IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 02 OF 2023

(C/F Civil Appeal No. 19 of 2022 in the District Court of Moshi at Moshi; Originating from Civil Case No. 168 of 2022 in the Primary Court of Moshi at Moshi)

AMINA SIRAJI…… APPELLANT

VERSUS

SALMA ABUU SHAYO……..……..RESPONDENT

JUDGEMENT

Date of Last Order: 14.12.2023
Date of Judgment: 14.02.2023

MONGELLA, J.

The respondent herein sued the appellant in the primary court of Moshi at Moshi district (the trial court, hereinafter). She claimed against her T.shs. 3,000,000/= being money she lent to her in three diverse transactions namely: T.shs. 750,000/- issued on 13.05.2022; T.shs. 1,250,000/- issued on 18.05.2022; and T.shs. 1,000,000/- issued on 28.05.2022. The loan amounts were given without interest on an agreement to be paid back on 28.08.2022. The respondent sought to be paid the loan amount and compensation for disturbance as well as costs for the suit.

The trial court found in favour of the respondent whereby it ordered the appellant to pay back the loan amount of T.shs. 3,000,000/= and costs of the suit. Aggrieved, the appellant filed Civil Appeal No. 19 of 2022 in the district court of Moshi at Moshi (the 1st appellate court). However, the appeal was dismissed. Still aggrieved the appellant has filed this second appeal on the following grounds:

1. *That, the appellate court Magistrate erred in law and fact while re-evaluating the evidence adduced and exhibit tendered by relying on exhibit PI which is an agreement to pay which was not freely signed by the appellant as the same was signed before the police officer while in custody.*

2. *That, the appellate court Magistrate erred in law and facts by not re-evaluating evidence and exhibit tendered properly which led to the miscarriage of justice.* (sic)

3. *That, the appellate court Magistrate erred in law and facts to order that the trial court judgment was proper while there was no witness to support the claims rather than relying on agreement to pay which was signed by coercion while the appellant was in police custody.*

The appeal was argued in writing whereby the appellant was represented by Mr. Engelbert Boniphace while the respondent was unrepresented.

Mr. Boniface collectively argued the grounds of appeal as he considered them to be related. He averred that the trial court and 1st appellate court erred in relying on Exhibit KM1 which was an agreement for payment of T.shs. 3,000,000/- to the respondent. He averred that there were matters that were not disputed before the trial court and the 1st appellate court which are; first, that the said agreement was signed at the Central Police Station on 05.09.2022. Second, that the loan was issued in 3 diverse installments the first being on 13.05.2022 whereby the respondent gave the appellant T.shs. 750,000/-, the second on 18.05.2022 whereby the appellant was given T.shs. 1,250,000/- and the final loan on 28.05.2022 of T.shs. 1,000,000/- making the grand total of T.shs. 3,000,000/-. Third, that there was no witness that proved that the respondent lent the appellant the said money. Fourth, the appellant took a loan of T.shs. 300,000/- and repaid the same and, fifth, that in her testimony, the respondent failed to disclose the terms and conditions under which she lent the said money to the appellant. Thus, in that regard, he had the view that exhibit KM1 was not sufficient to prove that the respondent lent the appellant the alleged T.shs. 3,000,000/=.

Mr. Boniphace backed up his claims with the 2nd item of the Schedule to the **Magistrates' Courts (Rules of Evidence in Primary Court) Regulations** GN 22/1964, which is in *pari materia* with section 110 of the Evidence Act [Cap 6 R.E. 2022]. These provisions provide that a claimant must prove every fact in relation to his or her claims, that is, he who alleges must prove. He advanced that it was the responsibility of the respondent to prove on balance of probabilities

that she gave the appellant the alleged money on the mentioned dates.

Making reference to **section 10 of the Law of Contrac**t **Act** [Cap 345 RE 2019], he averred that for a contract to be valid there must be free consent otherwise the same will be rendered void. For free consent to be seen, the court must satisfy itself that there is no coercion or undue influence or fraud as required under **section 14 to 17 of the Law of Contract Act.** He contended that Exhibit KM1 was coupled with coercion, undue influence and fraud because before the appellant was arrested and locked up, there had not been any agreement on loan of T.shs. 3,000,000/=. He contended that the trial court misdirected itself by relying on the said exhibit which came into existence after the alleged transactions had been made while there was no exhibit showing the relationship between the parties prior to the said exhibit.

He quoted the book by N.N.N Nditi, titled" *General Principles of Contract Law in East Africa*" 1st Edition, DUP, Reprinted in 2017, at Page 136 whereby the author averred that, in cases involving unconscionable bargains and inequality of bargaining power or economic duress there exists a presumption that the bargain is unfair and where a party to a contract is in position to dominate the will of another the law will presume undue influence.

