

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 304 OF 2020

(Arising from the Judgment and Decree of the District Court of Kinondoni delivered on 15th day of June 2020 before Hon. Dr Y. J. B Yongolo, SRM in Civil Case No. 28 of 2014)

ABDULGNAFUR H. ABUBAKARI ----- 1ST APPELLANT

ZUENA RASHID ABDALLAH ----- 2ND APPELLANT

VERSUS

IBRAHIM HUSSEIN SHERALLY ----- 1ST RESPONDENT

ISMAIL H. HUSSEIN ----- 2ND RESPONDENT

Date of last order: 30/03/2023

Date of Judgment: 07/06/2023

J U D G M E N T

MGONYA, J.

Before the District Court Kinondoni at Kinondoni, the Respondents herein initiated ***Civil Case No. 28 of 2014*** claiming jointly and severally against the Appellants for payment of **Tsh. 35,807,966/=** being the principal loan over due to the Appellants, general damages at the tune of **Tshs. 20,000,000/=**,

an order that Certificate of Title be surrendered as agreed, interest at the rate of **13%**, costs of the suit and other reliefs.

At the trial Court the relief sought by the Respondents in their plaint were granted against the Appellants. Having been aggrieved by the decision of the trial Court, the Appellants have preferred this appeal on the following grounds;

- 1. That, the honorable trial Magistrate erred in law and in fact by entering default judgement against the 1st Appellant without fixing a day for exparte proof as the claim was for liquidated sum exceeding Tshs 1,000/=;*
- 2. That, the honorable trial Magistrate erred in law and in fact for entertaining a case arising from commercial transaction which was beyond its statutory pecuniary jurisdiction;*
- 3. That, the honorable trial Magistrate erred in law and in fact for relying on unenforceable contract signed by the 1st Appellant on behalf of the Company called Mwanatraders Co. Limited which is a separate Legal Entity*
- 4. That, the honorable trial Magistrate erred in law and in fact for failure to consider that the 2nd Appellant and 2nd Respondent were not parties to the alleged Memorandum of understanding which was the issue on the claim filed by the Respondents;*

5. That, the honorable trial Magistrate erred in law and in fact for allowing Mr. Alex Mushamba Balomi, Advocate to prosecute the case which he had conflict of interest as he was an attesting officer and the one who prepared the Agreement dated 31st January, 2012 which was at issue in the District Court.

Hearing of the appeal was done by way of written submissions, where the Appellants enjoyed the legal services of Mr. **Edward Peter Chuwa**, learned Advocate, and Respondents enjoyed the services of **Mr. Abubakar Salim**, learned Advocate.

In arguing the Appeal, the Appellants' submission on the 1st ground of Appeal that, ***the honorable trial Magistrate erred in law and in fact by entering default judgment against the 1st Appellant without fixing a day for exparte proof as the claim was for liquidated sum exceeding Tshs 1,000/=*** was to the effect that the 1st Appellant defaulted in filing his Written Statement of Defence and default Judgment was entered against him, and there was no such default Judgment which was written by the Court. Mr. Chuwa stated also that even if there was such a Judgment it is a misconception of the law and contrary to **Order VIII Rule 14(2) (a) and (b) of the Civil Procedure Code, Cap. 33**. It was his further submission that, the trial court, if there

was proof of service, was supposed to order an *Ex parte* proof as the suit was for liquidated damages whose amount exceeds Tshs. 1,000/= . He further submitted that, the Respondents were duty bound to lead the evidence and prove the claim against the 1st Appellant and the resultant would have been an *Exparte Judgment* and not a Default Judgment.

