IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 111 OF 2023

AWENA RASHID.....APPELLANT

VERSUS

HBKS ENTERPRISES CO. LTD.....RESPONDENT

JUDGMENT OF THE COURT

Date of Last Order: 28/11/2023

Date of Judgment: 11/12/2023

KAFANABO, J.:

This appeal originates from the judgment and decree of the district court of Temeke (Hon. Luvinga, SRM) dated 4th May 2023 in Civil Case No. 25 of 2021. This appeal was, initially, before my learned brother Hon. Mwanga, J., but was reassigned to me for judgment writing because of the special clearance session programme undertaken by this court.

The facts of the case are that the respondent is a company registered in Tanzania with its major activities in financial services; and microcredit being its core business. It is also on record that, the appellant was an employee of the respondent in a position of credit or loan officer, and her workstation

was the respondent's branch located at Chanika. The appellant's main duties included identifying potential borrowers and processing loans at the respondent's Chanika Branch. The appellant was also responsible for following up with borrowers and ensuring that the loans were repaid within the agreed time. The appellant also agreed, under a contract of employment, to be held responsible for the unpaid loans of the defaulting borrowers.

Moreover, in May 2019 the respondent conducted an assessment or evaluation of the unpaid and outstanding loans at the said Chanika branch. From the said evaluation, it was noted that some borrowers had defaulted in repaying their loans; and that all the defaulters were under the appellant's portfolio, and she is the one who processed their loans. It was alleged by the respondent that all the borrowers who defaulted to repay the loans were fictitious, and that was done by the appellant purposely for her personal benefit, and that a huge percentage of the said unpaid loans were taken by the appellant.

Moreover, the respondent engaged an auditor who came up with findings that there was a loss of Tanzania Shillings(TZS) 58,715,000/= from 16 defaulters who, allegedly, were organized by the appellant. Also, TZS 7,000,000/= was missing from the respondent's coffers and the responsible

person was the appellant. It was also alleged by the appellant that she decided to commit herself to repay the loan because she could not follow up on the unpaid loans for medical reasons, taking into account the fact that she was pregnant.

Given the situation, the respondent instituted a suit claiming TZS 65,915,000/= being specific damages, TZS 25,000,000/= being general damages, and interest and costs of the case. The appellant disputed all claims and prayed for the dismissal of the suit with costs.

The case was heard and determined, and the trial court ordered the appellant to pay specific damages of TZS 5,349,000/=, general damages of TZS 500,000/=, interest on the decretal amount at the rate of 7% from the date of the judgment until the same is fully paid and costs of the suit. The appellant was disgruntled by the said decision and is appealing against the said decision of the trial court.

Being displeased by the said decision, the appellant approached this court by way of appeal. The petition (which was supposed to be a memorandum) of appeal filed on 5th July 2023 contains four grounds of appeal as follows:

1. The trial court erred in law and facts by ordering the appellant to pay the alleged amount without considering the existence of guarantors and collaterals of the defaulters.
2. The trial court erred in law and facts by concluding that the appellant was the employee while she was just a labourer.
3. The trial court erred in law and facts by holding the appellant responsible, without considering that the appellant was not the last approval(sic) of the loan process.
4. The trial court erred in law and in facts by not considering the evidence and testimonies adduced by the appellant and her witness.

On 25th September 2023 this court ordered that the appeal be argued by written submissions and the parties duly filed the same as scheduled by the court. The parties were duly represented. The appellant was represented by Rolita Didas Kaswamila, learned counsel and the respondent was represented by Omega Juael learned counsel.

In support of the first ground of appeal, the appellant submitted that according to regulation 41(2) of the **Microfinance (Non-deposit Taking Microfinance Service Providers) GN number 679 of 2019** a microfinance shall have a register of all collaterals securing the loans. The

appellant suggests that the respondent should pursue the collaterals instead of placing a burden on employees who did not borrow the loans. The case of **Nokwim Investment Co. Ltd and Another vs CRDB Bank Plc (Civil Appeal 105 of 2020) [2021] TZHC 7362** (18 November 2021) was cited in support of the submission.

