IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB-REGISTRY

AT SONGEA

CIVIL APPEAL NO. 01 OF 2023

(Originating from Songea District Court at Songea, in Civil Case No. 03 of 2022)

IMMAKULATA ALOIS MITOTO .... APPELLANT

VERSUS

DAVID MILINGA .... RESPONDENT

JUDGEMENT

Dated: 30th October and 11th December, 2023

KARAYEMAHA, J.

This appeal stems from the decision passed by the District Court of Songea at Songea (the trial Court) in respect of Civil Case No. 03 of 2022 instituted by the appellant claiming against the respondent for payment of Tshs. 49, 500,000/= (forty-nine million, five hundred Tanzania shillings only) which she gave to the respondent for safe custody on trust. She is complaining that the respondent breached that trust.

After a full trial which saw the appellant produce two witnesses and the respondent one witness, the trial court was satisfied that the appellant failed to prove her allegations on the balance of probabilities.

The decision has aggrieved the appellant hence this appeal. The memorandum of appeal has four grounds, reproduced as hereunder:

1. *The trial magistrate erred in law and fact when it held that there was no reasonable explanation as to why the respondent was trusted by the appellant.*
2. *The learned trial magistrate erred in law and fact not to believe the evidence of PW2 basing on the existing matrimonial issue without considering the credibility of the witness.*
3. *The learned trial magistrate erred in law and fact to base its finding on the document, which was not tendered and admitted as exhibit during hearing of the case.*
4. *The trial court erred in law when it delivered the judgement in favour of the respondent herein contrary to the law.*

At the date scheduled for the hearing, the appellant was represented by Mr. Lazaro Simba, learned advocate. All efforts to procure the attendance of the respondent proved failure. He could not enter appearance even after publishing the summons in the newspaper. Having no other option and after complying with the serving procedure, the appeal was ordered to proceed *ex parte.*

When he was invited to expound the grounds of appeal, Mr. Simba commenced by praying to consolidate the 1st, 2nd and 4th grounds of appeal and argue them together and argue the 3rd ground of appeal separately.

The learned counsel started with third ground by faulting the trial court for relying on the exhibit, which was neither tendered nor admitted during the trial. He argued cautioning that in law annexture is not an exhibit to be relied upon on giving decision. For a document to be relied upon, it must be admitted as an exhibit and form part of the proceedings, he stated. It was his argument that the trial court operated into errors when it used a document annexed on the plaint and ultimately reached to a conclusion that the appellant failed to proof her case. Referring this court to the decisions; **Godbless Jonathan Lema v. Musa Hamis Mkanga and 20 Others**, Civil Appeal no. 47 of 2002, **Sabry Hafidh Halifan v. Telecom Ltd (Zantel Zanzibar),** Civil Appeal No. 47 of 2009 as it was referred in the case of **Julius Mungule (as administrator of the Estate of the late Wilfred Ndetaulwa Mungure) v. Mwarabu Kitisha**, Civil Appeal No. 62 of 2020 HCTZ-Arusha Registry (unreported) at pages 4 and 5, Mr. Simba held the view that the intention of attaching documents to a plaint or WSD is to inform the adversary of the case and

prepare itself. He concluded that it is an error to use attachments to give a decision because they are not part of the proceedings.

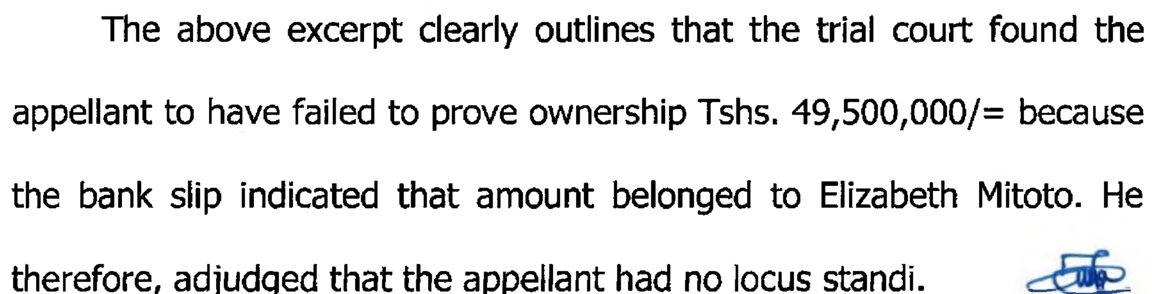
Amplifying the combined grounds of appeal (first, second and fourth grounds) the counsel for the appellant emphatically stated that the appellant proved the case to the balance of probabilities as per section 110 of the Evidence Act [Cap 6 Revised Edition 2022] (the Evidence Act). It was his firm argument that the appellant proved through oral and documentary evidence that she entrusted a sum of Tshs. 49,000,000/= to the respondent for safe custody. He argued further that there was strong evidence proving that that amount was withdrawn from account No. 61702501390 and gave it to the respondent in the presence of PW2 in July, 2017. The learned counsel submitted that it was wrong for the trial court to hold that there was no trust while the respondent was her son-in-law.

I have dispassionately considered the argument by the appellant's counsel to this appeal in the light of the trial court's record and the grounds of appeal. I should now be in a position to confront the grounds for determination as appearing in the grounds of appeal raised. It is pertinent to bear in mind that in the instant appeal, as the first appellate court my duty is to analyse and re-evaluate the evidence which was before

the trial court and come to my own conclusion on the evidence without overlooking the conclusion of the trial court (see **Pendo Fulgence Nkwenge v Dr. Wahida Shangali,** Civil Appeal No. 368 of 2020 and **Moses Mwakasindile v. Republic**, Criminal Appeal 15 of 2017 [2019] TZCA 275 (30 August 2019) at page 13, TanzLII.

