** (2012) TLR 85 where he argued that the Court of Appeal held that failure to call an attesting officer renders the document of no evidential value.

Having perused the proceedings of the trial Court, it is clear at page 33 and 34 of the proceedings that the trial Court allowed the evidence of PW3 to be brought by affidavit due to sickness of the witness which made it difficult for him to attend in Court. The trial court proceeded to decide that if counsel for the defendant (appellant herein) so wishes he may pray for an order to call the said witness for cross-examination. Following that Order by the court, counsel for the appellant applied under Order XIX Rule 1 of the Civil Procedure Code, Cap. 33 (R.E.2019) for cross-examination in respect of the evidence in the affidavit. Although the Court ordered at page 37 of the proceedings that a ruling in respect of the application for cross-examination would be delivered on 20/3/2021 that ruling was not delivered and PW3 was not cross-examined.

In the case of **Mildred Julius Kisamo vs Footlose Tanzania LTD & another**, Land Case No. 20 of 2015, HC, Land Division at Dsm, this Court (Maige, J as he then was) held at page 10 that:

> *"Under order 19 of the CPC, an affidavit of proof can, where the circumstances allow, be admitted in evidence in lieu of oral evidence in chief and of course subject to an automatic right of cross-examination to the adverse party. This is in terms of order 17 of the CPC read together with order 19 rule (3) of the same. In this case,*

neither of the deponents of affidavits was produced for cross-examination. In not producing such witnesses for cross-examination, it is obvious that, the plaintiff much as it is the second defendant were denied their rights to test the probative value of such evidence by way of cross-examination."

In determining the value of evidence where cross-examination of a witness is absent, the Court in the cited case above was inspired and subscribed to the South African case; South Gauteng High Court, Johannesburg in **S vs Msimango and another** (187/2005) [2009] ZAGPJHC) where the Court made the following observation:

"For the foregoing reasons, I have come to the conclusion that no probative value should be attached to evidence where cross-examination of a witness absent, for whatever reason, including illness or death. It appears to be equally and equitable that such an approach should not only apply to prosecution witnesses but to defence witnesses, and witnesses called by the court in terms of s186 of CPA, or indeed other witnesses."

Guided by the principle above, I am equally inclined to decide that, since PW3 who is the deponent of the affidavit was not subjected to cross-examination the evidence contained in his affidavit is of no value and is hereby disregarded.

Although the affidavit of PW3 who allegedly attested exhibit P1 is considered to have no evidential value for reasons stated above, this Court considers that exhibit P1, being an agreement for personal loan between individuals, is not one of the documents contemplated under section 70 of the Evidence Act and therefore failure to call the attesting witness cannot render Exhibit P1 of no evidential value. It falls within the exceptions stipulated under section 74 of the Act which allows it to be proved as unattested document. In the circumstances, I find the case of **Asia Mohamed vs Mgeni Seif** (supra) cited by the appellant distinguishable from this case since in that case the Court of Appeal was settled in its mind that the Deed of Transfer of a Right of Occupancy is one of the documents contemplated under section 70 of the Evidence Act.

Coming to the fourth ground, Mr. Nyaoro faulted the trial Magistrate for holding that the appellant had to pay TZS 175,000,000/= as the loan given to deceased without any cogent proof to that effect. He argued that, even if it is assumed that the said money was advanced to the deceased still the evidence on record does not support that.

In response, although Mr. Mushobozi argued generally at the end of his submissions that all grounds of appeal lack merits and prayed that they should be dismissed with costs, his submissions lacked specific response to the fourth ground of appeal as submitted by the appellant.

Having examined the records of this matter, this Court finds no merit in this ground. The terms of the loan agreement (exhibit P1) indicates clearly each amount advanced to the deceased, the date of the transaction, the bank account where the specified amount was deposited and the date of repayment. The agreement was signed by the deceased which signified his acceptance to the terms of the agreement.

In the end, I find no merit in this appeal and I dismiss it with costs.

It is so ordered.

K.N.ROBERT
JUDGE
3/3/2023