

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 43 OF 2021

M/S ZAKUBA COMPANY LTD..... 1ST APPELLANT

ZAMDA RAMADHANI..... 2ND APPELLANT

VERSUS

AYOUB RWEHAZULA OMARI.....RESPONDENT

**(Appeal from the decision of the District Court of Ilala
at Ilala in Civil Case No.90 of 2017)**

JUDGMENT

5th December, 2022 & 3rd February, 2023

KISANYA, J.:

The respondent, Ayoub Rwezahula Omari, filed a suit in the Resident Magistrate Court of Ilala at Ilala (the trial court) against the appellants, M/S Zakuba Company (T) Ltd and Zamda Ramadhani. He prayed for payment of TZS 47,234,577 being the specific damage; interest at commercial bank rate of 35% from the date the amount due to the date of full payment; costs of the suit; and such other relief which the court deemed fit and just to grant.

Pursuant to the record, the material facts giving rise to this appeal are as follows: On 15th July, 2010, the respondent and Tanzania Investment Bank (henceforth "the Bank") executed a guarantee agreement. According to that agreement, the respondent stood as guarantor of the facility

amounting to TZS 100,000,000/= being restructured overdraft, which was advanced to the 1st appellant by the Bank. The guarantee was supported by the mortgage of the respondent's landed properties described as Plot. No. 2731, and 2732, Block A, Kimara Matangini, Kinondoni District.

Following the appellants failure to liquidate the loan, the respondent was served with a notice of default by the Bank to auction the mortgaged properties in order to recover the outstanding loan which stood at TZS 53,000,000. Upon consulting TIB, the respondent was compelled to pay the former (the Bank) a sum of TZS 47,234,577 being part of outstanding loan which the 1st appellant owed the bank. Thereafter, the respondent instituted the suit praying for the above stated reliefs. In his evidence, the respondent refuted to have borrowed TZS 25,000,000 from the appellants. He told the court that he borrowed TZS 20,000,000 from Zamda (PW1), the debt which was repaid to the appellants.

The appellants refuted the respondent's claim in their written statement of defence. They further raised a counterclaim against the appellants, praying for payment of TZS 25,000,000/= being the loan extended to him as beneficiary of the loan. They further stated that the respondent was required to repay the said amount at commercial rate of 18%. It was the appellants' case that the respondent repaid part of the loan

advanced to the 1st appellant because he was executing his obligation of paying the money arising from the debt by him.

To guide the parties in adducing evidence, the trial court framed three issues as follows:

1. *Whether the plaintiff was compelled to repay the loan due to default by the defendant.*
2. *Whether the defendant has any claim against the plaintiff.*
3. *To what reliefs are the parties entitled.*

In a bid to prove his case, the respondent appeared as the sole witness and tendered two exhibits. On the adversary part, the appellants had a total number of two witnesses namely Zamda Ramadhani (DW1) and Swahabu Ramadhani (DW2).

At the conclusion of the trial the trial court decided the case in favour of the respondent and ordered the appellants to pay TZS 46,000,000/= being the specific damages and costs of the suit.

Aggrieved by that decision of the trial court, the appellants lodged a memorandum of appeal consisting of four grounds of appeal. However, during the hearing of the appeal, the appellant abandoned two grounds of appeal and argued the following grounds:

- 1. The honourable resident magistrate erred in law for not realizing that, the respondent's act of paying Tshs. 46,908,577 was in response of discharging his liability as a beneficiary of part of the loan extended to the appellants.*
- 2. The honourable resident magistrate erred in law and facts for not taken (sic) into consideration the evidence of the Appellants' witnesses over the responsibility of the respondent to the tune of Tshs.25,000,000/=*

At the instance of the parties, this matter was disposed of by way of written submissions. Mr. Harry Mwakalasya learned advocate appeared for the appellants, whereas Mr. Goodchance Lyimo, also learned counsel appeared for the respondent.

Submitting on the second ground of appeal Mr.Mwakalasya submitted that the respondent was the guarantor of the loan facility which was advance to the appellants. However, he went on contend that there was a separate agreement amongst the parties herein, whereby the sum of TZS 25,000,000 was extended to the respondent to cater for his son's tuition fees. It was his further submission that the sum of TZS 46,908,577 paid by the respondent was in respect of discharging his liability of the loan extended to the appellants. The learned counsel went on to argue that the respondent admitted to have received Tshs. 20,000,000/= and stated that TZS 5,000,000/= was given to her sister.

Mr. Mwakalasya conceded that there was no written agreement on the terms of the payment of the said loan. However, he faulted the trial court for taking into account the respondent's evidence that the said sum was given to the respondent free from interest. His argument counts on the evidence on record that the money was not given to the respondent out of kindness, but with the obligation to repay back since it was given as to him as a loan.

Arguing on the third ground of appeal, Mr. Mwakalasya submitted that the trial court failed to account that the respondent could not be held liable to repay the sum of TZS 25,000,000/=. He argued that the evidence on record shows that the respondent was given the sum of TZS 20,000,000/= as a tuition fees for his son who was studying abroad, while the other TZS 5,000,000/= was given to his (respondent's) sister. The learned counsel contended that the respondent and his sister withheld the money for two years while he was required to pay the same within one month. He went on to submit that failure for the respondent and his sister to repay the claimed sum resulted to delay on part of the appellants to repay the loan to the bank, the delay attracted more interest and penalty. In that regard Mr. Mwakalasya faulted the trial court for failure to consider that the appellants' evidence. He therefore, urged the court to allow the appeal.