In the 3rd ground of appeal, essentially the complaint is that the trial magistrate erred to base its findings on the document which was not tended and admitted as exhibit during hearing of the case. I find it apt to reproduce part of the holding by the trial court that giving rise to the complaints found at pages 8 and 9, where the trial magistrate stated:

> *"Third, I have carefully gone through the plaint and its annextures especially annexture P1, which is the Bank slip which it is alleged to be used to withdraw the money Tsh 49,500,000/=. I do find that the bank slip belongs to another person ELIZABETH MITOTO who is the stranger in this case. This creates doubts as to why the plaintiff have (sic) impersonated the name of another person without notifying this court. Therefore even the existence of the money Tsh 49,500,000/= which is alleged to be entrusted to the defendant is questionable. In addition to that the plaintiff have (sic) no locus stand to sue."*



The above excerpt clearly outlines that the trial court found the appellant to have failed to prove ownership Tshs. 49,500,000/= because the bank slip indicated that amount belonged to Elizabeth Mitoto. He therefore, adjudged that the appellant had no locus standi.

I agree with Mr. Simba on this contention because the trial court's is very clear that the bank slip was not tendered and admitted as evidence. The purported bank slip was merely attached to the plaint and referred to as "P1". The proceedings do not suggest that it was tendered and cleared for admission as an exhibit. The cardinal principle is that annextures are not exhibits. This long-established principle was set by the CAT in case of **Godbless Jonathan Lema v Mussa Hamis Mkanga and 2 others,** Civil Appeal no. 47 of 2012 (unreported), while reiterating its earlier decision in **Sabry Hafidhi Khalfan v Zanzibar Telecom Ltd (Zantel) Zanzibar,** Civil Appeal No. 47 of 2009 (unreported). It was held:

> *"We wish to point out that annextures attached along with either the plaint or written statement of defence are not evidence. Probably it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose annexing the documents either to the plaint or to the written statement of defence is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annextures are not evidence."*

In the present case, the trial magistrate knew that the bank slip was an annexure but reasons best known to him he treated it as an exhibit. With respect, the trial Magistrate committed a material error. At this juncture, it suffices to quash the decision passed basing on the bank slip

which was not admitted as an exhibit, hence not integral part of the proceedings.

Next for consideration is the issue whether the appellant proved the case to a standard required in law. Mr. Simba submitted that the appellant proved the case to the balance of probabilities. I am alive to the settled principle in law that in civil litigation the burden of proof lies on the plaintiff to prove his case in terms of section 110(1) and (2) and section 112 of the Evidence Act. In the case of **Anthony M. Masanga v Penina (Mama Mgesi) and Lucia (Mama Anna)**, Civil Appeal No 118 of 2014 (unreported), the CAT held:

> *"Lets begin by re-emphasising the ever cherished principle of law that generally, in civil cases the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act, Cap. 6 of the Revised Edition 2002."*

In the present case the appellant is convinced that she gave Tshs. 49,500,000/= to the respondent trusting him that he would keep it. She gave him that money in the presence of PW2, her daughter who was formerly the respondent's wife.

The learned trial Magistrate did not see sufficient evidence on record proving that the appellant gave a huge amount of money to the

respondent on trust. He found nothing convincing in the assertion that the appellant gave that money to the respondent because PW2 and the latter were a couple. He firmly concluded that that assertion was insufficient to prove that there was faith, confidence or belief which created trust. I shall come to this later on.

Mr. Simba was emphatic that the money entrusted with the respondent was withdrawn from account No. 61702501390 and gave it to the respondent in the presence of PW2 in July, 2017. PW1 (appellant) testified, confirming, that she withdrew it from that account in NMB on 22/7/2017 for the purpose of treatment.

Reverting to the provisions of sections 110 and 112 of the Evidence Act, did PW1 put on the record sufficient evidence. I don't think so. Reasons are as follows: **One,** there is no proof that she owned a bank account with NMB apart from mentioning the account number. **Two,** there is no proof that she once deposited any amount of money in the mentioned account. **Three,** there is no proof that she withdrew Tshs. 49,500,000/= from account No. 61702501390 NMB bank on 22/7/2017.

Guided by the evidence on record, I disagree with Mr. Simba that the appellant offered weightier evidence conforming to a standard set by law that she proved her case to the balance of probabilities. I am firmly

convinced that the appellant's evidence is less probable hence has not discharged the burden of proof.

In the circumstances, it is inacceptable to assert that the respondent breached trust. In law, a trust is a relationship in which the holder of a property gives it to another person who must keep or use solely for the benefit of another person normally called the beneficiary.

In the instant case, I concur with the trial magistrate that failure by the appellant to prove that she owned such amount of money, she had nothing to entrust to the respondent. Indeed, the trustor (appellant) had no money to give to the trustee (respondent) to keep. Thus, the argument by the learned counsel that the appellant proved her case to the hilt, does not stand. It was more crucial for the appellant to produce documentary evidence that she owned a bank account with NMB bank, that she had Tshs. 49,500,000/= in her account and withdrew it. Then she needed to give a probable explanation that after withdrawing it she gave it to the respondent.

In conclusion, the appellant failed not only to prove that she had money but also failed to prove that she handed it over to the respondent. In the circumstances, I find the appeal lacks merit. The appeal is hereby

partly dismissed. No costs are awarded because the respondent neither filed any document nor appeared in court.

It is so ordered.

DATED at **SONGEA** this 11th day of December, 2023.

J. M. KARAYEMAHA
JUDGE