

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 132 OF 2022**

*(Arising from Civil Case No. 87 of 2020 of the District Court of Kinondoni at Kinondoni*

*dated 18<sup>th</sup> July 2020 by Hon.J.H Mtega, PRM)*

**LEOPHORD TIMOTHEO MBAGA..... APPELLANT**

**VERSUS**

**EFC TANZANIA MICROFINANCE.....RESPONDENT**

**JUDGMENT**

*28<sup>th</sup> April & 16<sup>th</sup> June 2023*

**MKWIZU, J.**

In this case, the appellant is aggrieved by the dismissal of his claims at the District Court of Kinondoni in Civil Case No. 87 of 2020. He has preferred this appeal on the following grounds.

1. That the Trial Magistrate grossly erred in law and fact by holding that Adela Elisha did not appear to testify while testifying as PW4.
2. That the Trial Magistrate erred in law and fact for failure to evaluate that it was proved on the balance of probability that Adela Elisha is the wife of the appellant
3. That the Trial Magistrate grossly erred in law and fact by holding that compensation for psychological torture was not proved.

4. That the Trial Magistrate grossly erred in law and fact for failure to evaluate that marriage is not only proved by the production of a Marriage Certificate.

The information decoded from the records is that: On 29<sup>th</sup> November 2017, the plaintiff/appellant entered into a secured loan agreement with the respondent/defendant for borrowing Tshs 70,000,000/=. The loan was for 36 months tenure. A house located at Mwera, Somangila, Kigamboni, and a motor vehicle Mitsubishi Canter No.T.311 AAS were all pledged as security. This loan was later on 27<sup>th</sup> March 2019 restructured creating a new loan of Tshs 55,891,878.06.

It is from the appellant averment that having paid the entire principal sum, he on 17<sup>th</sup> April 2020 wrote a letter to the respondent asking for the loan amount due. Before heading to his letter, the respondent on 24/4/2020 without any colour of right trespassed into the Appellant matrimonial house and printed thereon that the house belongs to the defendant/respondent ("nyumba hii ni mali ya Benki") causing him and his family to suffer serious psychological torture which he quantified to 150,000,000/= presented for endorsement before the trial court. The trial court did not find merit in this claim hence this appeal.

In this appeal, parties are represented by Mr. Paulo Mtui and Mr Cleophace James advocate respectively. The appeal was disposed of by way of written submission.

Arguing the first ground of appeal, the appellant's counsel said censured the Trial Magistrate for holding that Adela Elisha did not appear to testify

while the record exposes her as PW4. He invited the court to allow this ground.

Submitting on the second and fourth grounds of appeal together, the appellant's counsel stated the testimonies of PW1, PW2, and PW3 proved on the balance of probability that Adela is the wife of the appellant. He said PW3 is a doctor who attended PW4 at the hospital and named Adela Elisha the appellant's wife. PW1 informed the court that PW4 is his wife they contracted informal marriage in 1993 and 2001 they officiated their marriage at the District Commissioner's office. He added that this evidence was supported by Pw4 and the mortgage deed which Pw4 signed to signify her consent as a spouse. He contended that the marriage certificate is not the only means to prove marriage between the parties and in any case, whether the two were married or not was not at issue in this matter.

On the third ground, Mr. Mtui said, the finding by the trial court that no proof of psychological torture was arrived at after he had failed to consider the evidence by PW4 which he termed as a misdirection. He said, even the decision of **Finca Tanzania Limited and another Vs Baltazar Wambura and,** relied upon by the trial court is distinguishable from his case because that case was for specific damage for loss of business which needed strict proof while the compensation claimed in this matter is for psychological torture well established by PW3, a doctor who attends PW4 and confirmed that she suffered a miscarriage resulted from the respondents' conduct. He prayed the court to allow the appeal with costs.

The respondent counsel on the other hand was keen enough to admit that Adela Elisha testified in court as PW4. He was however quick to add that that evidence was not enough to prove the claims to the required standard for no marriage certificate was tendered to prove that PW4 was the legal wife to the appellant in court. He was in support of the trial court's findings that the plaintiff/ appellant has failed to prove the claimed amount of Tshs 150,000,000/= psychological torture suffered due to the painted words in his matrimonial house. Citing to the court section 110(1) of the Evidence Act, Cap 6 R: E 2019 and the case of **Bytrade Tanzania Limited Vs Asenga Agroviet Company Limited**, Civil Appeal No. 64 of 2018, (CAT)

He stressed that the appellant failed not only to prove that Pw4 is his wife but also that he suffered the claimed damages due to the shock PW4 suffered.

On the 2<sup>nd</sup> and 4<sup>th</sup> grounds of appeal, the respondent's counsel said, there is no evidence adduced to establish that the alleged miscarriage was a result of the respondent's act of printing words on their matrimonial home, marriage between the appellant and Pw4 and there is no even a loan documents to establish whether the said Adela Elisha was involved in the loan processes. Citing the decisions in **Africarries Limited Vs Millenium Logistics Limited**, Civil Appeal No. 185 of 2015(CAT) (unreported) the respondent counsel said, the burden of proof as to any particular act lies on that person who wishes the court to believe in its existence unless otherwise provided for by the law. He implored the court to find the 2<sup>nd</sup> and 4<sup>th</sup> grounds baseless.

Similarly, in the third round, the respondent's counsel was of the view that the evidence adduced was weak to prove the amount of 150,000,000/= claimed for psychological torture. He lastly invited the court to dismiss the appeal with costs.