Submitting on the second ground appeal, that, ***the honorable trial Magistrate erred in law and in fact for entertaining a case arising from commercial transaction which was beyond its statutory pecuniary jurisdiction,*** it was Mr. Chuwa's submission that, at the time of filing the suit on 16th April 2014, the jurisdiction of the District Court to try Commercial disputes was **Tsh. 30,000,000/=** as per **section 40(3) (b) of the Magistrates Courts Act**. The Suit before the trial court was a Commercial Case arising from contract and a Bank loan. The amount of Bank loan as pleaded in paragraph 6 of the plaint was **Tsh. 150,000,000/=** while the alleged Memorandum of understanding pleaded in paragraph 4 of the Plaint was **Tsh. 110,712,736.30/=** and the alleged outstanding amount pleaded in paragraph 5 of the Plaint was **Tsh. 35,807,966/=** hence the amount was beyond the jurisdiction of the trial court, hence the Judgment was nullity.

On the third ground of appeal that, Mr. Chuwa stated that, the basis of Judgment was wrong for relying on the Memorandum of Understanding between the 1st Appellant and the 1st Respondent which was admitted as Exhibit P1 for the repayment of loan. He stated that, the Agreement was clear that, the 1st Appellant purported to enter the Agreement on behalf of the company called Mwanatraders Co. Limited. However, at the bottom of the Agreement he signed in his capacity and not for the company. He further submitted that, there was no proof of the Board Resolution of Mwanatraders Co. Limited or power of attorney authorizing the 1st Appellant to sign the Agreement.

It was his further submissions that, under the principle of Corporate Personality, the Appellant is different from the Company. To bolster his argument, he cited the case of ***SALOMON VS. SALOMON & CO LTD*** [1897] AC 22. He stated also that on the said Memorandum of Understanding there was a clause which ousted the jurisdiction of normal court. Also the Advocate of the Respondent, one Alex Balomi who also took the 1st Appellants title under the strength of Exhibit P2 made it worse as it turned out to be a mortgage and notice of deposit of title at the same title hence was void.

On the fourth ground, Mr. Chuwa submitted that, guided by the principle of privity of contract as it was pleaded from the plaintiff, the 2nd Appellant was not pleaded anywhere as there was no legal mortgage which was pleaded or annexed and thus there was no any spousal consent. He added that, in the Memorandum of Understanding which was pleaded in paragraph 4, and the 2nd Appellant was not a party and therefore in law she could be liable. He referred this court to the case of ***DUNLOP PNEUMATIC TYRE CO LIMITED V. SELFRIDGE & COMPANY LIMITED*** (1915) AC 847.

Arguing on the last ground of appeal, that, ***the honorable trial Magistrate erred in law and in fact for allowing Mr Alex Mushamba Balomi, Advocate to prosecute the case which he had conflict of interest as he was an attesting officer and the one who prepared the agreement dated 31st January, 2012 which was at issue in the District Court,*** M. Chuwa submitted that, it is a rule of practice that an Advocate should not act as a Counsel and a witness in the same case. He further stated that it is undisputed that Mr. Alex Mashamba Balomi Advocate, was the Advocate for the 1st Respondent but he also acted for the 1st Appellant in Memorandum of Understanding dated 31st January 2012 which is the source of the claim in issue. He

further submitted that, he was also a custodian of the 1st Appellant's Certificate of Title and also, he was the one who prepared the Memorandum of Understanding on behalf of both parties with the terms and conditions gathered from both parties, and he was the one who represented the Respondents in the suit and gave evidence as witness. It was his further submission that, the Memorandum of Understanding dated 31st January 2012 created a Client/Advocate relationship which creates a conflict of interest, because during the time, advocate Balomi got access to information which he will use against the appellants. To bolster this, he cited the case of ***NATIONAL BANK OF COMMERCE LTD V. NABRO LTD AND ANOTHER***, Civil Case No. 44 of 2001, High Court Commercial Division at Dar es Salaam (Unreported).

The Learned Counsel also referred to **rule 15 (b) of the Rules of Professional Conduct and Etiquette of the Tanganyika Law Society** on the sub-part titled "**Commissioner for Oath-Duties**". He prayed this appeal be allowed, quash the Judgment and proceedings of the lower court.

