IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF MWANZA)

AT MWANZA

PC. CIVIL APPEAL NO. 85 OF 2022

(Arising from Civil Appeal No 17 of 2022 at Nyamagana District Court originating from Civil Case No. 188 of 2021 at Mkuyuni Primary Court)

DUBAI ISACK MBWILO---------- APPELLANT

VERSUS

REVOCATUS MAGEZI---------- RESPONDENT

JUDGMENT

Last Order: 28.04.2023
Judgment Date: 01.06.2023

M. MNYUKWA, J.

In this Appeal, the appellant Dubai Isack Mbwilo appealed against the decision of Nyamagana District Court vide Civil Appeal No. 17 of 2022. It goes that; the respondent (plaintiff in the trial court) instituted a case against the appellant (the defendant in the trial court) in Civil Case No 188 of 2021 at Mkuyuni Primary Court, claiming a total of Tsh. 6,900,000/= as the sum advanced to the appellant in terms of loan for doing business and that the appellant defaulted to pay the said sum. He, therefore, prayed before the trial court to compel the appellant to pay

that sum. The appellant totally denied the claim that he had never taken any loan from the respondent.

It is the evidence of the respondent in the trial court that he was introduced to the appellant by his friend who testified as PW2 in the trial court to advance him Tsh 1, 000,000 to his relative who is the appellant who promised to return back Tsh 1,200,000 within a month, the promise which he honoured. He testified further that, some days later, the appellant introduced his M-PESA business to and borrowed from the respondent Tsh 3,000,000 to boost his business. The former allegedly claimed that, since he was using the simcard of another person and therefore he was not getting adequate profit. The respondent further testified that he advanced Tsh 3,000,000 to Mr. Mbwilo on for the promise of the latter depositing Tsh 450,000 monthly. That is, within three months, he was supposed to complete paying his debt. He went on to testify that they entered into a written agreement at the time of advancing the money to appellant whose wife also signed. He added that on 3/6/2021, the appellant made a call to him and asked him to advance his wife Tsh 3, 000,000 who was in need of money to boost their business and that they would return the said money with an addition of 450,000 as a profit for each month. That on 3/7/2021 the appellant and his wife who were supposed to pay back money informed the respondent that their simcard

was blocked and therefore they would not manage to return back the money.

He further testified before the trial court that the appellant promised to pay the loan after two months. However, he defaulted. The appellant proposed to give his plot at Luchelele to the respondent in lieu of loan. The respondent refused and asked the appellant to sell the plot and to pay back the loan. The appellant then promised to sell timber and pay back the money but he did not do so.

PW2 testified that he introduced the appellant to the respondent and that the respondent advanced the appellant Tsh 1,000,000 for which he paid back as agreed and from the two were knowing each other.

On his part, the appellant denied to have ever taken loan from the respondent and that it was the respondent who was in need of money for he was owed by his sister.

After hearing both parties to the case the trial court found that the respondent advanced Tsh 6,000,000 and that the appellant had never paid it. Therefore, it ordered him to pay the stated amount. Tsh 900.000 claimed by the respondent as interest was disallowed as the respondent was not among the authorized agent to advance loan on interest.

Aggrieved, the appellant appealled before Nyamagana District Court, (the first appellate court). He advanced three grounds of appeal.

Mainly, he challenged the evaluation of the evidence done by the trial court which declared the respondent as the winner. After hearing the appeal, the first appellate court upheld the decision of the trial court and dismiss the appeal for want of merit.

Aggrieved further, the appellant appealed to this court with three grounds:

i. *That the honourable magistrate erred in fact and law by failing to evaluate and analyse the ground of appeal regarding the evidence in the court of law*

ii. *That the honourable magistrate erred in fact and in law by failing to consider the ground of appeal of the purported non-existence of the contract between the parties thereof and*

iii. *The honourable magistrate erred in law by delivering inappropriate and unfounded ruling thereof.*

At the hearing of this appeal which was argued orally, the appellant appeared in person unrepresented while the respondent afforded the service of Mr. Bernard Msalaba, learned counsel.

The appellant was the first to roll the ball. He prayed to adopt his grounds of appeal to form part of his submissions. Arguing in support of the first ground of appeal, he submitted that, the first appellate court failed

to properly analyse the evidence on record because PW2 testified that the appellant borrowed Tsh 1,000,000 and paid back the money as promised. He enquired how the court ordered the appellant to pay the respondent Tsh 6,000,000. He went on to attack exhibits DD1 and DD2 (loan agreements) by objecting the signature of the borrower which are different and the dates are also different. He averred that, in Exhibit DD1 the appellant seems to have borrowed money on 20/03/2021 while the respondent signed it on 22/03/2021 while in Exhibit DD2, the appellant who was named as Dubai Mbwilo signed it on 3/6/2021 and the respondent signed it on 4/6/2021. He added that the name of the lender in both agreements are different with the name of the respondent in this case; and that the conditions of borrowing money was not considered as stated in those exhibits.

