

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

HC CIVIL APPEAL NO. 08 OF 2023

(Originating from RM'S Court Mwanza RM Civil Case No. 76/2021)

ZAITUNI MUSETI NG'ARIBA.....APPELLANT

VERSUS

JOHN BHOKE GENTEGAI.....RESPONDENT

JUDGMENT

15/8/2023 & 13/10/2023

ROBERT, J:-

The appellant, Zaituni Museti Ng'ariba, filed this appeal against the decision of the Resident Magistrates' Court of Mwanza in Civil Case No. 76 of 2021, which was decided in favour of the respondent, John Bhoke Gentegai. The appellant's appeal is based on one ground, contending that the trial court erred in law and fact when it dismissed her suit against the respondent, asserting that she had failed to prove her claim of TZS 37,000,000/=.

The appellant initially instituted a summary suit against the respondent at the Resident Magistrates' Court, seeking payment of TZS 37,000,000/=, which she alleged to have loaned to the respondent on 12th June 2020, in response to his request for financial assistance. She

alleged that the respondent promised to repay the amount by 17th June 2020.

The appellant claimed that, on 17th June 2020, the respondent issued a cheque (No. 000024) worth TZS 37,000,000/= in her favour as a means of repayment. However, the cheque was dishonored when presented to the bank due to insufficient funds, and it was marked "refer to the drawer." Subsequently, the appellant demanded the immediate payment of the said sum through a demand notice dated 1st August 2020.

In his Written Statement of Defence (WSD), the respondent contested the appellant's claim, stating that he had not sought any financial assistance from her and had not issued a cheque as alleged. He claimed that he had lost his cheque book on 8th January 2020, reported the loss to the police, and notified the bank on 9th January 2020 through a letter, which was received and stamped.

Furthermore, the respondent contended that the only transaction between him and the appellant was the transfer of a piece of land, which was already concluded.

The trial court identified three issues for determination: First, whether the respondent is liable to the appellant for TZS 37,000,000/=; Secondly, if the above issue is answered affirmatively, under what circumstances did the debt arise? Lastly, to what reliefs are the parties entitled?

The appellant (PW1) testified that on 12th June 2020, the respondent visited her office, a loan financing entity, and requested TZS 37,000,000/= to support his gold business. She agreed to provide the loan, under the condition that the respondent would offer his title deed as security. The respondent claimed that his title deed was with Equity Bank until he completed his loan repayment, so he proposed giving her a post-dated cheque due within five days. The cheque, dated 17th June 2020, was handed over to the appellant.

After the five-day period passed, the appellant presented the cheque to NMB Bank, but the respondent refused to answer her calls. Eventually, she opened an account at Equity Bank on 23rd June 2020 to complete the transaction. However, the respondent did not confirm the cheque, and the bank found insufficient funds, resulting in the cheque being marked "refer to drawer" (Exhibit P1). The appellant also issued a demand notice (Exhibit P2) dated 1st August 2020.

The respondent (DW1) disputed the loan and alleged that the only transaction he had with the appellant was related to the purchase of a plot of land. He stated that he had paid TZS 50,000,000/= for the relevant land. He claimed to have lost his cheque book on 8th January 2020, reporting it to the police and the bank. He denied the issuance of the cheque and refused to confirm the cheque presented by the appellant.

The trial court concluded that the appellant failed to establish her claim due to the absence of a loan agreement, and the circumstances surrounding the post-dated cheque cast doubt on the veracity of the claim. The court also raised concerns about the authenticity of the demand notice and questioned why the appellant delayed filing the case.

At the hearing of this appeal, Mr. Kassim Gilla, learned counsel for the appellant, argued that the trial court's reasons for dismissing the case were not legally sound. He contended that the drawing of the cheque by the respondent was sufficient evidence of his acknowledgment of the debt, obviating the need for a written loan agreement. He also argued that there was no legal requirement for the demand notice to have signatures or stamps on every page. Finally, Mr. Gilla maintained that the delay in filing the case, exceeding a year after the demand notice, did not affect the legality of the suit.