Responding to the 1st ground of appeal, Mr. Salim submitted that, the trial court entered default Judgment pursuant to **Order VIII Rule 14(2) (a) and (b) of the Civil Procedure Code** (supra) and the Appellants relying at the phrase found at page 3

of the typed Judgment submitting that the default judgment was entered without proof of allegation, however at page 4 of the Judgment is clear that PW1 and PW2 testified for the Plaintiffs. He further submitted that, they do not agree with the Appellants alone leaving the 1st Appellant as there is no way that the testimonies that was given before the trial Court was in respect of the 2nd Appellant alone leaving the 1st Appellant. He stated that a mere accidental slip of pen on the part of the trial Magistrate did not in any way prejudice the 1st Appellant, and it is clear that the 1st Appellant did not present his Written Statement Defence before the trial court and no explanation is given to that effect.

On the 2nd ground of appeal, Mr. Salim stated that, the case before the trial Court was not a commercial case as the bank loan was a different subject all together as after the 1st Appellant failed to service his bank loan, the Respondent intervened to rescue their houses that were to be auctioned by the bank. He stated that the 2nd Respondent sold his house and paid a loan and a separate Agreement was entered that the 1st Appellant would be paying **Tsh. 105,000/=** to the 1st Respondent thus the Agreement is not of a commercial nature.

Submitting in opposing the 3rd ground of appeal, Mr. Salim stated that, the Memorandum of Understanding was signed by one

Abdulghafur H. Abubakar a director of the company and Ibrahim Hussein Sherally. He stated that Mwanatraders Co. Limited is nowhere featuring in the proceedings of the trial Court, not a part to a suit hence the 1st Appellant should not find shelter in that company.

In response to the 4th ground of appeal, he stated that the 2nd Appellant filed her defence and went on to testify in Court hence she cannot raise this now as she did not raise an objection on her involvement in the suit. He stated also that, 2nd Appellant admitted to have signed several documents from bank and she knew everything concerning the loan. He referred the provision of **Order 1 Rule 7, 9 and 13 of the Civil Procedure Code (supra)**.

Responding to the last ground of Appeal, Mr. Salim stated that, it is not always the case that an Advocate who witnesses the Agreement should not act for either party in a subsequent suit. He stated that, at the time Mr. Alex Balomi was witnessing the Memorandum of Understanding, there was no pending proceeding in Court, hence he was a competent to act for the Respondents. He cited the case of ***AMIRI ABDALLAH KILINDO VS. GLOBAL SECURITIES FINANCE***, Civil Case No. 220 of 2002 (unreported).

On rejoinder submissions, Mr. Chuwa reiterated his submission in chief and further stated that, the errors in holding by the trial Magistrate in respect to the first ground cannot mere slip of pen as they are fundamental and they go to the root of the case. He stated further that the dispute of parties is of commercial nature has it arises from commercial loan.

I have thoroughly gone through the file of the trial Court and the respective submissions from the learned Counsel for both Appellants and Respondents. A question to be resolved is whether this appeal has merit or not.

I will embark on the disposal journey by first tackling ground two of the appeal. This is to the effect that, *the honorable trial Magistrate erred in law and in fact for entertaining a case arising from commercial transaction which was beyond its statutory pecuniary jurisdiction.* It has been decided by this Court and also the Court of Appeal in times without number that, the issue of jurisdiction can be raised at any stage of the proceedings including during an appeal as it touches on the very root of any matter. See the case of ***Tanzania-China Friendship Textile Co. Ltd vs. Our Lady of Usambara Sisters [2006] TLR 70.***

It was the argument of Mr. Chuwa that, at the time of filing the suit on 16th April 2014, the jurisdiction of the District Court to try Commercial disputes was **Tsh. 30,000,000/=** as per **section 40(3) (b) of the Magistrates Courts Act**. On their part, the Respondents stated that, the case before the trial Court was not a Commercial case as the bank loan was a different subject all together as after the 1st Appellant failed to service his bank loan, the Respondent intervened to rescue their houses that were to be auctioned by the bank.