He further submitted to attack Exhibit DD3 for not being properly analysed by the first appellate court. He said that, the transaction dated 20/03/2021 is of Tsh 2,960,000 where it was shown that the money was sent to Baftrade Investment Ltd and not to the respondent, Dubai Isack Mbwilo. Again, a total of 10 transactions are seen to be sent to Mbwilo Isack Dubai and not Dubai Isack Mbwilo who is the appellant in this case. He went on to attack different transactions of the appellant and averred

that, the same are the M-PESA business transactions of the respondent and was not part of the borrowing as he wished the court to believe.

He retired on the first ground by submitted that, the court ordered respondent to be paid Tsh 6,000,000 while the total debt as per the analysis of exhibit DD3 was Tsh 5,840,000 while the total transactions stated by the respondent gives a total amount of Tsh 6,060,000/ which are different figures. Therefore, he prayed the court allow the appeal.

On the second ground of appeal he submitted that, in Exhibit DD1 and DD2 the lender is Revocatus Magezi and the borrower is Dubai Isack Mbwilo and the persons who signed on those exhibits are different persons.

On the third ground, the appellant reiterated on what he had submitted on the first ground and therefore prayed the appeal to be allowed with costs and the decision of the first appellate court to be quashed and set aside.

Responding to the appellant's submissions, Mr. Msalaba, the learned counsel objected to the appellant's prayers and insisted that the appeal lacks merit and therefore be dismissed with costs. He highlighted that, this is the second appellate court and the issue of evaluating evidence has been done by the first appellate court and, therefore, there is no reason

for this court not to concur with the concurrent findings of the lower courts.

He opposed the appeal by starting his submissions with the evidence of PW2 to whom he said that he is a credible witness and must be trusted. He averred that, the evidence of PW2 is to the effect that the appellant and the respondent were knowing to each other and that the appellant borrowed money from the respondent. He went on praying the court to consider exhibit DD1, DD2 and DD3 which proved that the appellant borrowed the money and the lower courts properly evaluated the evidence on record based on that exhibits and therefore prayed the court to consider those exhibits and ordered him to pay the decreed amount.

He further submitted that, the court ordered the payment of Tsh 6,000,000/- since 900,000/- was rejected as it was considered as interest and that Tsh 5, 840,000/- that the transaction involved some deduction and the appellant knew very well the history of this figure. He added that, the agreement was between the appellant and the respondent and he wonder why the appellant did not name his wife, Selina John Bulema who was the witness and in another contract the witness was Amour John Mbwilo.

He therefore prayed the appeal to be dismissed since the two lower courts proved the appellant's debt and that this court should order the appellant to pay the amount proved by the lower courts.

In his rejoinder, the appellant insisted that the respondent's submission was wrong and went on to reiterate his submissions in chief.

After going through the submissions of the parties and the grounds of appeal, the only issue for determination and consideration is whether the appeal is meritorious. In answering this issue, I will determine all the grounds of appeal jointly as they are intertwined. The appellant faulted the lower courts findings for failure to properly evaluate the evidence on record.

In the determination of this appeal on merit, and taking into consideration that this is the second appellate court, indeed, I am mindful with the settled principle that it is very rare for a second appellate court to interfere with concurrent findings of fact by two courts below unless there is a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice, (See **Helmina Nyoni v Yerena Magoti,** Civil Appeal No 61 of 2020 CAT at Tabora).

The above principle was also reiterated in the case of **North Mara Gold Mining Limited vs Emmanuel Mwita Magesa**, Civil Appeal No. 271 of 2019 CAT at Mwanza, in which the Court of Appeal citing with

authority the case of **Neli Manase Foya vs Damian Mlinga** [2005] TLR 167 had this to say;

> *".. 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, concurred with the findings of facts 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 before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of the fact."*

It is the complaint of the appellant that, the 1st appellate court failed to re-consider and to properly re-evaluate the evidence adduced by the respondent at the trial court especially the exhibit tendered before the trial court which are Exhibit DD1 and DD2 which are contracts for borrowing money as well as DD3 which is the print out of the M-PESA transactions. The main complaint of the appellant is that, Exhibit DD1 and DD2 the signatures of the borrower are different and the dates in which the borrower and the lender signed the contract are different dates while the transaction is purported to have been done on the very day. He further

claimed that, in both Exhibits, DD1 and DD2 the name of the lender is Joseph Kata Yusufu which are different names from the respondent.

He further disputed the debt of Tsh 6,000,000 claiming that the same lacks proof because the only witness who testified earlier knew the relationship of the parties in respect to loan was PW2 who testified that, the appellant once borrowed Tsh 1,000,000 and returned Tsh 1, 200,000 and there is no any other contractual relationship between the parties. He further disputed the amount based on Exhibit DD3 which shows that the total alleged amount said to be transacted to appellant was Tsh 5.840,000 while the respondent claimed different figure of Tsh 6,900,000 and the court awarded the respondent Tsh 6,000,000.