He further argued that the trial magistrate did not show in her decision why Exhibit KM1 led to the signing of the contact at the

police station while matters of loan issuance are not covered under the Penal Code. He added that even those who witnessed the agreement being signed at the Police station ought to have been brought to testify on the same. Contending further on the legality of the alleged contract, he had the stance that it is against law and practice for the police department to supervise contract signing where a party is not accused of an offence in the Penal Code as the same renders the contract being signed by a party who is not free.

In the circumstances, he prayed for Exhibit KM1 to be expunged as it was illegally admitted. He asked the court to find that the appellant only borrowed T.shs. 300,000/= which she repaid and not T.shs. 3,000,000/=. He as well prayed for costs to be awarded to the appellant.

In reply, the respondent briefly stated that she had done business with the appellant for a long time and the appellant is now indebted to her. That she claims from the appellant T.shs. 3,000,000/- and it was the appellant who took her to the police station. She added that the appellant also went to the police to commit herself to pay T.shs. 3,000,000/= while she was in Nairobi. That the police recorded the appellant in a video and called her. That, on the next day they went to the police with the appellant whereby there was no any contract signed. Instead, what was recorded by the police was the appellant's commitment to pay the loan and she was handed the said commitment which she

produced in court as evidence. Addressing the argument of coercion before the police, she contended that while the police officer did not appear before the trial court to testify on the same, the police had no reason to threaten her as she took herself to the police claiming utensils that she had bought for her.

Rejoining, Mr. Boniphace reiterated his submission in chief and added that Exhibit KM1 was unknown to the respondent. He averred that the respondent had raised new facts pertaining the several contracts and business partnerships between them. The video was also allegedly a new fact. That, the respondent had admitted that the contracts of 13.05.2022, 18.05.2022 and 28.05.2022 were not tendered at the trial court, so she failed to prove existence of the contract between them. He also alleged that the statement that the appellant sent herself to the police was a new fact, and in that regard Exhibit KM1 was invalid. He prayed that the same be expunged and that the court declares that the appellant is not indebted to the respondent. He also maintained his prayer for costs.

I have considered the grounds of appeal, the submissions by both parties and gone through the trial court record. Since all grounds of appeal touch on evaluation of evidence, I find it pertinent to first produce a summary of evidence of both parties at the trial court. At the trial court, the respondent stood for her case as SM1, while the appellant testified as SU1 and had two witnesses; SU2, Aisha Siraji Hassan and SU3, Iddi Husein Mohamed.

The respondent's testimony was that, she and the appellant were running a business together as partners The respondent assisted the appellant with capital for her food business. On 13.05.2022, the appellant approached the respondent requesting a loan of T.shs. 750,000/= without interest as her relatives had problems. Since it was not the first time to ask for a loan and she trusted the appellant, she gave her the said amount. However, later, the appellant requested two more loans, one of T.shs. 1,250,000/= and the other of T.shs. 1,000,000/-. The appellant promised to return the whole amount on 28.08.2022. In August, the appellant stopped operating the business and did not give her the returns. When she went to her place of business, she found the same closed. She tried calling her, but was unsuccessful. Eventually, she decided to take the appellant's utensils. Thereafter, the appellant resurfaced and purchased her own utensils and then went to the police whereby she told the police that she owed the respondent money. That, the appellant while alone at the police duly wrote up a contract. By that time the respondent was in Nairobi and she was sent a video of the appellant committing herself to pay. The statement was admitted as Exhibit KM1.

The appellant testified that she started her food business on 09.04.2016. She alleged to have known the respondent for 3 years. She said that she encountered a shortage in her business so she lent T.shs. 300,000/- from the respondent on 28.04.2022. That, she returned the amount to the respondent in June, but the respondent told her that if she was still not in a good financial position, she could

keep with the amount and repay her later. Then the appellant fell sick in July and the respondent called her to remind her of the money. That, when she told her to wait for a while, the respondent did not understand her. The respondent called her again on 28.08.2022 whereby she told her she was sick. The next day, that is, on 29.08.2022, the respondent went to her place of business and took everything. That led her to go to the police station to report the same. When she got there, she was told that she was under arrest because she had a debt of T.shs. 3,000,000/-. Then she decided to go home and was later brought to court.

SU2 testified that on 29.08.2022 at 09:00hrs the respondent emerged at the appellant's home and took all of her utensils on allegations that she owed her, while the appellant had been in the area doing business for 7 years. SU2 however stated that she did not know about the debt. SU3 testified that the appellant was a tenant of Mweni Mohamed since 09.04.2016. He also stated that the utensils belonged to the appellant, but he too had no knowledge of the debt.

As evident in the above summary of facts and generally on record, I wish to remark foremost, that the facts alleged by Mr. Boniphace to be new are not. I wonder if the learned counsel did not do his job well going through the trial court record or he made his submission with intention to mislead the court. The evidence shows that the respondent did state that she had a business with the appellant. It also shows that there was allegedly a video recording

on what transpired at the police station although no details were provided as to what transpired in the same. Also, as to the appellant going to the police on her free will, the same was well stated by the respondent in her testimony.

