IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB-REGISTRY)

AT DAR-ES-SALAAM

PC. CIVIL APPEAL NO. 20 OF 2022

DAVID JOHN GATUNA ..... APPELLANT

VERSUS

INUKA MICROFINANCE LTD ..... RESPONDENT

(Appeal from the Judgment and decree of the District Court of Ilala at Kinyerezi)
(A. A. Kanje, SRM)
Dated 29th day of April 2022
In
(Civil Appeal No. 71 of 2021)

JUDGMENT

Date: 19/09/2023 & 25/03/2024

NKWABI, J.:

This is a second appeal. The appellant instituted Civil Case No. 179 of 2021 in the primary court of Ilala district at Ukonga. He was claiming a return to him a motor vehicle registration card of his motor vehicle which has registration number T. 285 DRJ make Nissan X-Trail. He had pledged the motor vehicle as a collateral for obtaining a loan from the respondent. I will leave Form C/F 52 which is used for filing civil suits in primary courts speak for itself:

DAI LA KADI YA GARI;-

Ilikuwa mwaka 2020 nilichukuwa mkopo wa T.shs 5,000,000/= toka kwa mdaiwa kwa dhamana ya kadi ya gari. Tarehe 23/12/2020 nimemaliza deni langu, lakini kunipa kadi ya gari hataki.

NINACHODAI KADI YA GARI.

After entertaining the suit on merit, the trial court found that the appellant had not proved the suit on balance of probabilities. It ordered the parties to adhere to the terms of the contract. Unsatisfied with the decision of the trial court, the appellant rushed to the district court, which upon hearing the appeal on merit, dismissed the appeal with costs for being lacking in merits. Presently, the appellant is in this Court with a mission of overturning the concurrent findings of the lower courts. He pinned his hopes on the ground of appeal which is:

The learned appellate resident magistrate erred in law and facts by failure to consider that the respondent failed to prove that the requested loan of Tanzania shillings 2,000,000/= was actually disbursed to the appellant on 21/12/2020 as she alleged.

Anchored in the above justification of the appeal, the appellant is beseeching this Court to allow the appeal, the decision of the first appellate court be set aside and the respondent be condemned to bear the costs.

The counsel for the respondent asked this Court they dispose of the appeal by way of written submissions. The appellant extended his hand to that prayer. I unhesitatingly granted the prayer. The appellant drew and filed the submission in chief by himself, he appears he did not wish to make a rejoinder submission because he did not file one. Mr. Evance Rwekaza, learned counsel for the respondent, drew and lodged the submission in reply.

To make himself heard and accorded his highly anticipated reliefs, the appellant asserted, in written submission in chief, that the first appellate magistrate erred in law and fact for failure to consider that the respondent failed to prove that the requested loan of T.shs 2,000,000/= was actually disbursed to the appellant on 21/12/2020 as she alleged. He pointed out that the ground of appeal stems from the respondent's evidence based on exhibit E. the loan contract and exhibit F. which proved that appellant had not serviced his loan.

In an extra submission, the appellant equated the claim of T.shs 2,000,000/= loan as a counter claim which had evidence from SU.1 and SU.2. Moreover, he contended that since the appellant and SM.2 denied to have received the loan, and the respondent is the one who alleged it, she had a duty to prove that claim under section 110(1) and (2) of the Evidence Act, Cap. 6 R.E. 2019. He additionally pointed out that the witnesses of the respondent contradicted as to the amount which they claimed was posted into the appellant's mobile phone at T.shs 1,800,000/= per SU.2. It is added that the respondent was supposed to tender the mobile phone message that proved the transaction. So, it was erroneous for the 1st appellate court to uphold the decision of the trial court. He thus, prayed this Court to allow the appeal and quash the concurrent decisions of the lower courts with costs.

In a reply submission, the counsel of the respondent contended that the respondent proved the contractual obligation of the appellant to the respondent through the loan contract. The loan facility had the facility of T.shs 2,000,000/= whereas the transaction at T.shs 1,805,000/= was done and it has reference number 92117924879 dated 21st December 2020 at 14:25 through phone number 0675 899 170. The amount deducted was to cover car track costs and applying fees for the loan. It is added that since

the appellant instituted the suit, he ought to have proved to have serviced the loan. Mr. Rwekaza, relied on **Peter v. Sunday Post Ltd & 2 Others v. Phares Kabuye** [1982] T.L.R. 338 and **Mathias Erasto Manga v. Ms. Simon Group (T) Ltd,** Civil Appeal No. 43 of 2013 (unreported). He urged I find the appeal to be devoid of merit. Mr. Rwekaza prayed the appeal be dismissed with costs.

