IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB - REGISTRY OF MWANZA

AT MWANZA

CIVIL APPEAL NO. 2 OF 2023

BEATRICE IBRAHIM AUGOSTINO (*an administratrix of the estates of the late* **NYABENDA AUGOSTINO NTAGAYE**.....**APPELLANT**

VERSUS

AMANI ERASTO SHAMAJE.....**RESPONDENT**

JUDGMENT

June 14th & 6th July, 2023

Morris, J

The appellant herein, dissatisfied with the judgement of the Resident Magistrates' Court of Mwanza (trial court) in Commercial Case No. 39 of 2021 dated 3/11/2022, has preferred this appeal. Three grounds form the basis of the appeal. The trio-grounds may be merged into one major ground that: **the respondent failed to prove his case on balance of probabilities**.

Briefly put, the record reveals that parties herein litigated over Tshs. 18,100,000/=. It was alleged that the respondent had loaned the said money to the late **NYABENDA AUGOSTINO NTAGAYE**. The total sum was said to had been given to the latter in two instalments of Tshs. 5,000,000/ and Tshs. 15,000,000/= on 11/10/2019 and 30/10/2019

respectively. Allegedly both transactions were deposited in the deceased's CRDB Account No. 0152428058700. However, it is recorded further that, on 2/12/2019 the deceased repaid Tshs. 1,900,000/= to the respondent. The outstanding debt of Tshs. 18,100,000/= remained unpaid until his death.

The appellant above was appointed administratrix of the estates of the deceased but, too, did not settle the remaining debt. She was sued. The trial court ordered the appellant to pay the subject debt and interest at the court's rate from the date of judgement to payment. The said decision culminated into this appeal.

Before hearing, I raised a concern whether this appeal was filed within time. I invited parties to address this issue together with the appeal. Parties argued both the appeal and the court-raised preliminary objection through written submissions. Parties were represented by Advocates Josephat Mabula and Geofrey Kange respectively. Regarding the appeal being filed in time, it was the appellant's submissions that the same was filed on the 75th day after the impugned judgement was delivered. That is, it was filed timely because according to item 1 part II to the first schedule to ***the Law of Limitation Act***, Cap 89 R.E. 2019

(the LLA); appeal should be filed within 90 days. Reference was made to the case of ***Bukoba Municipal Council v New Metro Merchandise***, Civil Appeal No. 374 of 2021 (unreported) to the effect that ***the Civil Procedure Code***, Cap 33 R.E. 2022 (the CPC) does not provide specific time within which to appeal. Consequently, item 1 of part II to the first schedule to ***the LLA*** is applicable.

For the respondent, it was submitted that, the appeal emanates from the commercial case. Thus, ***CPC*** does not apply instead ***the Magistrates Courts Act,*** Cap. 11 R.E. 2019 (the MCA) does. Therefore, pursuant to item 2 of part II to the first schedule to ***LLA,*** the present appeal ought to have been filed within 45 days. Consequently, to him, this appeal is time barred.

I have considered the submissions of both parties. The ***MCA*** provides for general jurisdiction of the Resident Magistrates Court (RMs court) in civil and commercial cases. It does not provide for the appeal procedures from the RMs court in original jurisdiction. Therefore, as correctly submitted for the appellant, the law which regulates appeals therefrom are governed by Order XXXIX rule 1 (1) of ***the CPC***. Nevertheless, ***the CPC*** does not provide for the time limit to file an

appeal. Consequent to such absence of the requisite time-line, item 1 of part II to the first schedule to ***the LLA*** provides for 90 days. Therefore, this appeal was filed within time.