The respondent on her part, and in response to the appellant's submission, submitted that each party is duty-bound to perform the terms of the agreement. In this case, the appellant committed herself to refund or repay the appellant's money after it was discovered that she processed loans to non-existing (fictitious) borrowers and others were made fraudulently.

The respondent further submitted that the appellant took the loan refunds illegally for personal benefit as per exhibit P3. The appellant agreed with the respondent for repayment of the respondent's money, and the trial court enforced the terms of the agreement between the parties herein. The cases of **Miriam E. Maro vs Bank of Tanzania (Civil Appeal 22 of 2017) [2020] TZCA 1789 (30 September 2020)** and **Unilever Tanzania Ltd vs. Benedict Mkasa t/a Bema enterprises, Civil Appeal No. 41 of 2009** (unreported) were cited in support of the submission. The respondent also referred this court to section 110 of the **Evidence Act** (supra)

cementing the position that the appellant had agreed to repay the unpaid loans.

The respondent also distinguished the case of **Nokwim Investment Co. Ltd and Another vs CRDB Bank Plc (Civil Appeal 105 of 2020) [2021] TZHC 7362** as irrelevant because, in this case, there were no actual borrowers or collaterals made available to the respondent. The appellant acknowledged to have taken the money and promised to pay.

The appellant in rejoinder submissions, alleged the existence of undue influence and that the appellant was forced to sign the agreements to repay the loans by the respondent, and thus the agreement was not freely entered into.

As regards the second ground of appeal, the appellant submitted that for one to be treated as an employee, there are requirements to be adhered to and rights to be given to the said employee under the Employment and Labour Relations Act. It was the appellant's submission that she was not given the rights as any other employee according to law. The case of **Happiness Geff v. Wadhamini (KKT Dayosisi ya Mashariki Ziwa Victoria) Rev. No. 35 of 2013** HC Labour Division was cited in support of the submission.

The respondent in her reply dismissed the appellant's argument that she was just a laborer and not an employee. The respondent submitted that the appellant testified and argued that she was an employee of the respondent from 2017 to 2019, and she never disputed the fact that she was an employee of the respondent. The case of **Hawa Siwa Abduhussein vs. MFI Document Solution Ltd, Labour Revision No. 273** of 2022 (unreported) was cited in support of the submission.

In respect of the 3rd ground of appeal, the appellant submitted that the parties bind themselves with the contract they freely entered into and section 10 of the **Law of Contract Act, Cap. 345 R.E. 2019** was referred to in support of the submission. The appellant also submitted that she was working as a loan officer and she was not the last approver of the loan. It was the appellant's submission that as per the loan agreements, if the borrower fails to pay the loan, the collaterals shall be sold and the proceeds thereof be used to repay the loans of the defaulters.

Further, the appellant submitted that if repayments cannot be done by collaterals, then guarantors shall be responsible for repaying the required unpaid amount. It was the appellant's further submission that if the collaterals and guarantors were available, then it was wrong for the court to

order the appellant to repay the loan. The case of **Unilever Tanzania Ltd vs. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009** (unreported) was cited in support of the submission that, it is the duty of the parties themselves to rectify terms of the contract they consider erroneous and not the court.

The respondent on his part submitted that, if the appellant was not responsible for the loan, why did she commit herself to repay the same? It was further submitted that the commitment to pay was a result of the meetings held at the appellant's house and the local government office. The case of **Miriam E. Maro vs Bank of Tanzania (Civil Appeal 22 of 2017) [2020] TZCA 1789 (30 September 2020).** The Case of **Unilever Tanzania Ltd** (supra) was distinguished by the respondent as, in this case, the trial court simply enforced the agreement of the parties.

