IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CIVIL APPEAL NO 7 OF 2023

(Arising from the Resident Magistrates' Court of Arusha Civil Case No. 10 of 2021)

AFRICAN ZOOM ADVENTURES

TOURS LTD (AZAT)..... APPELLANT

VERSUS

HERRITAGE FINANCING CO. LTD .....1ST RESPONDENT

MAJEMBE COMPANY LTD ..... 2ND RESPONDENT

JUDGMENT

11th July & 10th October, 2023

KAMUZORA, J.

In this appeal the Appellant is challenging the judgment and decree of the Resident Magistrate court of Arusha (the trial court) dated 17th day of November, 2022 in Civil Case No. 10 of 2021. The brief fact of the matter leading to the current appeal as may be depicted from the trial court record is that, the 1st defendant extended loan facility to the Appellant whereas the Appellant deposited his motor vehicle make Toyota Land Cruiser No. T662 BYM as security for the loan facility. It was contended by the Appellant that he requested for loan reschedule but

was denied that chance by the first Respondent who proceeded on engaging the service of the 2nd Respondent to realise the security. The Appellant filed a suit before the trial court claiming that the 1st Respondent acted in material breach of the loan agreement by refusing to reschedule the loan resulting to illegal sale of his motor vehicle with registration number T662 BYM to a third party, Adventure Aloft Tanzania. The Appellant therefore claimed for recovery of the said motor vehicle or payment of money equivalent to the value of the sold motor vehicle.

It was the defence by the 1st Respondent herein before the trial court that she was exercising her lawful right to recover the loan subject to the terms of the contract as the Appellant was accorded an opportunity to pay the said loan but defaulted. The trial court dismissed the Appellant's claims and ordered each part to bear its own costs. Being aggrieved by that decision, the Appellant preferred the current appeal on six grounds which are reshaped as hereunder: -

1) *That, the learned trial magistrate grossly erred in law and fact for failure to appreciate the substantial amendments made to the plaint and relying only to the original plaint henceforth leading to misconceived conclusions.*
2) *That, the learned trial magistrate grossly erred in law for subjecting the records of the case to an objective scrutiny, and in blatant disregard to a clear and compelling oral evidence over*

the 1st Respondent's breach of partial settlement and consensus arrived at, following the frustration of the original loan agreement.

3) *That, the learned trial magistrate grossly erred in law by failure to appreciate the applicability of doctrine of frustration of contract in the case under consideration.*
4) *That, the learned trial magistrate grossly erred in law and fact by making speculative assumption and misguided conclusion over the legality of sale of Appellant's motor vehicle without proper rationale under the law, and in blatant disregard to a clear evidential gap from defence side.*
5) *That, the learned trial magistrate grossly erred in law and fact by ignoring the evidence adduced by Appellant over the illegality of the sale of motor vehicle.*
6) *That, the learned trial magistrate grossly erred in law for failure to appreciate the pecuniary fact and circumstance of the case under consideration and for premising the decision on the court of appeal decisions whose facts and circumstances were substantially different and distinguishable.*

The appeal was argued by way of written submissions and as a matter of legal representation, the Appellant enjoyed the service of Mr. Asubuhi Yoyo while the Respondents were dully represented by Mr. Silayo Edwin, all learned advocates. Both parties filed their submissions as scheduled.

Arguing in support of the 1st ground of appeal, Mr. Yoyo submitted that the trial court record dated 10/11/2021 reveals that the Appellant filed amended plaint but the trial court at page 8 to 17 of its judgment referred the plaint instead of the amended plaint hence, there was a departure from what the Appellant pleaded. Mr. Yoyo further submitted that the real controversy between the parties in the amended plaint was failure on the side of the lander to fulfil the newly implied obligation following frustration of the initial one-month contract. That, the trial magistrate departed from what was pleaded in the amended plaint and failed to consider the modifications made in exhibit P3 thus, the decision was made without considering what was pleaded by parties in the amended plaint. He was of the view that the said omissions resulted to failure by the trial court to resolve the real controversy between the parties hence, caused failure of justice. Reference was made to the case of **Stanbick Bank Ltd Vs. Trust Engineering Work Limited,** Civil Appeal No. 374 of 2019 CAT at DSM.