It is settled that the 2nd appellate court cannot interfere with concurrent findings of facts of the two lower courts, unless there are misdirections and misapprehensions of nature and quality of evidence or there was miscarriage of justice. This was well stated in **Helmina Nyoni vs. Yeremia Magoti** (Civil Appeal 61 of 2020) [2022] TZCA 170 TANZLII, as quoted hereunder:

> "It is trite law that second appellate courts should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or have occasioned a miscarriage of justice."

Upon observing the record, the respondent's claim as found in the claim form (hati ya Madai Fomu ya Madai 2) is that she lent the appellant money on three diverse times, that is, on 13.05.2022 where she gave her T.shs. 750,000/=; on 18.05.2022 where she gave her T.shs. 1,250,000/= and on 28.05.2022 where she gave her T.shs. 1,000,000/-. That, they both agreed that she would pay back the full amount on 28.08.2022 but did not do so. However, in her testimony, she only mentioned the first date. She did not mention the other dates, but mentioned the respective transactions. When

the agreed time elapsed, the respondent allegedly sought for the appellant to pay her back, but her efforts were fruitless as the appellant was nowhere to be found. She even visited her place of business from which she took her utensils as testified by the appellant and SU2.

I find most of the contentious arguments stem from Exhibit KM1 which was alleged to prove the existence of the said debt. This exhibit was apparently written by the appellant herself at the Police station whereby she allegedly willingly attended, for the sake of committing herself to pay the outstanding loan.

Upon observing the exhibit, I found myself curious as to whether the two lower courts paid attention to the details disclosed in the exhibit. I say so because; **one**, despite being seemingly a simple commitment, this document did not have the sign of the appellant attached therein nor the date the same was drafted. **Two**, the document disclosed that she assisted the respondent to distribute money to personnel that she knew. That, she had been given T.shs. 2,400,000/= and she had to collect interest thereafter every month for over a year. The document further states that she also paid back all interest 3for July and failed to collect the interests for August. That, she informed the respondent who did not want to listen to her and eventually on 28.08.2022 she went to her office poured out her food and took all the utensils. The respondent thereafter promised to pay the T.shs. 2,400,000/= in installments. This content in Exhibit KM1 is different from the respondent's testimony in which she

testified on the debt originating from three transactions totaling at T.shs 3,000,000/-.

An instrument on a debt is valuable as evidence signifying existence of the debt. However, just like how a contract reflects an actual agreement, an instrument on a debt should match up with the alleged transactions from which the debt arose. In this matter, there stands contradiction between Exhibit KM1 and the evidence on record which in my view, is a major contradiction going to the root of the claim. The facts displayed in Exhibit KM1 raise questions as to how the debt was created and what amount of money the respondent claims from the appellant as there stands no explanation on the variance between the said details.

The doubts in the respondent's case clearly show that she failed to exhaust her burden to prove all facts as required under **paragraph 1 (2)(a) and 6 of Schedule to GN. 22/1964** which states:

> "1(2) Where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim."
>
> **"6.** In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, but it shall be sufficient if the weight of the evidence of the one party is

> greater than the weight of the evidence of the other."

The above provisions are *pari materia* to **section 111 and 112 of the Evidence Act**. It is well settled that the burden to prove does not shift to the other party until exhausted by the party to whom it lies. This was well explained in the case of **Crescent Impex (T) Limited vs. Mtibwa Sugar Estates Limited** (Civil Appeal No.455 of 2020) [2023] TZCA 17501 TANZLII whereby the Court of Appeal stated:

> "It is also elementary that the standard of proof, in civil cases, is on a balance of probabilities which means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. Likewise, it is the law that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/her burden to prove and the said burden is not discharged or diluted on account of the weakness of the opposite party's case."

See also; **Maria Amandus Kavishe vs. Norah Waziri Mzeru & Another** (Civil Appeal No. 365 of 2019) [2023] TZCA 31 TANZLII; **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha** (Civil Appeal 45 of 2017) [2019] TZCA 453 TANZLII and; **Agatha Mshote vs. Edson Emmanuel and Others** (Civil Appeal No. 121 of 2019) [2021] TZCA 323 TANZLII.

In the foregoing, I hold the view that the respondent had not discharged her burden sufficient enough for the same to shift to the other party. In that regard, the strength or weakness of her evidence is immaterial. Consequently, I agree with Mr. Boniphace that the trial court and the 1st appellate court failed to properly evaluate the evidence on record Had they done so they would have discovered the material inconsistencies between her testimony and the facts in Exhibit KM1 which she tendered before the trial court. The respondent clearly failed to prove her case. The appeal is thus found to have merit and is hereby allowed, with costs. The judgment and decree of the two lower courts are quashed in their entirety.

Dated and delivered at Moshi on this 14th Day of February, 2024.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA