

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

**(MOSHI DISTRICT REGISTRY)**

**AT MOSHI**

**CIVIL APPEAL NO. 11 OF 2022**

*(Originating from Hai District Court in Civil Case 1 of 2021)*

**HILDA ISACK MUNISI..... APPELLANT**

**VERSUS**

**VISION FUND MICROFINANCE BANK..... 1<sup>st</sup> RESPONDENT**

**MALAPA AUCTION MARK CO. LTD.....2<sup>nd</sup> RESPONDENT**

**KIJENGE ANIMAL PRODUCTS LTD..... 3<sup>rd</sup> RESPONDENT**

**JUDGMENT**

21<sup>st</sup> December 2022 & 7<sup>th</sup> February, 2023

**A.P.KILIMI, J.:**

The appellant entered a loan agreement with the first respondent, then the first respondent advanced the said loan to the appellant to the sum of TZS 30,000,000/ with an interest of 12,000,000, the said loan facility was witnessed by one Isack Abeid Munisi and Nancy Gerald Kimaro. It was agreed there at the said loan be paid back within 24 months. This agreement was not honoured, as a result first respondent started steps of selling appellant's residential house which was cited as a security in the said agreement. The appellant consequently, instituted a suit against all

respondents at Hai District Court in Civil Case no. 1 of 2021 seeking orders inter alia that, A temporary injunction against the defendants together and severally and their agents thereto from selling the plaintiff's Residential home, and the trial court be pleased to order the first defendant to be paid TZS 29,552,762.00 only by the Interim Administrator dully appointed by the High Court of Tanzania at Dar es salaam main Registry via Misc. Civil Case No 5 of 2018.

At the trial court, the case was held on merit and finally it decided that the appellant to pay the cost of the suit, to pay the whole loan amount to TZS 30,953,022/= or in alternative to that above, the mortgaged house which is her residential house be sold to recover the debt.

The appellant being aggrieved by the trial court decision filed this appeal relying on the following two grounds:-

1. That, Hai District Court has no Jurisdiction to grant the order of sale of appellant's property according to the laws.
2. That, the trial court erred in laws and facts to evaluate the evidence adduced in court.

At the hearing of this appeal, the appellant and third respondent were unrepresented while the first respondent enjoyed the service of Joseph Milumbe learned advocate, both prayed the appeal be argued by way of written submission. This court acceded to their proposal and they duly filed them as per scheduled ordered.

In respect to first ground of appeal, the appellant submitted that, the District court of Hai had no jurisdiction when it ordered the first respondent to sale the appellant's house contrary with section 3(1) of the Land Disputes Court Act (cap 216 R.E 2019) which provide where to institute the complaint concerning land and list the court deal with land matters while the District Court is not listed therein. Appellant further submitted that, the District court established under section 4 of the Magistrate Court Act, Cap 11 R.E 2019, is prohibited by laws to hear or to determine the land Matter, so the fact it granted order to sell the appellant house, and then the court determined the land disputes while it not permitted.

Submitting in regard to the second ground, she contended that, the prayer contained in the plaint is difference with the decision of the said judgment and total difference with the issues framed, the case concerned

with the court to order the 1<sup>st</sup> respondent to be paid by administrator dully appointed under the case Misc. civil case No.5 of 2018 while the issues framed and decision is contrary with the said prayer, this shows the trial court failed to evaluate the evidence adduced in court.

In replying the above, the first respondent contended that, the Appellant was ordered to pay the outstanding loan and if she fails to do so then her pledged collateral be sold to recover the outstanding loan. It should be noted here that, it is the Appellant who instituted the said case at the District Court to determine her matter. If the trial Court had no jurisdiction to determine her case, she should have instituted the matter before the proper Court with competent jurisdiction. Now that the case was decided against her favor, she is challenging the jurisdiction of the Court which she herself choose to determine her case.