I have considered the rival submissions and the grounds of appeal. In sum, the appeal raises three main issues; whether Adella Elisha was called as a witness, whether there was an improper evaluation of evidence regarding the status of marriage between the appellant and Adella Elisha, and lastly, whether the claims by the appellant were proved to the required standards. Before resolving the said issues, it is crucial to re-state the principle that this being a first appeal, the Court is mandated by law to re-evaluate the evidence before the trial court as well as the impugned decisions and may arrive at its own conclusions. See **Peter Vs Sunday Post Limited** [1958 E.A 424]; **Domina Kagaruki Vs Farida F, Mbarak And 5 Others**, Civil Appeal No. 60 of 2016 (unreported) and **Siza Patrice vs, Republic**, Criminal Appeal No. 19 of 2010 (unreported). In the latter case, the Court of Appeal held: -

*"We understand that it is settled law that a first appeal is in the form of a rehearing, as such, the first appellate court must re-evaluate the entire evidence in an objective manner and arrive at its finding of fact, if necessary."*

The first issue is answered in the affirmative. It is true from the trial court proceedings that one Adella Elisha gave her evidence in court as PW4, thus the findings by the trial court faulting the appellant for not calling this witness as a witness were a misapprehension of evidence.

I have examined the records. To have the appellant's claims stand, there must be established not only the relationship between himself and Adella Elisha (PW4) but also a close link between the alleged miscarriage and the claimed damage. It is for this reason; I propose to determine the 2<sup>nd</sup> and the 3<sup>rd</sup> issue together.

Firstly, there is no dispute that the appellant is indebted to the Bank since 2017 and had at the time of the institution of the matter did not clear the debts. There is no dispute also that on 17/4/2020 he wrote a letter to the respondent to be reminded of his remaining loan amount. His only contention is on an illegal trespass and illegal painting of his matrimonial house indicating that the house would from that time on belong to the Lender (The banks) without notice which resulted in the psychological torture of himself and his family. This is grounded on paragraph 12 of the plaints which reads:

*"12: That the defendant's illegal act of printing words on the plaintiff's property that the house belongs to them before due process has caused the plaintiff and his family to suffer from psychological torture, hence the claim of TSh 150,000,000 as compensation."*

To prove the alleged psychological torture, the appellant banked much on the Pw4's miscarriage. He said the miscarriage was a result of un an informed printing of the house by the bank that shocked his wife resulting in miscarriage and High Blood pressure. This evidence gained support from PW3, the doctor, and PW4.

I have evaluated the appellant's evidence. It is in both witnesses that PW4 is the appellant's wife. However, the evidence on how the complained incident was reported, the events thereafter, and the alleged PW4's treatment raise doubt about their credibility. The incident happened on 24/4/2020. PW2, the eyewitness of the alleged event told the court that he reported the matter to the appellant who found the bank officers leaving the house. His evidence on page 31 of the trial court proceeds reads.

*"In that situation, I decided to call my father, he came but when he reached home, he found the said people leaving..."*

On page 26 of the trial court proceedings, Pw1's told the court that the bank officers were threatening his wife and his child suggesting that She was at the scene during the material time. His evidence was recorded thus:

*"The ones who came to draw my house, they were bank officers, they were threatening my wife and my child who by that time she was in form two".*

Contrariwise, during cross-examination on page 36 of the trial court proceedings PW4, denied having found the bank's officers at her home. Her evidence was that:

*"When I reached, I did not find them. I was told they were four, but I don't know their names."*

One would ask the question; how could the bank's officers threaten a person who was not around at that material time?

The appellant's evidence is also contradictory on where exactly Pw4 was taken for medication after the alleged shock. In his evidence, PW1(the appellant) said he rushed his wife (PW4) to Magomeni Hospital. This was recorded on page 22 line 3 of the trial court proceedings while Pw3 and PW4 said PW4 was treated at Vijibweni Hospital. The question here is how could PW1 forget the name of the hospital he, himself took his wife to after that striking incident. I hold this as a serious contradiction that goes to the root of the matter.

Another contradiction is on the date of evacuation. While PW3 and PW4 say the evacuation was performed on the date Pw4 was taken to the Hospital which is 24/4/2020. PW1 says the evacuation was effected the next day. His evidence on page 22 reads.

*"We took her to Magomeni Hospital. She had been three months pregnant and due to that shock, she got a miscarriage. On the following day, she got other treatment" alisafishwa"..."*

This is a civil case where the burden of proof lies on the persons who allege as instructed by sections 110, 111, and 112 of the Evidence Act. Cap 6 RE 2022. The varying narrations of the appellant's witnesses have dismantled the entire coherence of the appellant's story raising doubt whether there was such a claimed shock and miscarriage at all.

Even if the court agrees with the appellant that his relationship with PW4 was proved, that alone would not have gained him a pen without proof of torture, which is key in connecting the alleged respondent's acts with the claimed damages.



There is yet another puncture in the appellant's evidence. Apart from the alleged psychological torture, there is nothing said on how the said 150,000,000 was arrived at. There is no statement in the records on how PW4's miscarriage had affected the appellant personally to be entitled to the claimed 150,000,000/=.

Lastly, the appellant's evidence has failed to establish the alleged drawings in his house, and whether the respondent's officers were involved in that process.

Save for the first ground of appeal which is allowed, the rest of the grounds are dismissed with costs.

Order accordingly.

**DATED at DARE ES SALAAM this 16<sup>th</sup> day of JUNE 2023.**



**E.Y. MKWIZU**

**JUDGE**

**16/6/2023**