In support of the fourth ground of appeal, the appellant submitted that whoever asserts the existence of certain facts, must prove the same as the burden of proof lies on him, citing section 110 of the **Evidence Act, Cap. 6 R.E. 2019**. The cases of **Hemedi Saidi v. Mohamed Mbilu (1984) TLR 113** and **Nokwim Investment Co. Ltd and Another vs CRDB Bank Plc**

(Civil Appeal 105 of 2020) [2021] TZHC 7362 were cited in support of the submission.

It was further submitted by the appellant that, the trial magistrate did not consider the evidence and testimonies of the appellant. It was the appellant's view that she proved that there were collaterals that were supposed to be used to repay the loan and the fact that the appellant was not the last approver of the loan. This, according to the applicant, led to an unfair and unjust decision.

In response to the appellant's submissions, the respondent submitted that the standard of proof as required by law in Civil cases was met following the appellant's consent to repay the unpaid loans and non-disclosure of borrowers who were beneficiaries of the loans processed by the appellant. The case of **Madeni Ally Mohamed & Others v. Shame Ally Mohamed & Another, Civil Appeal No. 272 of 2020** was cited in support of the submission. The court was also referred to section 110 of the **Evidence Act, R.E. 2019**.

On 29th September 2023, the court ordered that the appeal be argued by the parties by written submissions. The submissions of the parties were duly

filed, and it's this court's turn to consider the same together with the grounds of appeal.

The first and fourth grounds of appeal are related and thus the same will be determined together. In respect of both grounds, the appellant is of the view the trial court erred in law and facts by ordering the appellant to pay the alleged amount without considering the existence of guarantors and collaterals of the defaulter and evidence thereof. The said grounds will not detain this court for the simple reason that the issue of guarantors and collaterals was neither pleaded in the appellant's written statement of defence nor proved by the appellant. The same applies to the issue of evidence and testimonies regarding the existence of the same, together with the issue of undue influence which was raised by the appellant in the rejoinder submissions in support of the appeal.

The said matters of collaterals and guarantors have been brought up by the appellant on the grounds of appeal and submissions in support of the appeal. Since the matter was not before the trial court for determination, the same cannot be entertained by this court as parties are bound by their pleadings. It is trite law that evidence and submissions must be on matters averred by the parties in their pleadings and no departure therefrom shall be allowed

without leave of the court. In the case of **Astepro Investment Co. Ltd vs Jawinga Co. Ltd (Civil Appeal 8 of 2015) [2018] TZCA 278 (24 October 2018),** the court of appeal observed that:

> ***As a result, the procedure offended the cherished principle in pleading that, the proceedings in a civil suit and the decision thereof, has to come from what has been pleaded, and so goes the parlance 'parties are bound to their own pleadings'.*** *See: Nkulabo Vs Kibirige [1973] EA 1Q2, Peter Ng'homango vs the Attorney General, Civil Appeal No. 214 of 2011, Sean TAN Tours Limited vs the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (both unreported) and James Funge Ngwagilo Vs the Attorney General [2004] TLR 161*

Also in the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha (Civil Appeal 45 of 2017) [2019] TZCA 453** (11 December 2019) the court of Appeal held that:

> *'The other remark which we find ourselves compelled to make relates to pleadings. In doing so we cannot do better than reiterate what we said in James Funke Gwagilo vs. Attorney General [2004] TLR 161* ***whereby we underscored the function of pleadings being to put notice of the case which the opponent has to make lest he is taken by surprise. From that same decision we reiterated another equally important principle of law that parties are***

bound by their own pleadings and that no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded.'

As stated herein above, since the issues of collaterals and guarantors, as well as undue influence were not pleaded and determined by the trial court the same cannot be entertained at the appeal stage.

It is also important to point out that regulation 41(2) of the **Microfinance (Non-deposit Taking Microfinance Service Providers) GN number 679 of 2019** could be relevant if the issues of collaterals would have been pleaded and placed before the trial court first for determination, which is not the case in this matter.

