IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 65 OF 2021

BAHATI NESTORY MWETA ..... APPELLANT

VERSUS

REUBEN K. MWAVANO ..... RESPONDENT

(Appeal from the Judgment and Decree of the District Court of Kinondoni at Kinondoni)
(K. C. Mshomba, RM)
Dated 14th day of December 2020
In
(Civil Case No. 187 of 2019)

JUDGMENT

Date: 05/4 & 22/05/2023

NKWABI, J.:

The appellant and the respondent had a loan agreement. While the appellant claims that he advanced a loan to the respondent at T. shs 14,000,000/=, the respondent admitted to be indebted to the appellant only T.shs 3,000,000/= out of which he had already paid T.shs 2,000,000/= the balance being 1,000,000/= and disturbance money T.shs 500,000/=. The total money due to be paid to the appellant was T.shs 1,500,000/=. The appellant had even attempted to charge the respondent for obtaining money by false pretences and later this civil suit was filed in court. Having heard both parties, the trial court decreed that the appellant was entitled to be paid

T.shs 1,500,000/= by the respondent which the respondent had admitted. It ordered each party to bear their own costs.

The appellant was aggrieved by the decision of the trial court. He lodged this appeal in this Court having the following grounds of appeal:

1. That the trial court erred both in law and fact in failing to consider that the respondent's defence advanced during the defence hearing that the signature on exhibit PE1 (Makubaliano ya kutatua mgogoro nje ya Mahakama) was not his contravened the principles guiding pleadings.
2. That the trial court erred in law and fact in holding that the appellant proved the claim for Tzs 1,500,000/= but failed to prove the claim of 14,000,000/= against the respondent.
3. That the trial court erred in law and fact in holding that the alleged money lending was unworthy based on contradictory testimonies of PW1 and PW2.
4. That the trial court erred in law and in fact by pronouncing judgment before the forensic investigation with respect to the contested signatures could be conducted contrary to its previous orders.
5. That the trial court erred in law and in fact in failing to award the appellant costs of the case.

The appellant is thus urging this Court to allow the appeal with costs and the decision of the trial court be quashed and set aside. The appeal is resisted by the respondent who prays that the same be dismissed with costs.

The appeal was disposed of by way of written submissions. The appellant had his written submissions drawn and filed by Ms. Blandina Harrieth Kihampa, learned counsel while the submissions in reply, for the respondent were drawn and filed by Richard Mbuli, also learned counsel. Ms. Kihampa did not wish to file a rejoinder submission.

I start considering this appeal with the 1st ground of appeal which is that the trial court erred both in law and fact in failing to consider that the respondent's defence advanced during the defence hearing that the signature on exhibit PE1 (Makubaliano ya kutatua mgogoro nje ya Mahakama) did not contravene the principles guiding pleadings.

It was submitted in chief on the first ground of appeal that two documents were tendered to support the suit, exhibit PE1 and PE2. It was claimed by the appellant that the defendant did not deny the allegations specifically. The counsel for the appellant cited Order VIII rule 3, 4 and 5 of the CPC. Sub rule 5 provides that:

5.Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability.

Provided that the court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

The counsel for the appellant apart from citing PC Mogha in his book The Law of Pleadings in India 14th Ed., and Mulla on Code of Civil Procedure, 18th Ed. Vol. 2 also cited the case of **Tanga Gas & Hardware Ltd v. The National Bank of Commerce**, Civil Case No. 1 of 1989 however, the learned counsel for the appellant did not provide a copy of it, so I cannot seriously consider that cited case.

It was contended further that the decision of the trial court was erroneous both in law and in fact because the trial court failed to note and consider that the oral evidence of the respondent was a departure from what he pleaded in his amended written statement of defence.

It was, however, the response of the respondent that the view is misconceived on what amounts to evasive denial as provided by the law in

a given circumstance of the matter at hand it was enough for the respondent to his defense to deny the allegation and state what exactly happened and to let the appellant to carry out his legal duty of proving the allegations to the required standard. The risk of evasive denial is when the plaintiff carries out his burden of proof. Since the document was unworthy to consider therefor this ground of appeal be dismissed.

I agree, it is for the plaintiff to prove his case to the required standard. That is why even when a defendant has not filed a defence, the plaintiff may be called upon for ex-parte proof. It appears that the complaint over the amended written statement of defence is overtaken by events given the fact that evidence was produced, so, the appellant cannot be heard to complain against it. She ought to have claimed so before the evidence is taken. Regard be had to the proviso to Order VIII Rule 5 as I have indicated above. The ground of appeal is unmerited and it is dismissed.

The next ground of appeal for my consideration and determination is that the trial court erred in law and fact in holding that the appellant proved the claim for Tzs 1,500,000/= but failed to prove the claim of 14,000,000/= against the respondent.

Ms. Kihampa reiterated the arguments in respect of the 1st ground of appeal and contended further that in the absence of the respondent's unlawful evidence, there is nothing to support the finding that the appellant failed to prove the claim of T.shs 14,000,000/= and that only 1,500,000/= was proved. The counsel for the appellant prayed that the ground of appeal be allowed.

In reply submission, it was the view of Mr. Mbuli that it is clear on the record that the appellant proved nothing in regard of his allegation it was the respondent who admitted that he is in debt of 1,500,000/= from the appellant as he had a loan of 3,000,000/= of which he paid 2,000,000/= and there remained T.shs 1,000,000/= and promised to pay 500,000/= for disturbance therefore if the appellant wishes to expunge oral evidence then the award of 1,500,000/= shall be excluded as well. He prayed the ground of appeal be dismissed.

I have taken a considerable time re-evaluating the evidence on the record, I am of the view that given the contradictions in the evidence of PW1 and PW2, the appellant proved nothing. It was his duty to prove his case as per **East African Road Services Ltd v. J.S. Davis & Co. Ltd.** [1965] E.A. 676

"He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant."

