

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 364 OF 2021

*(Originating from judgement and decree in Civil Case No. 3 of 2019 in the District Court
of Rufiji)*

ALLY MASUDI MANGAJE..... APPELLANT

VERSUS

SAID SEIF MKELE..... RESPONDENT

JUDGMENT

18th May & 23rd June, 2023

MWANGA, J.

This appeal has its origin from Civil Case No. 3 of 2019 from the District Court of Rufiji at Rufiji where the respondent filed a suit in respect of unpaid loan in the tune of Tshs. 52,347,350/=. Upon conclusion of the trial, the court awarded the respondent specific claim of Tshs. 27,757,000/=. The trial court held that, the appellant failed to prove the

case to the required standard that the amount shown in exhibit D1 was paid by him.

The appellant was aggrieved with the above decision. Therefore, he appealed to this court on two grounds, namely: -

1. That the trial Magistrate erred in law and fact for failure to evaluate and take into consideration the evidence adduced by the appellant and reach into wrong decision; and
2. That the trial Magistrate erred in law and fact for failure to consider pleading, evidence and issues framed when determining the dispute between the parties.

The facts giving rise to this appeal are that; the appellant entered into road construction agreement with Tanzania Rural Road Agency (TARURA) through Nangonga Company. Later, the appellant involved the respondent in that job where in absence of the appellant the respondent used to take over works. As asserted by the respondent, he used to inject money in the project. Therefore, he wanted the payment to be split in the manner that part of the project money to be paid directly to his bank account, the fact which was not agreed. As a result, parties herein agreed

that the payment amongst themselves shall be distributed after receiving payment from TARURA.

According to the records, the respondent communicated with one Mohammed Athuman Nangonga who was in Morogoro and the owner of Nangonga Company which the appellant used through to enter the contract to confirm if he was aware of the respondent's debt. He acknowledged the existence of debt and stated that the respondent shall be paid upon receiving payments from TARURA. However, it was not known if that person in Morogoro paid the respondent or not.

The record shows that, the loan of Tshs. 52,347,350/= resulted from various loans extended to the appellant on different occasions. During the trial, the respondent tendered in court nine exhibits to prove his case out of which exhibits P1, P3 P 4 and P5 were admitted. Exhibit P2 was the contract entered by another person with the appellant and Exhibits P6, P7, P8 and P9 were contracts which the terms of the agreement were considered unreliable and not clear.

The appellant tendered in court three exhibits; exhibit D1, D2 and D3 to defend his case. However, exhibit D1 was disputed due to the fact that the depositor of the money was not the one who entered loan agreement

with the appellant. The records show that the appellant deposited six million as it is shown in exhibit D 2. After the trial court analysis, it was found that the loan extended to the appellant was thirty-three million seven hundred and fifty-seven thousand shillings minus six million deposited by the appellant, which makes the outstanding debt to the tune of twenty-seven million seven hundred and fifty-seven thousand shillings only.

During the hearing, the appellant enjoyed legal representation from Mr. Godfrey Kizito Chambi, the learned counsel. On the other hand, the respondent was represented by L.C. Mlelwa, also the learned counsel.

In the 1st ground of appeal, the appellant contended that during the trial the appellant tendered pay in slip from NMB Morogoro Business centre dated 23rd September, 2019 and another pay in slip from NMB dated 25th June, 2019 which both showed deposited amount of Tshs. 21,200,000/= in the respondent's bank account. The appellant contended further that, the two pay in slips were from the Director of Nangonga Company namely Mohamed Athuman Nangonga who had also business relation with the appellant Ali Masudi Manganje. It was asserted that the appellant tendered power of attorney which was the cause of action of parties to this case but

the trial magistrate ignored it. The appellant learned counsel argued that if the trial court magistrate considered the receipts showing deposited amount of Tshs. 21,200,000/= the only outstanding debt would be 5,800,000/=. It was contended that the court had to consider as to how Mohamed Athuman Nangonga knew the bank account of the respondent and what reason made the said Mohamed Athuman Nangonga to deposit that amount of money to the respondent's bank account. It was the appellant view that the respondent knew and recognised such payment as part of the payment of outstanding debt. In conclusion the appellant prayed this honourable court to take into account Tshs. 21,200,000/= as part of appellant's part the debt payments.

Per contra, the respondent acknowledged the fact that on 25th June, 2019 and 23rd September 2019 he received the total amount of Tshs. 21,200,000/= deposited in two pay in slips by the Director of Nangonga Company one Mohamed Athuman Nangonga. According to the respondent, the payments of Tshs. 21,200,000 were made for some business which were run by both the appellant and said Mohamed Athuman Nangonga. Therefore, it was clear that their account numbers were known by each

other. In that aspect the respondent prays this honourable court to dismiss the appeal with costs.

Having passed through the trial court's proceedings and respective submission of the learned counsels, it can be observed that the dispute between the parties in the appeal is aligned to the purported loan agreements extended by the respondent to the appellant concerning construction of the road at Utete, within Rufiji District. The appellant herein is disputing the fact that the trial court erred by discrediting exhibit D1 which was pay in slips with the money Tshs. 21, 200,000/= deposited by one Athuman Mohammed Nangonga in the bank account of the respondent.

After thorough perusal of the trial court records and submission of the parties herein, I have noted that the appellant is the one who entered into loan agreement with respondent, but as it can be seen in exhibit D1 the depositor was Athuman Mohammed Nangonga. The respondent contended yes; the money was paid by the said individual but the payment was for other business which he had with such person. On the other hand, the appellant argued that, he was the one who deposited the money as part of payment of the debt to the respondent.

I think the duty to proof such allegations was on the part of the appellant on balance of probabilities. To discharge such duty, the appellant ought to bring the said Mohamed Athuman Nangonga to testify on his behalf or at least give explanation to the trial court as to why the depositor was not called to do so. In the case of **Paulina Samson Ndawavya Versus Theresia Thomasi Madaha, Civil Appeal No. 53 of 2017** the Court of Appeal observed that:

“It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other”

On the basis of the above, it was rightly concluded by the trial court that the said money was not paid by the appellant. As the pay in slips in exhibit D1 displayed different name other than that of the appellant, the money was neither paid by the appellant nor on his behalf. Following the appellant’s submission, it was stated that there was a business relation between the appellant and Mohamed Athuman Nangonga and the same was established through a power of attorney which was not even tendered

to substantiate the claims that there was a business legal relation between the appellant and Mohamed Athuman Nangonga. Also, the records reveal that there was no doubt that parties entered into loan agreement as is shown in the proceedings in the typed judgement through exhibit P1, P3, P4 and P5, where parties signed the respective amount indebted to the appellant. However, there was no statement indicating that the debt will be paid by the director of NANGONGA COMPANY.

Under the circumstances, I am of the considered view that the trial court was right on its decision to hold that, the appellant had failed to prove his case beyond the required standards that the amount shown in exhibit D1 was paid by him through one Mohamed Athuman Nangonga.

In the case of **Kichele Chacha vs Aveline M.Kilawe**(Civil Appeal 160 of 2018)[2021] TZCA 43 it was held that;

"it is a settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law"

There was no agreement that some amount of money will be paid by third party to contract.

In the light of the above discussion, I am of the profound view that the appeal lacks merit. Therefore, it is hereby dismissed with costs and the decision of the district court is upheld.

Order accordingly.

H. R. MWANGA

JUDGE

23/06/2023

COURT: Judgment delivered in Chambers this 23rd day of June, 2023 in the presence of Advocate Mr. Mlelwa for the respondent and in absence of the Appellant. .

H. R. MWANGA

JUDGE

23/06/2023