In respect to this ground, I have considered the rival arguments and, it is my view that, the issues for this Court's determination are **one**, whether or not the matter before the trial Court was of commercial nature or significance; and **two**, if issue No. 1 is answered in the affirmative, whether the trial Court had jurisdiction to entertain it.

What constitute to a Commercial case was outlined under section **2 of the Magistrate Court's Act** as amended through Act No. 4 of 2004. From definition outlined therein, I am inclined to hold that, the case before the trial Court was not Commercial nature or significance since the same resulted from the Agreement between parties for payment of a loan so as to rescue their houses that were to be auctioned by the bank. That being the case, I find

the District Court to have jurisdiction hence **this ground lacks merit.**

In respect to the 5th ground of appeal that, *That, the honorable trial Magistrate erred in law and in fact for allowing Mr Alex Mushamba Balomi, Advocate to prosecute the case which he had conflict of interest as he was an attesting officer and the one who prepared the agreement dated 31st January, 2012 which was at issue in the District Court,* it was Mr. Chuwa's submission that, it is a rule of practice that an Advocate should not act as a counsel and a witness in the same case. He further stated that it is undisputed that Mr. Alex Mashamba Balomi Advocate, was the Advocate for the 1st Respondent but he also acted for the 1st Appellant in Memorandum of Understanding dated 31st January 2012 which is the source of the claim in issue.

Mr. Salim stated that, at the time Mr. Alex Balomi was witnessing the memorandum of understanding, there was no pending proceeding in Court, hence he was a competent to act for the Respondents.

From this point, the records clearly show that, Mr. Alex Mashamba witnessed the Memorandum of Understanding. Moreover, he also acted as a counsel for the Respondents before

the trial Court as clearly seen. I must emphasize that Advocates are required to act with high level of integrity and one of crucial measures of integrity is one's ability to realize that there is conflict of interest and refrain from acting on anything with or that may create a situation of conflict of interest. The act of Mr. Alex Mashamba Balomi being a witness to the Memorandum of Understanding that is a center of dispute between parties, ought to refrain from acting in any way as an Advocate of either party in the matter before the trial Court.

This is also clearly stated in **rule 15 (b) of the Rules of Professional Conduct and Etiquette of the Tanganyika Law Society**, that provides as follows:

*"A commissioner may not act as such in any proceeding in which he has acted as advocate of any parties to that proceedings or in which he is interested. **The proceeding referred to is not limited to a court proceeding but also includes, for instance, all documents prepare by a partner or clerk in the commissioner firm...**"*

From the foregoing, I find that Advocate Alex Mashamba Balomi had conflict of interest in representing the Respondents before the trial Court in the matter that resulted from the document

that he witnessed. In the case of **MAGWEIGA MUNANKA SAMO AND 2 OTHERS VS. ALOYCE KISENGA KIMBORI & OTHERS**, Land Case No. 80/2017, High Court of Tanzania at Dar Es Salaam (unreported), the Court cited the case of **General Trading Co. Ltd vs. Skjevesland (2002) EWCA Civil 1567**, it was held:

" The court had power under its inherent powers to prevent abuse of its procedure to restraining an advocate from representing a party if it were satisfied that there was a real risk that his continued participation would lead to a situation where the order made at a trial would have to be set aside on Appeal..."

Basing on the above, I find the fifth ground of appeal **to have merit**. The ground no doubt disposes of the appeal and I see no reason to labour much on rest of the grounds for that will be academic exercise which does not serve any purpose.

In the event, **in invoke the revisionary powers bestowed to this Court and proceed to quash the proceeding of the District Court and set aside its Judgment and Decree thereto. Consequently, the Appellants' appeal is hereby allowed.**

Further to that, the Appellants are awarded costs.

It is so ordered.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya".

L. E. MGONYA
JUDGE
07/06/2023