I shall demonstrate the contradictions when dealing with the 3rd ground of appeal. The trial court was justified in dismissing the claim of the appellant save for what was admitted by the respondent.

Next, I consider the 3rd ground of appeal. This is that the trial court erred in law and fact in holding that the alleged money lending was unworthy based on contradictory testimonies of PW1 and PW2.

Expounding on this ground of appeal, the counsel for the appellant stated that that holding is erroneous. It was further explained that the testimonies of PW1 and PW2 found at pages 27-28 and page 33 of the proceedings on account of exhibit PE1 are consistent. It was added that exhibit PW1 (makubaliano ya kutatua mgogoro nje ya mahakama) speaks for itself and it confirms that T.shs 14,000,000/= was loaned to the respondent. On the basis of exhibit PE1 it was prayed that the ground of appeal be allowed.

Responding to the argument on the 3rd ground of appeal, the counsel for the respondent maintained that the principle of law of evidence is that

contradictions which touch the root of the case are not curable as stated by the trial magistrate with the help of cited decision therefore, it was submitted that the ground be dismissed.

I have considered the submissions of both parties on this ground of appeal, it is worthy to remind the appellant that the court apart from considering the evidence of one witness after the other, it considers the evidence as a whole and come to its conclusion. I have to re-evaluate the evidence in the record under the guidance of **the Registered Trustees of Joy in The Harvest v Hamza K. Sungura,** Civil Appeal No. 149 of 2017, CAT (unreported). The re-evaluation of the evidence shows that the appellant's evidence was weaker as it was tainted by grave contradictions between the testimony of PW1 and PW2 in respect of amount advanced and whether it was advanced to the respondent in lamp sum or in instalment. Given the fact that there ware contradictions in the evidence of the appellant (PW1 and PW2) the appellant ought to have brought to testify the advocate who witnessed the parties sign the makubaliano ya kumaliza mgogoro nje ya mahakama. I accord adverse inference for the appellant's failure to bring the advocate to testify. So, the decision of the trial court cannot be faulted.

I now turn to consider the 4th ground of appeal which goes that the trial court erred in law and in fact by pronouncing judgment before the forensic investigation with respect to the contested signatures could be conducted contrary to its previous orders.

It was the contention of the counsel for the appellant that in the event this Court finds that it was lawful for the trial court to determine the issue of fraud which was not specifically pleaded with its particulars, it was still wrong for the trial court to enter judgment in the absence of inputs or report from the forensic expert. It was added that an allegation of fraud apart from being specifically pleaded, must be proved on a higher decree of probability than that which is required in ordinary civil cases. The counsel for the appellant cited **Twazihirwa Abraham Mgema v. James Christin Basil (as administrator of the estate of the late Christian Basil Kiria deceased),** Civil Appeal No. 229 of 2018 CAT (unreported).

The counsel for the appellant was of the further view that the oral evidence of the respondent did not meet the threshold of proof for fraud. Perhaps the forensic report could have cured this, but the judgment was delivered in its

absence. No good reason was advanced to justify the non-tendering of the forensic report. It was prayed that the ground of appeal be upheld.

In response, the counsel for the respondent maintained that the record is clear that the trial magistrate did not in any how deal with the issue of fraud as submitted by the appellant rather he correctly justified on the reason of irrelevance of forensic report in making his decision therefore it was prayed that the ground of appeal be dismissed.

I have carefully considered the rival submission in respect of this ground of appeal. I think it was a misconception by the counsel for the appellant. It was not for the respondent to prove his defence but for the appellant to prove her case. It was for her to bring that forensic evidence. The criticism against the respondent is misguided. I have noted that the court through the Resident Magistrate In-charge required the forensic bureau to conduct the examination of the disputed signatures. That was improper because, the court of law does not assist a party to prove his or her case. Admittedly, prove of signatures are not solely done by way of forensic examination. It can be done by the persons who witnessed the respondent sign. In this case the advocate who witnessed the signing of the document between the

parties. The appellant did not bring the advocate, so he cannot be heard to complain against the court. The complaint is unmerited. It is dismissed.

The last ground of appeal for consideration and determination is that the trial court erred in law and in fact in failing to award the appellant costs of the case.

The counsel for the appellant contended that it is settled law that a successful civil litigant is entitle to costs, therefore denial to award costs was erroneous, contrary to the law and was based on wrong considerations which is that the appellant was evading receiving payment which is not supported by evidence on record be it oral or documentary. The testimony of the respondent is not founded on pleadings. There is also unlawful evidence supporting the finding that T.shs 1,500,000/= was the remaining outstanding balance.

Replying the submissions on this ground, the counsel for the respondent stated that costs of the case are discretion of the court given to the circumstance of the case in this matter the award emanated from admission of the respondent this invited the fact that if the appellant preferred amicable settlement they might have not come along court procedure therefore the

success claimed by the appellant came from the respondent in such manner it was just and proper not to award costs therefore it was prayed that the 5th ground of appeal be dismissed. Also, it was prayed that the appeal be found lacking in merits and it be dismissed with costs.

I have considered the argument of both parties, I accept the views of the counsel for the respondent. Costs are a discretionary relief. The trial court used its discretion in its determination. Since the appellant did not prove her claim save for what was admitted by the respondent, I think that the trial court applied justly its discretion in not awarding costs to the appellant. That decision cannot be faulted. This approach of mine is guided by **Mbogo and Another v. Shah** [1968] E.A. 93

> *"... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."*

To conclude, I hold that all the grounds of appeal preferred by the appellant are wanting in merit, thus, the appeal is dismissed with costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 22nd day of May, 2023.

J. F. NKWABI
JUDGE