Based on the complaint of the appellant, I wish to point out that, it is a settled principle of law that, in civil cases the standard of proof is on the balance of probabilities. I proceed to hold that based on that principle, any party that wanted the court to rule in his favour must have given evidence which is greater in value and weight to the evidence of other party. Regulation 6 of **the Magistrates Court (Rules of Evidence in Primary Courts) Regulations**, 1964 GN. No 22 of 1964 provides that:

> *"In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, but it shall be sufficient if the*

weight of the evidence of the one party is greater than the weight of the evidence of the other."

Going to the records, it is clear that the parties had a relationship of transacting money in the form of borrower-lender. That is to say, there was informal transactions of borrowing money between the appellant and the respondent. The evidence on record suggest as the appellant himself subscribed it in his submissions to the first appellate court and to this Court. The evidence of PW2 is to the effect that, he introduced the appellant who is his friend to the respondent as he was in need of borrowing money. The record shows that, the respondent gave the appellant Tsh 1,000,000 in form of loan with the promise to return Tsh 1,200,000 within a month where by Tsh 200,000 was regarded as interest and the appellant returned it as promised.

From the above evidence, it is clear that, the two entered into an agreement without any of the written contract. It was only the oral agreement which suffices their transactions of borrowing money with the assurance of the third party who stands as a guarantor who introduced the appellant to the respondent. In short, there was mutual trust from each other.

It is the evidence of the respondent that, after the appellant knew him and his business of borrowing money with interest, he came back to borrow money into two different transactions of Tsh 3,000,000 each. The appellant also promised to return it with an interest of Tsh 450,000 per month for each transactions pending the final date of paying the principal sum. The appellant denied this claim and alleging that it is the respondent who wanted to use a tricky by involving him as he was owed by his sister.

On the above evidence, the existence of the relationship between the parties could be inferred from the evidence of PW2 which earlier on entered into an oral contract to transact the business of borrowing money. In law, the contract can be made orally or in writing and the oral evidence is worthy and sufficient to prove the matter in issue without documentary evidence. That is, if the documentary evidence exists, it is regarded as the best evidence.

Admittedly, it is true that Exhibit DD1 and DD2 which establish the binding contract between the parties are questionable. The said exhibits in the very beginning recognized the respondent as the lender since the contract reads as

> *"Mimi Dubai Isack Mbwilo nimeazima kiasi cha Tsh 3,000,000 kutoka kwa Revocatus Magenzi."*

In its loose translation, the above statement literally means that, "I Dubai Isack Mbwilo, I borrowed Tsh 3,000,000 from Revocatus Magenzi". However, at the end, the lender is named as Joseph Kala Yusuph who is not the respondent in this case which makes its authenticity to be in doubt.

The related question now is, in the absence of the written agreement which is Exhibit DD1 aNd DD2 between the two, does it mean that there were no transactions of borrowing money between them? In my view, the presence of the separate contract between the two in which Tsh 1,000,000 were lent to the appellant; and the presence of Exhibit DD3 which shows that there were transactions of money from the respondent to the appellant as it was rightly examined by the two lower courts; I find that the respondent did transact with the appellant and the appellant failed to repay the money as agreed. The appellant's proposal of giving his plot to the respondent in lieu of the loan, also suggests that the respondent owes the appellant. I say so because the respondent could not know that the appellant had a plot at Luchelele if at all he was not informed by him.

The story of the appellant that it is the respondent who wanted to borrow money from him is unfounded as it was rightly observed by the lower courts. I reach the above decision after scrutinizing the relationship of the parties from the date they were introduced to one another by PW2

whereby their relationship became more of informal and was built on trust by the respondent towards the appellant.

The appellant's argument that the claimed amount was Tsh 6,900,000 and the trial court ordered payment of Tsh 6,000,000 is baseless because the reasons for reaching that amount by the trial court has been clearly stated on page 6 and 7 of the trial court's judgment that the respondent was not an authorized agent allowed to transact money by charging interest.

Again, the claim that exhibit DD3 shows that the amount purported to be sent was Tsh 5,840,000, but as it was submitted by the counsel of the respondent, that there are deduction charges that were also involved.

Based on my observations above, I find nothing to fault in the findings of the two courts below. In the upshot, I proceed to uphold the decision of both, the trial court and the 1st appellate court that the respondent managed to prove his claim against the appellant whose present appeal is hereby dismissed with costs.

It is so ordered.

Right of appeal explained to the parties.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY

M.MNYUKWA

JUDGE

01/06/2023

Court: Judgment delivered in the presence of the parties.

M.MNYUKWA

JUDGE

01/06/2023