Regarding the appeal, it was submitted for the appellant that the trial court erred in law and fact by failure to consider that the respondent had no tangible evidence to prove two loan transactions between him and the deceased. Reference was made to section 110 (1) & (2) and 111 of ***the Evidence Act***, Cap 6 R.E. 2019. A further argument was that, the trial court relied solely on evidence of text message sent to the respondent that "***naomba uniazime shilingi milioni tano nitakurudishia baada ya wiki mbili."***

That, the foregoing message does not tell whether the repayment was supposed to be made through the respondent's account. Also, the 2nd transaction of Tshs. 15,000,000/= was not proved. The purpose for the same and whether it was also to be transferred into the deceased account were not proved. Other anomalies were stated as being absence of justification for Tshs. 5m/= to be paid in cash to the respondent; the reason for 15m/= to be given to the deceased before full repayment of Tshs. 5m/= which was supposed to be paid within two weeks. The

appellant's conclusion was, therefore, that the trial court failed to analyse evidence properly.

In reply it was submitted that, the respondent proved the case on required standard. To him, Exhibit P5 showed a print out of text message the deceased wrote borrowing 5m/= from him. Further, the amount is reflected by a bank slip [Exhibit P1 (a)] which shows that the amount was deposited into deceased's account. In respect of Tshs. 15m/=, the respondent argued that the deceased made a phone call to him requesting for an addition of money (page 31 of the proceedings).

It was a further proof through exhibit P5 that the respondent demanded account number from the deceased into which he deposited the money on 30/10/2019 per Exhibit P1 (a). Also, the respondent submitted that, as shown by Exhibit P1(c); the deceased managed to repay Tshs. 1.9m/= out of Tshs. 20m/=. And that, at the time of his death on 22/2/2020, the deceased had not repaid the remaining balance. To prove that no money was deposited into his account by the deceased the respondent had tendered exhibit P1 (b).

In addition, the respondent contended that the name on the account appeared as **Luhogoza**. Though DW1 had denied that the name

did not belong to the deceased, such rebuttal-testimony was countered by Exhibit P1 (a) which indicated that the 5m/= was deposited into the deceased's bank account. Also, the bank account sent by the deceased through the same number, according to exhibit P5, had the name of **Nyabenda Augustino Nyagaye**. At page 40 of the proceedings, DW1 admitted the account number to belong to the deceased. That the trial court analysed evidence that the question as to whether the money was paid in cash did not arise on trial court as the appellant did not testify if the money was paid.

In rejoinder, the submissions in chief were reiterated. In addition, the appellant stressed that the respondent failed to prove who **Luhongoza** was. And that the admission by the appellant that the bank account belonged to the deceased was not an admission to the fact that 20m/= was deposited into the deceased's bank account.

In view of submissions of both parties; and mindful of the fact that this is the first appeal, the court will determine it in a form of rehearing. In law, the first appellate court is vested with the mandate to re-appraise, re-assess and re-analyse the evidence on the record before it arrives at its own conclusion. Reference may be made in ***Paulina Samson***

Ndawavya v Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017; ***Kaimu Said v Republic***, Criminal Appeal No. 391 of 2019; ***Makubi Dogani v Ngodongo Maganga***, Civil Appeal No. 78 of 2019; ***Mwenga Hydro Limited v Commissioner General Tanzania Revenue Authority***, Civil Appeal No. 356 of 2019; and ***Diamond Motors Limited v K-Group (T) Ltd***, Civil Appeal No. 50 of 2019 (all unreported).

Having said so; the issue to be determined herein is whether the case at the trial court was proved on balance of probabilities. Evidence on record show that, according to Exhibit P5, the respondent received a text message on 11/10/2019 from cell phone No. +255 753 277 255 saved as Ruhongoza stating that: **"*za asubuhi! Naomba niazime sh. 5000000. Nitazirudisha ndani ya wiki 2. Asante***". PW2 (the respondent) further testified that after the said message, he called the deceased and agreed to send him 5m/= which was transferred through ***SimBanking*** on the same date as per bank statement [Exhibit P1(b)]. Further, it was the testimony by PW2 that the deceased phoned him and demanded Tshs. 15m/=. Further, on 28/10/2019 per Exhibit P5, the deceased sent CRDB account Number 0152428058700 with the name NYABENDA AGOSTINO NTAGAYE which was followed by the respondent's reply: "*sawa*

nimeipata" (implying that the respondent had received the message). It was further testified by the respondent that he sent 15m/= on 30/10/2019 through bank transfer while he was at Shinyanga as shown by deposit slip (Exhibit P3) and bank statement [Exhibit P1(B)].