I have given due consideration to the submissions of both parties. I have also gone through the evidence on record. The appellant while testifying, he was examined by the trial court about him being advanced a loan facility of T.shs 2,000,000/=, he denied to have obtained that loan. He was backed by PW.2. Eve Evance Philipo, his wife that they had discharged to pay the facility loan of T.shs 5,000,000/=. But DW.1 stated that the appellant had in full reserviced the loan facility of T.shs 5,000,000/= and applied for another loan facility of T.shs 2,000,000/= as exhibited by exhibit E. but did not reservice that loan at all which he had pledged the motor vehicle as security. DW.2 said the money was deposited into the appellant's phone.

Exhibit E. clearly shows that the appellant signed by written signature and by finger print on 21/12/2020. The appellant instituted this suit on

22/06/2021. In C/F 52 he said he completed reservicing the loan on 23/12/2020. But exhibit B. which is dated 11/12/2020 was issued with the receipt to have paid in full the loan at T.shs 7,375,000/=.

I should state at the outset that I am soothed by the truth that both parties know that it is the duty of the party who makes an allegation to prove that allegation. I need not reproduce the sections and case laws which state so. But I have noted with concern the view of the appellant that there was a counterclaim by the respondent of T.shs 2,000,000/=. If it were a counter-claim, I have not seen the reliefs that the respondent was asking the trial court to grant him. However, the loan facility contract was tendered in evidence to disprove the allegation of the appellant that he had only received a loan of T.shs 5,000,000/= but that he had been advanced a loan facility of T.shs 2,000,000/= by the respondent. In that regard, the respondent had no duty of proof of the loan facility of T.shs 2,000,000/=. The trial court and the first appellate court correctly applied the principle of law elucidated in **Sarkar on Evidence in India, Pakistan, Bangladesh, Burma & Ceylon,** 14th Edition 1993 at P. 1338 where it is stated that:

> *"An essential distinction between the burden of proof and onus of proof is that the burden of proof never shifts, but*

the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence."

What the respondent did with exhibit E was to discharge the onus of prove his defence but the plaintiff failed to discharge is burden of proof howbeit on balance of probabilities. In other words, the respondent, by exhibit E. sufficiently explained (cogent explanation) his refusal to hand over back to the appellant the registration card of the motor vehicle.

The appellant tried to suggest that even if he signed exhibit E., there was no proof that he received the money. I should say that exhibit E. absolutely exonerates the respondent from liability of failure to hand over the registration card. If that were not the case, why the appellant did not prove his allegations by tendering letters of follow-up of the card to the respondent? The respondent defended that she actually disbursed the money via phone. With the contradictory evidence of the appellant, I accept the defence of the respondent that indeed, she disbursed the money to the appellant via phone number. It appears that the appellant did not want to reservice the loan, that is why he visited several offices including the BOT in an attempt to escape the loan. It occurs to me that the efforts of the appellant were in total disregard of the principle of sanctity of contract as

expounded in **Philipo Joseph Lukonde v. Faraji Ally Saidi** [2020] 1 T.L.R. 556 where it was stressed that:

> *"Once parties have entered into a contract, they must honour their obligations under that contract. Neither this Court, nor any other court in Tanzania for that matter, should allow deliberate breach of the sanctity of contract."*

See also **Simon Kichele Chacha v. Aveline M. Kilawe,** Civil Appeal No. 160 of 2018, (CAT) where it was underscored that:

> *"On our part, we are satisfied that the contract entered between the appellant and the respondent had all attributes of a valid contract. It was not prohibited by the public policy and it is on record that the appellant was not complaining about his consent to the agreement being obtained by coercion, undue influence, fraud or misrepresentation in order to make it voidable in terms of the provisions of section 19(1) of the Law of Contract Act, Cap. 345 R. E. 2002."*

Having stated above, I feel compelled to state the time-honoured principle of law that a second appellate court will rarely interfere with concurrent findings of lower courts. This is as per **Amratlal Damodar Maltaser &**

Another t/a Zanzibar Silk Stores v. A.H. Jariwalla t/a Zanzibar Hotel [1980] T.L.R. 31 where it was stated that:

> *"Where there are concurrent findings of fact by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure."*

Bearing in mind what I have already stated herein above, I think that the trial court was entitled to tell the parties to go back to their contract. The appellant has to reservice the loan that was advanced to him. The district court was therefore entitled to uphold the judgment of the trial court.

In the upshot, I dismiss the appeal with costs for being patently devoid of merits. The concurrent findings of both lower courts are upheld.

It is so ordered.

DATED at **KIGOMA** this 25th day of March, 2024.

J. F. NKWABI
JUDGE