THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO. 04 OF 2023

(Originating from Civil Case No. 15 of 2022 at Newala Urban Primary Court, arising from the District Court of Newala at Newala in Civil Appeal No.2 of 2022)

Saidi Mussa Lilugula .....**APPELLANT**

VERSUS

Ayubu Ajali Mnalidi ..... **RESPONDENT**

JUDGEMENT

Date of last Order: *02.08.2023*

Date of Judgement: *01.09.2023*

Ebrahim, J.

This is the second appeal. The Respondent herein successfully filed a civil case against the Appellant herein at the Primary Court of Newala for recovery of Tshs. 17,600,000/-. The Respondent claimed at the trial court that the Appellant, on various dates borrowed from him the above claimed amount. He outlined the dates whereby the Respondent on 16.02.2019 borrowed the Appellant Tshs 5,000,000/-; on 19.02.2019 Tshs 5,000,000/-; on 20.04.2019 Tshs 2,000,000/-; on 25.04.2019 Tshs. 1,000,000/-; and on 17.06.2019 Tshs. 4,600,000/- totalling Tshs. 17,600,000/-.

The Appellant admitted the claim to the tune of Tshs. 15,000,000/- only and that said that he was ready to pay the said amount after receiving his retirement benefits.

After evaluating the evidence presented before him and the exhibits thereof, the trial magistrate found the Respondent to have managed to prove his claim against the Appellant and ordered the Appellant to pay the indebted amount of Tshs. 17,600,000/- to the Respondent within three months.

Aggrieved by the decision of the trial court the Appellant he unsuccessfully lodged an appeal at the District Court of Newala at Newala. The first appellate court dismissed the appeal with cost on the basis that the evidence of the Respondent was heavier than that of the Appellant.

Aggrieved again, the Appellant has come to this court raising three grounds of appeal faulting the two lower court for basing their decision on the weak evidence of the Respondent; and that he only received Tshs. 3,850,000/- from the Respondent and not Tshs. 17,600,000/-. He also faulted the two lower courts for failure to consider the agreement between the parties.

When the case was called for hearing, both parties appeared in person, unrepresented.

The Appellant prayed to adopt his grounds of appeal. He explained that the amount he owes the Respondent is only Tshs. 5,500,000/- and not Tshs. 30,600,000/-. He itemised the amount that he firstly borrowed from the Respondent through his daughter Tshs. 2,000,000/-; for the second time he received through airtel money Tshs. 2,000,000/-; the 3rd time he received Tshs. 850,000/-; and then Tshs 450,000; and last time Tshs 250,000/-. He said among the claimed amount of Tshs. 30,600,000/-, Tshs. 13,000,000/- concerns his daughter.

On his part, the Respondent equally adopted his reply to the grounds of appeal and insisted that he is owed Tshs. 17,600,000/- by the Appellant.

I have keenly followed the rival submissions by the parties and I have gone through the records. In my view the main task assigned to this court is to look into whether the trial court properly evaluated the evidence before it reached its decision; the decision which was upheld by the 1st appellate court.

As alluded earlier, this is the second appeal. It is trite law that the second appellate court is discouraged from interfering with the concurrent findings of facts by the two courts below except in rare occasions where it is shown that there has been misapprehension of the evidence or misdirection causing miscarriage of justice - **Nchangwa Marwa Wambura v. Republic,** Criminal Appeal No. 44 of 2017 CAT at Mwanza, (unreported); **Musa Hassani v. Barnabas Yohanna Shedafa (Legal Representative of the late Yohana Shedafa)** Civil Appeal No. 101 of 2018 CAT at Tanga (unreported); and **Amratlal Damodar and Another v. H. Lariwalla [1980] TLR. 31**. In **Amratlal Damodar** for instance, it was held that:

> *"Where there are concurrent findings of fact by two courts/ the Court of Appeal, as a wise rule of practice/ should not disturb them unless it is clearly shown that there has been misapprehension of evidence/ a miscarriage of justice or violation of some principle of law or procedure."*

From the above position of the law, it is my considered view that the second appellate court will only interfere with findings of fact of lower courts in situations where a trial court had omitted to consider or had misconstrued some material evidence; or had

acted on a wrong principle, or had erred in its approach in evaluation of the evidence.

In light of the above observations, I am directing my mind to the position of the law that claimant must prove all the necessary facts to establish the claim –see the case of **M/S Universal Electronics and Hardware (T) Limited Vs Strabag International GmBH (Tanzania Branch)**, Civil Appeal No. 122 of 2017) and **Regulation 1(2) of THE MAGISTRATES' COURTS (RULES OF EVIDENCE IN PRIMARY COURTS) REGULATIONS GN. No 22 of 1964** read together with **Regulation 2(3)** which provides that any fact which is within the knowledge of the defendant (in our case the Appellant), the defendant(Appellant) must prove that fact. Again, **Regulation 6** of the same law requires in civil cases that, it shall be sufficient for the court to decide the matter in favour of the party whose weight of the evidence is greater than the weight of the evidence of the other. See also the persuasive case cited by the 1st appellate court of **Serengeti District Court and Another Vs. Maruko Sendi** [2011] TLR 334 (HC) where it was held as follows:

"According to the law, both parties to a suit cannot tie, but the person whose evidence is heavier that of the other is the one who must win"

To begin with, the Appellant in this case admitted at the trial court that he received Tshs. 15,000,000/- from the Respondent and not Tshs. 17,600,000/- as claimed. He said he was ready to pay such amount. Surprisingly, in his submission he has come with another amount of Tshs. 5,500,000/- as the only amount that he has received from the Respondent. Confusing to learn that in his second ground of appeal he said he only received from the Respondent Tshs. 3,850,000/- the amount which never featured at the trial court. Surely, Appellant is deliberately creating a confusion on the claimed amount.

The Respondent listed the dates with the amount that he borrowed the Appellant totalling to Tshs. 17,600,000/-. I have perused the records and there are forms that the Appellant filed and acknowledged by his signature to have received such amount of money. As such, I find no reason to disagree with both lower courts that the Respondent managed to prove his case in

terms of **Regulation 6 of THE MAGISTRATES' COURTS (RULES OF EVIDENCE IN PRIMARY COURTS) REGULATIONS GN. No 22 of 1964.**

As for the Appellant, since he is the one who is disputing the claimed amount by admitting the loan but on a different amount, the burden shifted to him to prove such amount as per **Regulation 1(2) read together with Regulation 2(3) of GN No. 22/1964.** To the contrary, and as alluded earlier he kept on contradicting himself and changing the loan amount. Evidently, he is not a credible witness.

As per the rule of the thumb, once a person borrows money, that person must ultimately pay it back and in most cases with interest.

Thus, the Appellant complaint that their agreements were not considered has no basis because the trial court considered what was agreed between parties and went further to consider the Appellants defence vis a vis his exhibit (SU1) and found that the Appellant's own argument does not tally with what he has presented in court.

Following the spirit of the cited case of **Serengeti District Council Case (supra),** I find that the Appellant is merely twisting the

narratives in avoiding to repay the loaned amount and the Respondent's case is heavier that the Appellant's.

That being said, I find no misapprehension or misconstruction of evidence to warrant this court to interfere with the concurrent findings of the two lower courts. Consequently, I find this appeal to be unmeritorious and I dismiss it in its entirely with costs.

Accordingly ordered.

R.A. Ebrahim

Judge

Mtwara

01.09.2023