Further on 27/11/2019, the deceased again texted the respondent that: "***za siku naomba acaunt namba***" and then the deceased sent him Tshs. 1,900,000/= on 2/12/2029 per the bank statement [Exhibit P1 (c)]. However, no further repayment was made by the deceased before his death as proved by bank statement [Exhibit P1(a)]. Thus, he claims Tshs. 18,100,000/= from the estates of the deceased.

The foregoing evidence was refuted by DW1 -the appellant that, her late husband was used to informing her everything including when he borrowed money. And that, the respondent was related to the deceased as his grandfather. After death of her late husband, she was shocked by news that her husband was indebted to the respondent a total of Tshs. 20m/=. Records have it a testimony of the appellant that the respondent had showed her the text messages but she denied the deceased to having been known as Luhongoza. She also denied the phone number to belong to her late husband.

During cross examination DW1 recognized the account number of the deceased as indicated in Exhibit P3 (the deposit slip). She admitted that the details showed that on 11/10/2019 the deceased had received 5m/=. Further, she conceded that according to Exhibit P3, Tshs. 15m/= was deposited into her late husband's account. However, she stated that the name of Nyabenda Ntagaye may belong to many people other than the deceased.

I have passionately considered the submissions by both parties in line with evidence in record. It is the long-settled principle of law that the standard of proof in civil matters is balance of preponderance. That is, all facts need to be proved on balance of probabilities. This is also a holding in ***Antony M. Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna)***, Civil Appeal No. 118 /2014; and ***Felician Muhandiki v Managing Director Barclays Bank Tanzania Limited***, Civil Appeal No. 89 of 2016 (both Unreported).

Also, it is a cardinal principle in civil cases that whoever alleges must prove. [***Obed Mtei dhidi ya Rakia Omari*** [1989] TLR 111; ***Paulina Samson Ndawavya v Theresia Thomas Madaha***, CoA Civil Appeal No. 45 /2017 (unreported)].

My analysis to the evidence of record shows that: ***one***, there is no dispute that the deceased maintained account No. 0152428058700 with CRDB bank. This is clearly admitted by the DW1 (the appellant) in her testimony. Further, Exhibit P4 (primary court judgement in Probate No, 13/2021 of Ilemela primary court) is also relevant to the same effect. ***Two***, a total of Tshs. 20,000,000/= was deposited into deceased account by the respondent on diverse dated of October 2019. **Three**, on 2/12/2019 the deceased deposited Tshs. 1,900,000/= into the respondent's bank account.

The appellant is faulting the trial court for failure to evaluate evidence on record. She is consistent that there was no conclusive proof of the transactions as contained in the text messages of Exhibit P5 especially on the argument that the same did not belong to the deceased. As I have stated above, the standard of proof in civil cases is on balance of probabilities. It is not beyond reasonable doubt. Exhibit P5 bears the same number which sent the text message requesting Tshs. 5m/= from the respondent on 11/10/2019 and which same number texted the above bank account on 28/10/2019; followed by a transfer of Tshs. 15m/= on 30/10/2019 into the deceased account. Further, on 27/11/2019 the same

number requested the account number of the respondent which was followed by the deposit of Tshs. 1.9m/=; therefore, the doubt which would otherwise arise in relation to the name of Ruhogoza was cleared by heavier evidence on record to the contrary.

From that evidence I am inclined not to fault the trial court's findings. To me, too, the case was proved by the respondent on the required standard -balance of probabilities. In other words, the evidence of the respondent carried more weight than the counter arguments by the respondent. I, therefore, uphold the findings of the trial court. The appeal is devoid of merit. It is accordingly dismissed. Each party to shoulder own costs. I so order. The right of appeal is fully explained to the parties.

C.K.K. Morris

Judge

July 6th, 2023