Arguing in support of the 2nd ground of appeal the counsel for the Appellant submitted that, there was no proper scrutiny of the Appellant's evidence at the trial court. Pointing at the evidence of PW1, PW2 and PW5 as well as Exhibits P2, P4, P5 and P10, it is the Appellant's

contention that there was no specific due date to repay the loan. That, it was impracticable to rely on the evidence of DW1 that the re-schedule was for one month. He added that, even after the final warning (Exhibit D1), there was a consensus between parties on the re-scheduling of the loan but there was no any written memorandum over such consensus.

On the 3rd ground, it is the Appellant's submission that the law on impossibility to perform contract or changes of circumstances in a contract for which parties are not to be blamed is provided for under section 56(2) of the Contract Act Cap 345 R.E 2019. That, in the current matter the performance of one month contract was impossible on the Appellant's side following the out break of COVID 19 and the cancellation of the tourist's trips thereto. That, it was not proper for the trial court to rule out that there is no law in Tanzania that accommodate Covid 19 situation.

Arguing in support of the 4th and 5th grounds, the Appellant's counsel submitted that, pursuant to exhibit P8 which is Habari Leo newspaper, the auction was to be held on 23/11/2020 but the date passed without the said auction being held. That, there was no any other sufficient notice issued to justify the subsequent sale hence, any subsequent sale carried out was arbitrarily.

Another fault pointed out by the Appellant is the valuation report. That, apart from not properly being certified, it was issued on 26/11/2020 after the appointed date of sale as evidenced by exhibit P9. In other words, the Appellant alleges that sale was conducted prior to obtaining of the valuation report hence, no proper valuation. To cement in his submission, the Appellant's counsel referred decision in the case of **Registered Trustees of Africa Inland Church, in Tanzania Vs. CRDB Bank PLC, MEM Auctioneers and General Brokers Ltd and another,** Commercial Case No 7/2017 at Mwanza.

On the 6th ground, the counsel for the Appellant submitted that, the trial court erred in premising her decision on the court of appeal decision whose facts and circumstance were substantially different and distinguishable. To him, the case of **Private Agricultural Sector Support trust & another Vs. Kilimanjaro Cooperative Bank Ltd,** Consolidated Civil Appeal No 171 & 172 of 2019 relied upon by the trial magistrate was distinguishable. In concluding, the counsel for the Appellant prayed for the appeal to be allowed.

In opposing the appeal, the counsel for the Respondent submitted that in its determination, the trial court responded to the issues that were raised by parties and considered evidence of both parties. To him,

none of the issues raised was left unattended or undetermined and none of the facts pleaded in the amended plaint was left unattended. That, the only party left were reliefs sought and the same were left because, the same were to be determined upon finding that the remedies sought by the Appellant were awardable. He insisted that the reliefs sought in the original plaint and in the amended plaint were much similar with addition of few words and the trial magistrate considered the amended plaint in determining the case. To him, there was only slight omission of determining reliefs but the trial court reasoned why it did not determine the reliefs. He was of the view that even if considered as omission, the same can be cured under sections 96 and 97 of the Civil Procedure Code cap 33 R.W 2019. The Respondent considered the case of **Stanbic (supra)** cited by the Appellant as not relevant to the matter at hand.

Responding to the second ground, the counsel for the Respondent submitted that the main complaint by the Appellant was that there was oral consensus on repayment of loan between the parties after the Appellant was obstructed by COVID 19 from fulfilling contractual obligation. The Respondent denies existence of such consensus and the allegation that she breached such agreement. The Respondent argued that the claim is an afterthought as the parties to the case are artificial

persons incapable of speaking by word of mouth. On the claim that COVID 19 was the reason that hindered the Appellant from repaying the loan as tourist cancelled their trips, the Respondent's counsel replied that such claim was an afterthought because, as per exhibit P3, the purpose of the loan was not indicated as tourism.

Responding to the third ground that the trial magistrate failed to appreciate the doctrine of frustration of contract, the counsel for the Respondent submitted that, the loan contract, exhibit P3 it did not state the reason for the loan. That, even PW1 did not state if the Defendant was made aware of the reasons for the loan. That, section 56 (2) of Cap 345 R.E 2019 cited by the Appellant does not apply because the contract (exhibit P3) does not provide for *Force Majoure* clause for the Appellant to use Covid 19 as unexpected event. He insisted that, the 1st Respondent is also a business entity thus, her business could not be victimised by Covid 19 at the expense of rescuing the Appellant.