As regards grounds one and four of the appeal, as already ruled above, it would be an exercise in futility to consider the relevance of cases cited in respect of the said grounds. Therefore, the cases of **Nokwim Investment Co. Ltd and Another vs CRDB Bank Plc (Civil Appeal 105 of 2020) [2021] TZHC 7362, Miriam E. Maro vs Bank of Tanzania (Civil Appeal 22 of 2017) [2020] TZCA 1789 (30 September 2020)** and **Unilever Tanzania Ltd vs. Benedict Mkasa t/a Bema enterprises, Civil Appeal No. 41 of 2009** will be of no significance as regards first and

fourth grounds of appeal. It follows that the first and second grounds of appeal have no merits and thus crumble.

In respect of the second ground of the appeal, the appellant is challenging the decision of the trial court for concluding that the appellant was the employee while she was just a labourer. The appellant submitted that for one to be treated as an employee, there are requirements to be adhered to and rights to be given to the said employee under the Employment and Labour Relations Act; and she was not given the said rights citing the case of **Happiness Geff v. Wadhamini (KKT Dayosisi ya Mashariki Ziwa Victoria) Rev. No. 35 of 2013.** The respondent was of the opposite view that the appellant testified that she was an employee of the respondent from 2017 to 2019 and she never disputed the fact that she was an employee of the respondent. This court agrees with the respondent in that the appellant was an employee of the respondent which the appellant herself proved by oral testimony (pages 52 and 55 of the trial court proceedings are relevant). Also, the contract of employment which was admitted by the trial court as exhibit P1 is relevant. The appellant also testified that she was terminated by the respondent. Therefore, this court finds no fault in the trial court's

conclusion that the appellant was an employee of the respondent. Hence, the second ground of appeal fails.

In respect of the third ground of appeal, the appellant faults the trial court's decision to hold her responsible for repaying the unpaid loans she committed herself to pay, without considering that the appellant was not the last approver of the loan process.

In support of the ground of appeal, the appellant simply submitted that the last approver of the loan was the director and not the loan officer. However, she did not adduce evidence in that regard and did not expound the submission any further. But in her testimony (on page 54 of the trial court proceedings) she testified that the one who approves loan is the supervisor and the manager.

Moreover, the appellant totally departed from the substance of the third ground of appeal and submitted that parties are bound by the contract they freely entered into referring to section 10 of **the Law of Contract Act, Cap. 345 R.E. 2019.** The other submission made by the appellant simply reiterated her submission on the issue of collaterals and guarantors as submitted in grounds one and four herein above.

The respondent on his part submitted that if the appellant was not responsible for the loan, why did she commit herself to pay? It was further submitted that the commitment to pay was a result of the meetings held at the appellant's house and the local government office.

On this ground, and according to the appellant's submissions, it seems the appellant has mixed up the two agreements that gave rise to this case. The first aspect of agreements is in respect of the borrowers and the respondent herein. These are loan agreements between the borrowers and the appellant in respect of which the borrowers were to pay the loan to the respondent. If the borrower fails to repay the same, then the loan should have been recovered by way of disposing of the collaterals, if any; or guarantors should have been contacted so that they can repay the loan.

The other category of agreements was in the form of commitments made between the appellant and the respondent. In these agreements, the appellant promised to repay the unpaid customers loans because she admitted to having taken some money from customers without the appellant's authorization. The other reason is that the appellant failed to provide the addresses of the borrowers, failed to follow up with the borrowers, and could not even provide the telephone numbers of the

borrowers for the company to make follow-up. This was relevant when the appellant had failed to follow up the same because she was sick.

Therefore, the loan between the borrowers and the respondent could not be recovered because the appellant could not provide necessary details as to who were the borrowers and their relevant addresses. The appellant, purportedly, provided to the respondent the mobile phone numbers of the alleged borrowers which, it turned out, were numbers of persons completely unrelated to the borrowers. The defense witnesses, especially DW3, made clear the efforts they made to get information from the appellant regarding the borrowers, but all was in vain.