Mr. Bahati Kessy, learned counsel for the respondent, opposed the appeal, stating that the appellant's claim was not proven on a balance of probabilities. He argued that the absence of a written loan agreement, as well as the absence of proper documentation, including withdrawal slips or a representative from the appellant's company, cast doubt on the veracity of the claim. He also pointed out that the cheque had been allegedly lost, reported to the police, and therefore should not have been accepted by the bank. He defended the trial court's decision on the ground that the appellant failed to prove her case.

In his rejoinder, Mr. Gilla reiterated that the cheque was in the possession of the appellant and did not qualify as a banker's book under the Evidence Act. He disputed the respondent's claim regarding reporting to the police and argued that the record did not indicate if the respondent had filed a loss report. Mr. Gilla maintained that the appellant's case should be allowed based on the evidence presented.

The primary issue in this case is whether the appellant has proven, on a balance of probabilities, that the respondent owes her TZS 37,000,000/=. The appellant contends that the cheque drawn by the respondent is conclusive evidence of the debt, while the respondent disputes the existence of such a debt.

This Court is aware that in civil cases, the proof rests on a balance of probabilities. Therefore, it is the duty of the appellant to demonstrate, on a preponderance of the evidence, that the respondent owes her the claimed amount. (See the Court of Appeal decision in the case of **Ernest Sebastian Mbele vs. Sebastian Mbele**, Civil Appeal No. 66 of 2019).

With regards to the existence of a Loan Agreement, the Court notes that the appellant's case was primarily based on an oral loan agreement. However, the appellant was unable to provide conclusive evidence of the existence of this loan agreement or the terms of the agreement. The presentation of the cheque, while indicative of a financial transaction, does not on its own prove the existence of a loan agreement or the specific terms of the loan. The respondent's position that his cheque book was lost and reported as such to both the police and the bank also raises questions about the authenticity of the cheque. Similarly, the issue of consideration is also contentious as the appellant alleges that a loan was extended while the respondent claims that the funds were related to a land transaction. The burden of proof in civil cases, as provided in Section 110 of the Evidence Act, is on the plaintiff to establish their case on a balance of probabilities. In this instance, the appellant failed to meet this burden.

As for the authenticity of the Demand Notice, the appellant's argument that the demand notice did not require every page to be signed and stamped is valid. However, the dispute over the authenticity of the notice raised legitimate concerns about its veracity. While the absence of signatures and stamps on every page may not be a legal requirement, this Court finds that, the trial court had justification in trying to verify its authenticity in light of the dispute.

With regards to the issue of delay in instituting the case, this Court finds that while it may raise questions, this issue does not have a legal effect on the validity of the case. As long as the case was brought within the prescribed time of limitations, the delay, in this case, does not render the claim invalid.

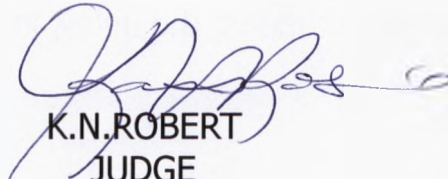
On the issue of whether the cheque qualified as a banker's book under section 78 of the Evidence Act, this Court finds that, in this case, the appellant was the drawee of the cheque and had possession of it. Therefore, it does not fit the definition of a banker's book as described in the Evidence Act since the relevant cheque did not form part of the entry in a banker's book and was not in the custody or control of the bank. However, it is essential to note that the respondent did not deny drawing the cheque. The issue raised was the loss of the chequebook, which

occurred earlier. The Court having considered the circumstances surrounding the cheque and the respondent's actions, finds that it does not alter the core issues in the case.

In light of the above analysis, the Court finds that the appellant failed to prove her case on a balance of probabilities. Therefore, the appeal is dismissed. The decision of the Resident Magistrates' Court of Mwanza is upheld. The respondent is awarded costs of the appeal.

It is so ordered.




K.N. ROBERT
JUDGE
13/10/2023