On the fourth and fifth grounds to where the Appellant challenge the auction and the valuation report, the counsel for the Respondent submitted that the modality of selling the security was not indicated in the agreement, exhibit P3. That, the evidence by DW1 also reveals that the Respondent was not forced to conduct the valuation before sale but

hey conducted valuation for purpose of knowing the value of the motor vehicle at the time of auction. He added that the said valuation led to the postponement of the auction as described in the newspaper. He insisted that the auction was conducted and the motor vehicle sold as certificate of sale, Exhibit D2. That, since exhibit P3 clearly stipulates that on failure to repay the loan the security will be executed, the trial court was correct to rely on the decision in the case of **Private Agriculture (supra).**

Responding to the sixth ground, the counsel for the Respondent submitted that, the trial magistrate was correct and the decision was correct and justifiable as it resolved the controversy between the parties. The Respondent thus prayed for the appeal to be dismissed.

In a brief rejoinder the counsel for the Appellant reiterated his submission in chief and added that departing from the amended plaint is fatal. That, the law allows the formalities used by individual to be applied by companies for contracts made on behalf of company. He urged this court to be guided by the case of **Yara Tanzania Ltd Vs. Ikuwo General Enterprises Limited**, Civil Appeal No 309 of 2019 in discussing the legality of oral contract entered by company representatives.

On the Respondent's argument that the contract was silent on the purpose of the loan, the Appellant's counsel added that the evidence is clear as to the effect of COVID 19. The evidence is also clear that parties agreed to re-schedule the loan due to COVID 19 that affected the Appellant.

I have considered the record of the trial court, grounds of appeal and rival submissions from counsel for both parties. Starting with the first ground, the Appellant faults the trial court for basing its decision on the original plaint while there was amended plaint in place. Upon perusal of the trial court proceedings, it is clear that on 15/11/2021 the Appellant filed an amended paint and the 1st Respondent filed Written Statement of defence on 19/11/2021. It is vivid under pages 2 and 3 pages of the trial court judgment that while referring remedies sought by the Appellant, the trial magistrate captured reliefs stated under the original plaint and not those under the amended plaint. The trial magistrate also captured issues that were raised by parties and determined the said issues. Among the issues dealt with were the reliefs, and under page 27 of judgment, the court stated that *"this court will not labour itself on the relief sought by the parties."* The court went further by addressing the 3rd relief sought under the amended plaint.

Without doubt, the trial magistrate erred in referring reliefs sought under the original plaint while the same was already amended. However, I do not see if that error occasioned to any miscarriage of justice. The reason for concluding so is that, despite capturing reliefs under original the plaint, the trial magistrate's assessment of evidence and reasoning considered the contents raised in the reliefs under the amended plaint. The record shows that there were two amendments of the plaint; one dated 17/09/2021 and another dated 15/11/2021. While the first amendment contained reliefs similar to the original plaint, the subsequent amended contained slightly different reliefs from that of the original plaint. With that record, it is obvious that the trial magistrate referred the wrong plaint. However, it is a fact that, under the original plaint the Appellant alleged breach of contract but under the amended plaint, she alleged breach of contract for failure to re-schedule the loan. That fact was well discussed by the trial magistrate in her decision from page 21 to 23 of the judgment. Other reliefs although referred, were not dealt with for the court found the first relief not proved and concluded that there was no need to determine other reliefs. In that regard, I find this ground devoid of merit.

On the second ground, the Appellant faults the trial court decision on account that there was no proper scrutiny of Appellant's evidence. That, the trial magistrate did not consider the Appellant's evidence proving that the Respondent's breached implied obligation formed following consensus between parties. I have gone through the evidence in record and in fact there is oral allegation that the parties agreed to re-schedule the loan. That fact was strongly disputed by Respondent who insisted that the Appellant was the one in breach of her obligation to repay the outstanding loan. In my view, having entered into a written agreement, any variation for the agreement ought to be in writing. Legally, the terms of a written contract can only be altered or varied by another written contract and not oral contract. Word of mouth cannot supersede the terms of a written contract lawfully entered between the parties. The Appellant's claim that after the initial default by the Appellant parties entered into an oral agreement to vary the terms of the said contract, to me, is wanting in merit. I agree with the trial magistrate's conclusion disregarding the alleged oral agreement. This ground is therefore meritless.