The first respondent further contended that, the issue that led this matter to be instituted before the trial Court is related to commercial matters in the sense that the first Respondent is a Banking institution which do lending business. The Appellant was issued with a loan facility and pledged her collateral for that purpose and therefore the matter here was of the

commercial nature where the District Court had jurisdiction to determine commercial matters of the said amount. The aim of pledging her house as collateral was agreed in the loan agreement that should the Appellant defaults in the repayments of the same, then the first Respondent can realize the said loan through sale of the pledged house. Buttressed this argument. He has cited the case of **The Private Agricultural Sector Support Trust And Jrt Agriservices Limited Vs. Kilimanjaro Cooperative Bank Ltd** Consolidated Civil Appeals Nos. 171 & 172 CAT at Moshi (unreported) and Section 40 (3) (a) of the Magistrates Court Act, Cap 11 R.E 2019 which give the jurisdiction the said District Court.

Contending in respect to the second ground of appeal, the first respondent argued that, the whole evidence given by the Appellant during the trial was well recorded and well evaluated by the trial court. During the trial, it was not in dispute that the Appellant had borrowed a loan from the first Respondent and also, she had an outstanding loan amount to the extent of TZS 30,953,022/= . The first respondent further added that, according to the cardinal principle of Sanctity to Contract, the Court had no powers to alter the loan contract entered between the Appellant and the first Respondent. Therefore, the Court had no powers to order the restructuring

of the loan repayment schedule as prayed, but parties themselves. To support his argument has referred the case of the court of appeal in **Harold Sekiete Levira and Florence Mkyanuzi Vs. African Banking Corporate Tanzania Limited (Bank Abc) And Nkya Company Limited**, Civil Appeal No. 46 of 2022 at page 5.

The next party replied to the appellant is the third respondent, who contended that, being a legal personnel and registered limited company conducted the business with different people inclusive the appellant herein, then the appellant's money entered to such business, also said the company is currently bankrupt and declared in the Misc. Civil Case NO.5 of 2018 HC Dsm Main Registry, and then interim administrator was appointed to pay the appellant such amount of money.

The third respondent further contended that, the appellant filed the Civil case No 1 of 2022 against the respondents seeking an order for the first defendant to be paid TZS 29,552,762.00 only by interim administrator dully appointed by the high court at Dar es salaam Main Registry via Misc. Civil Case No.5 of 2018 while the Hai district court ordered in contrary.

Furthermore, the third respondent prayed this court to adopt the written submission filed by the appellant and her ground of appeal.

I have considered the above submissions and the record of the trial court, starting with the first ground, I concede with the first respondent when he reasoned that is the appellant who filed the said case at the trial court but now, she is saying the court did not had jurisdiction. Despite she did not rise the said objection at the trial court, be as it may, let me revisit what transpired in the trial court. There is no dispute that the prayers thereat were an order for temporary injunction against the defendants together and severally and their agents thereto from selling the plaintiff's Residential home, and the trial court be pleased to order the first defendant to be paid TZS 29,552,762.00 only by the Interim Administrator dully appointed by the High Court of Tanzania at Dar es salaam main Registry via Misc. Civil Case No 5 of 2018.

I am mindful, this being the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. See the decisions of the Court of Appeal in **Future Century Ltd v. TANESCO**, Civil Appeal No. 5 of 2009, and **Makubi**

**Dogani v. Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (all unreported). The Court of Appeal held in **Future Century Ltd v. TANESCO**, (supra) that-

*"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."*

According to the records, this dispute emanates from contract, whereby the appellant faulted it by not paying the loan she obtained from the respondent, the said house was put by appellant herself as a security during the signing of the said contract, that is why is now praying to be sold after failing to honor the said agreement. In my view, I am settled this cannot be land case, from the above there is neither land disputes between the parties nor the issue of ownership of the said house to be sold, it merely arises from commercial transactions between the appellant and the first respondent. Thus, having observed that, I hold that this ground fail and dismissed forthwith.



In the second ground, the appellant vows that the trial court erred in laws and facts to evaluate the evidence adduced in court. In his submissions tries to substantiate these by saying that, the prayer contained in the plaint is difference with the decision of the said judgment and total difference with the issues framed, the case concerned with the court to order the 1<sup>st</sup> respondent to be paid by administrator dully appointed under the case Misc. civil case No.5 of 2018 while the issues framed and decision is contrary with the said prayer.