Therefore, this court agrees with the appellant that the loan agreements should have been implemented between the borrowers and the respondent. However, it is not in dispute that the borrowers of the loans could not be identified and/or reached and they were, literally, unknown to the appellant. Moreover, the person who was supposed to know all relevant details, and put them in order, as per the policies of the company, was the appellant who did not cooperate in supplying correct information regarding the borrowers.

Furthermore, the appellant also did not mention any borrower who was supposed to pay the loan, if the borrower(s) truly existed.

It is crystal clear that the unpaid loans were processed by the appellant to persons whom she was supposed to properly know and identify. She was also supposed to know and document their contacts and physical addresses, but she failed to provide any viable information in that regard. It is obvious that the appellant was grossly negligent, or she did not provide the necessary details by design, and as argued by the respondent, for either personal benefits or reasons best known to her.

Given the circumstances, the appellant admitted her wrongs and made commitments to pay the unpaid loans under her portfolio in respect of which the borrowers could not be found, or they were found but revealed that they had paid money to the appellant who, it was revealed, did not remit the same to the respondent as required.

On the issue of admission to repay the loans, and for the avoidance of doubt, it is important to make it clear that one of the agreements to repay the money (dated 16/05/2019) was done before the appellant's relatives who also signed as witnesses. Another contract (dated 08/05/2019) was signed before the local government leaders. Thus, exhibit 'P3' is relevant under the circumstances. It is clear that the appellant made the commitments to pay voluntarily; given that the issue of undue influence and being forced to sign

the said commitments or agreements were neither pleaded in the written statement of defense nor proved during trial.

In the case of **Miriam E. Maro vs Bank of Tanzania (Civil Appeal 22 of 2017) [2020] TZCA 1789 (30 September 2020),** the Court of Appeal held that:

> *"It is the law that parties are bound by the terms of the agreement they freely enter into. We find solace in this stance in the position we took in* ***Unilever Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No. 41 of 2009*** *(unreported) in which we relied on a persuasive decision of the Supreme Court of Nigeria in Osun State Government v. Dalami Nigeria Limited, Sc. 277/2002 to articulate:*
>
> > *"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute."*

This court finds that the above holding is relevant to this matter in the sense that the appellant agreed to repay the unpaid loans under her portfolio for reasons already stated herein above.

Section 10 of the **Law of Contract Act, Cap. 345 R.E. 2019** is also relevant, as it insists on the free consent of parties. Moreover, under section 14 of the said Act, it is provided that:

> 1) Consent is said to be free when it is not caused by:
>
> (a) coercion, as defined in section 15;
>
> (b) undue influence, as defined in section 16;
>
> (c) fraud, as defined in section 17;
>
> (d) misrepresentation as defined in section 18; or
>
> (e) mistake, subject to the provisions of sections 20, 21 and 22.
>
> (2) **Consent is said to be not free when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake**.

It is this court's observation that the appellant neither pleaded nor proved any of the above elements which would defeat the free consent of a party to the contract. It follows that ground three of the appeal also fails.

Under the circumstances, the decision of the trial court cannot be faulted on the grounds raised by the appellant. Therefore, this appeal lacks merit and is hereby dismissed.

Given the nature of the case, and taking into account that the dispute had its basis in the employer-employee relationship, no costs are awarded.

It is so ordered.

Dated, signed, and sealed at Dar es Salaam this 11th day of December 2023.

K. I. KAFANABO

JUDGE

Judgment delivered in the presence of Mr. Omega Juael, Advocate holding brief of Rolita Kaswamila, Advocate for the Appellant, and in the presence of Mr. Omega Juael Advocate for the Respondent.

K. I. KAFANABO

JUDGE

11/12/2023