Regarding the third ground based on frustration of the contract, I find the same also meritless. While I agree that a contract can be

frustrated by unforeseeable circumstances (force majeure), there is need for proof that the purpose of the loan was that to which such circumstance was not foreseen. For instance, where loan is advanced for purpose of accommodating tourists and the country burn tourism activities, such contract will be frustrated by such burn, or, where a contract is entered for purpose of facilitating seasonal agriculture and geological misallocation happen and it does not rain, the contract will be considered as frustrated. However, in the matter at hand, although there is no dispute that the Appellant is tourist company, there is nowhere in their contract they indicated that the loan was for purpose of tourist activities for them to complain that COVID 19 frustrated the purpose of the loan. I therefore agree with the Respondent's argument that section 56(2) of the Contract Act Cap 345 R.E. 2019 is inapplicable in the matter at hand. The said provision read;

> *"A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."*

The wording of the above provision implies that impossibility in performance of the contract will depend much on the purpose of the contract. A person asking for a loan without advancing the reason for

loan or the source of income for repayment of the loan cannot claim that his repayment for the loan was frustrated by either drop in his business or inability to raise fund. In the current appeal, the Appellant was advance one month loan without specifying the purpose and source of repaying the same. She cannot therefore complain that the performance of one month contract was frustrated by the outbreak of COVID 19 as there was cancellation of the tourist trips. Thus, the trial court was correct to rule that Covid 19 could not stand as excuse for not complying to the loan agreement. It must be noted that, parties are bound by terms of the contract they freely enter. See the case of **Simon Kichele Chacha Vs. Aveline M. Kilawe** (Civil Appeal No 160 of 2018) [2021] TZCA Tanzlii. The third ground of appeal is therefore meritless.

On the 4th and 5th grounds the Appellant faulted the auction and valuation report. Pursuant to exhibit P8, Habari Leo newspaper, the auction was to be held on 23/11/2020. The Appellant does not dispute the fact that the notice for auction was issued but her dispute is on the date the auction was conducted. The Respondent witness explained that the auction was not conducted on the scheduled date as there was no valuation. The same was conducted on 24/11/2021 and it was followed by auction on 26/11/2021 as evidenced by the certificate of sale. It must

be noted that the purpose for publishing notice is to notify the borrower on the intention to realise the security for the borrower to pay the outstanding loan if he/she intends to serve the loan security from being sold. The Appellant did not dispute her knowledge to the existence of notice for auction thus, to me she was not prejudiced by the adjournment of the auction. In fact, the adjournment gave her more chance to act to secure the security from being auctioned. Thus, the claim that there was no any other sufficient notice issued to justify the subsequent sale, is wanting. I therefore agree with the trial court's conclusion that the auction was proper. As regard to valuation report, the valuation was conducted on 24/11/2021 while the sale was effected on 26/11/2020 thus, nothing vitiates the valuation report. I therefore find the 4th and 5th grounds devoid of merit.

On the last ground, the Appellant's counsel contended that the trial magistrate premised its decision on the court of appeal decisions whose facts and circumstances were substantially different and distinguishable. In its decision, the trial court relied on the decision in the case of **Private Agricultural Sector Support trust & another Vs. Kilimanjaro Cooperative Bank Ltd,** Consolidated Civil Appeal No 171 & 172 of 2019 in discussing the parameters of loan. She insisted that

based on the decision in that case, the Appellant was bound to repay the loan advanced to her by the Respondent. I do not agree with the Appellant's contention that the said case is distinguishable. Similar the matter at hand, the above case originated from breach of contract and the circumstance under which the same was referred is much relevant to the case at hand. I therefore find the 6th grounds of appeal meritless.

In the final analysis, the appeal is devoid of merit and the same stand dismissed in its entirety. Costs of the appeal to be borne by the Appellant herein.

DATED at **ARUSHA** this 10th day of October, 2023.

D.C. KAMUZORA

JUDGE