To me as I view the trial court record, I think the appellant is misdirecting herself, at page 2 of the typed Judgment it provides: -

*"The following **issues were framed and agreed by the parties and adopted by this court as issues** for the determination: -*

- Whether there was a loan contract/ agreement between plaintiff and first defendant?*
- Who among the two breach the contract?*
- What reliefs do parties entitled to?"*

[Emphasizes Added]

Since, there is always a presumption that a court record accurately represents what happened, the same should not be lightly impeached. (See the case of Halfani **Sudi v. Abieza Chichili** [1998] TLR 527, **Paulo Osinya v. R** [1959] EA 353 and **Shabir F. A. Jessa v. Rajkumar Deogra**, Civil Reference No. 12 of 1994 (unreported)).

In this matter, the appellant and respondents as above agreed on the issues framed. It is trite law that a trial court is bound to make decisions on matters that are framed as issues for determination according to the evidence adduced. The object of framing of issues is to focus upon the questions on which evidence has to be led to prove them and also to indicate on which party the burden of proof lies. This also gives parties an opportunity to prepare and lead their evidence towards a focused direction in pursuit to prove their cases.

The fact the appellant is saying about the third respondent is one responsible for paying the said loan, this is an afterthought raised by way of submission and was neither proved at the trial court by way of evidence nor was not an issue to be decided at the trial court. It is a trite law that submission by parties are not evidence. They are arguments based on the available evidence and the governing law. (See the case of Dr. **A Nkini &**

**Associates Limited V National Housing Corporation**, Civil Appeal No 75/2015, **Republic vs. Donatus Dominic @ Ishengoma & 6 Others**, Criminal Appeal No. 262 of 2018, **Morandi Rutakyamirwa vs. Petro Joseph** [1990] T.L.R 49] and **Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government**, Civil Appeal No. 147 of 2006 (both unreported)

According to the proceeding on 28<sup>th</sup> April. 2022 the appellant testified at the trial court and had this to say;

*"Your honor, I used to make business with third defendant Kijenge Animal Product. I used to sale chicken to them. I used to sale broilers to them. At last, I sold to them broiler worth Tshs 34,000,000/= I went there to make follow up on how am I going to be paid. I find that their company failed to proceed it was closed due to the eruption of covid 19 disease, so I stacked."*

And at the conclusion of her testimony further said;

*"I had never disturbed them, but this time I stacked, because, I got sick and due to the eruption of covid 19 Disease. So, I pray the court to allow one to pay court to allow one to pay Tshs 300,000/= per*

*months, being monthly instalments to pay back my loan. I also pray that my house not be sold because I depends on it. I still have intention to repay back the loan only that not the instalment I'm supposed to pay."*

In the light of the above testimony in regard to the third respondent, nowhere the appellant shows the connection that the said debts should be paid by the third respondent on her behalf after business failed to pay the said loan. Then, she prayed to pay herself by instalment.

As a matter of principle, the burden of proving each allegation rests on the Plaintiff and must be discharged on the balance of probability. The fact that there was no evidence tendered to prove the connection that the said loan should be paid by the third party instead of the appellant herself. Therefore, there was no way or justification that, the trial court could have directed the said loan to be paid by the third respondent, having observed so hereinabove, it is then my settled opinion by appellant agreeing on the above issues framed, she pardoned the prayer of making the third respondent responsible to pay the said loan on her behalf.

In view of what I have deliberated hereinabove, I am satisfied that the Appellant did not prove prayers as per plaint filed. Thus, I find no reason to fault the Judgment of the trial court. Consequently, this appeal is devoid of merit and is hereby dismissed in its entirety. According to the circumstances of the case no order as to costs granted.

It is so ordered.

**DATED** at **MOSHI** this 7<sup>th</sup> day of February, 2023.



*A.P.K.*

**A. P. KILIMI**

**JUDGE**

**7/02/2023**

**Court:** - Ruling delivered today on 7<sup>th</sup> day of February, 2023 in the presence of Appellant and first Respondent. Second and third respondents absent.

**Sgd: A. P. KILIMI**

**JUDGE**

**7/02/2023**

**Court:** - Right of Appeal duly explained.

**Sgd: A. P. KILIMI**

**JUDGE**

**7/02/2023**