Responding to the first ground (the then second ground), Mr. Lyimo submitted that the respondent paid the sum of TZS. 46,908,577 to fulfil his obligation as the guarantor of the loan extended to the appellants which the respondent undertook to guarantee vide his landed properties.

He went on to submit that the claimed sum of TZS 25,000,000/= given to the respondent and his sister was a separate agreement excluding the respondent's obligations as the guarantor. However, he disputed the contention that the respondent's sister was authorized to receive the sum of TZS 5,000,000/= on the reason that she was neither impleaded in the defence nor in the counter claim. He referred the Court to the settled law that, parties are bound by their pleadings as held in the case of **Yara Tanzania Limited vs Charles Alloyce t/a Msemwa Junior Agrove Kassim Shodo Mazara**, Commercial Case No.5 of 2013.

Arguing on the second ground of appeal, Mr. Lyimo submitted that pages 6, 7 and 8 of the trial court's judgment suggest that the trial court took into account the evidence on record towards the appellants' claim. Referring to the case of ~~Hemed Said vs Mohamed Mbilu~~, he argued that the respondent's evidence was heavier than that of the appellants. The learned counsel added that the trial court record should not be impeached lightly as held in **Halfani Sudi vs Abieza Chichili** (1998) TLR 527. In conclusion, Mr. Lyimo implored the Court to dismiss the appeal with costs.

I have examined the record and considered the rival submissions by both parties. At this juncture, my task is to determine the merits of this appeal.

Starting with the first ground of appeal, it is common ground that the respondent guaranteed the loan facility advanced to the 1st appellant by the Bank. This fact is also reflected in Exhibit P1. It is further not disputed that the 1st appellant failed to repay the loan. Pursuant to Exhibit P2, the respondent proved to have paid the sum of TZS 46,908,577 to the Bank. PW1 stated that the said sum was part of the outstanding loan which the 1st respondent owed the Bank.

In this appeal, the trial court is faulted for failure to consider that the respondent paid TZS 46,908,577 when he was discharging his liability as the beneficiary of the loan from the bank. The record bears it out that, the respondent (PW1) paid the said amount as guarantor of the loan advanced to the 1st appellant.

The allegation that the respondent was also beneficiary of the loan advanced to the 1st appellant was deposed by the appellants in the counterclaim and evidence of DW1 and DW2. In terms of section 110 of the Evidence Act a person who alleges on existence of certain facts must prove the same. There is a number of authorities on that principle. See for instance, the case of **The Registered Trustees of the Joy in the Harvest vs**

Hamza K.Sungura, Civil Appeal No.149 of 2017 (unreported) in which the Court of Appeal held that;

"The general concept of the burden and the standard of proof in civil litigations. The concept is "he who alleges must prove," and it means that the burden of proof lies on the person who positively asserts existence of certain facts. The concept is embodied in the provisions of section 110 (1) and (2) of the Evidence Act, Cap 6 R.E. 2019"

In the light of the foregoing, the appellants were duty bound to prove before the trial court that the arrangement in which the respondent was the beneficiary of the loan facility advanced by TIB to the 1st appellant.

Looking at the evidence of DW1 and DW2 who testified for the appellants, I find no evidence proving the said allegation. Apart from failure to prove the arrangement in which the respondent was the loan's beneficiary, DW1 and DW2 did not prove that the respondent received the proceeds of the loan after the 1st respondent's receipt of loan facility from TIB.

Since DW1 testified to have deposited TZS 20,000,000 in the respondent's account, the foresaid fact would have been proved by tendering a bank statement showing the loan was credited in his bank account by TIB and bank slip or statement indicating the money deposited

in the respondent after receiving the loan facility. In that regard, the trial court was right in holding that appellants failed to prove that the sum paid to the respondent was part of the loan taken from the bank (TIB). I find no reason to fault the trial court on that point. Thus, the first ground complaint is devoid of merits.

Having so decided, the second ground of complaint should not detain this Court. As resolved in the first ground of complaint, the appellant did not prove that the sum of TZS 25,000,000/= was given to the respondent as proceed of the loan advanced to the 1st appellant. That being the case, the argument that the trial court had no basis of finding the respondent responsible for the appellant's failure to repay lacks legs to stand on. This is also when it is considered that while the pleadings shows that the sum of TZS 25,000,000 was given to the respondent, the evidence adduced by DW1 and DW2 is to the effect that the respondent's account was credited with TZS 20,000,000 and TZS 5,000,000 paid to the respondent's sister. As rightly submitted by Mr. Lyimo, it is settled principle of law that parties are bound by their own pleadings [See **Yara Tanzania Limited vs Ikuwo General Enterprises Ltd**, Civil Appeal No. 309 of 2019]. That being the position of law, I hold the view that the appellants' evidence did not prove what was pleaded in their counter-claim. For the reasons afore, the second ground of complaint is not meritorious as well.

In the light of the foregoing analysis, I am of the further opine that the trial court was right in holding that the respondent's evidence overshadowed the appellants' evidence.

All said and done, the appeal is hereby dismissed with costs for want of merit.

DATED at DAR ES SALAAM this 3rd day of February, 2023.



A handwritten signature in black ink, appearing to be "S.E. Kisanya".

S.E. KISANYA
JUDGE