

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA REGISTRY

AT IRINGA

PC CIVIL APPEAL CASE NO. 5 OF 2023

(Arising from the decision of the Iringa District Court at Iringa in Civil Appeal No. 02 of 2023 and originating from Civil Case No. 10 of 2022 of the Primary Court for Iringa District at Bomani)

ASAJILE BUILDERS COMPANY LIMITED.....APPELLANT

VERSUS

FRED SAMIA MMASI.....RESPONDENT

JUDGMENT

Date of the last order: 14.02.2024

Date of Judgment: 26.03.2024

A.E. Mwipopo, J.

A great treasure is a friend who is there for you, inspires you, and supports you. Friendship can bring joy or sorrow. Friendship is important, but a relationship is not always smooth. Sometimes, a friend can cause tension that can be a major stressor in life.

Asajile Mbwilo, Director of Asajile Builders Company Limited (the appellant), was a friend of Fred Samia Mmasi, the respondent. During their

friendship, the Asajile Mbwilo borrowed money from the respondent. He paid some of the loan using a check from Asajile Builders Company Limited, the appellant. Asajile Mbwilo failed to pay the remaining debt, and the respondent decided to sue Asajile Builders Company Limited, the appellant, which is the Company owned by Asajile Mbwilo, at the Primary Court for Iringa District at Bomani for the recovery of Tanzania shillings 28,700,000/=.

The trial Primary Court heard the parties and delivered judgment in favour of the respondent. The trial Court found that the respondent has proved the debt of Tanzania shillings 23,000,000/=. It ordered the appellant to pay the debt and the cost of the case. The appellant was aggrieved and appealed to the Iringa District Court, which dismissed the appeal for want of merits.

The appellant was not satisfied with the decision of the appellate District Court and filed the present appeal. The petition of appeal filed by the appellant contains six grounds of appeal as provided hereunder:-

- 1. That, the first appellate Court grossly erred in law and fact by holding that the respondent had a cause of action against the appellant.*
- 2. That, the first appellate Court grossly erred in law and fact by failing to consider that the Company is a separate legal entity different from its members.*
- 3. The first appellate Court grossly erred in law and fact by holding that there was an implied contract between the appellant and the*

respondent.

- 4. That, the first appellate Court grossly erred in law and fact by failure to consider that there was unfair trial at the trial Court by not considering at all the exhibits tendered by the appellant, hence arriving to unjust decision.*
- 5. That, the first appellate Court grossly erred in law and fact by holding that the exhibits tendered by the respondent were properly admitted based on the fact that the appellant was represented by an advocate during trial.*
- 6. That, the first appellate Court grossly erred in law and fact by failure to re assess properly the evidence of the trial Court and come up with the conclusion similar to the trial Court by holding that the respondent deserves to be paid Tanzania shillings 23,000,000/= while the respondent failed to prove his claims against the appellant.*

At the hearing, Ms. Tunsume Angumbwike, a learned advocate, represented the appellant, whereas Mr. Erick Nyato, an advocate, represented the respondent.

The counsel for the appellant submitted the 1st, 2nd and 3rd grounds of appeal jointly. She said the remaining grounds would be submitted separately. It was her submission regarding the 1st, 2nd, and 3rd grounds of appeal that there was no cause of action against the appellant. The Company is a legal entity that must be sued according to the law. The respondent

loaned Tanzania shillings 28,700,000/= to Asajile Mbwilo, and they entered into an oral agreement. Asajile Mbwilo failed to pay the loan, and the respondent sued Asajile Builders Company Limited, as Asajile Mbwilo is the owner and director of the Company. The reason for suing the appellant instead of Asajile Mbwilo is that some payments were made through a cheque issued by the Company (appellant). Asajile Mbwilo testified that he borrowed the money from the respondent. It was not the company that borrowed the money from the respondent. Section 15 of the Company Act provides that after the Company is registered, it becomes a legal person who can perform any duty under the registered name. In his evidence, the respondent said he lent the money to Asajile Mbwilo. Asajile Mbwilo and Asajile Builders Company Limited are two different persons. The agreement was binding to the parties and not to other persons. The trial Court and the first appellate Court erred to hold there is an implied contract between the appellant and the respondent as the appellant paid the respondent through cheque. The evidence from the accountant of the Company (PW2) proved that there was no debt from the respondent. She cited the **British American Tobacco Kenya Limited vs. Mohan's Oysterbay Drinks Limited**, Civil Appeal No. 209 of 2019, and the Court of Appeal of Tanzania at Dar Es Salaam (unreported) to support the

argument.

On the fourth ground of appeal, the counsel said that the trial Court did not consider the exhibits tendered by the appellant in its judgment. The Court was biased and caused injustice to the appellant. This is against the principles of natural justice and the rule against bias.

The Fifth ground of appeal is a procedural irregularity in the admission of the exhibits tendered by the respondent. The counsel for the appellant said that the respondent tendered his exhibits after examination in chief, cross-examination and re-examination. The respondent tendered those exhibits after completing his testimony, as seen in the proceedings dated 22/02/2022. The appellant was prejudiced for failing to test the exhibits' validity through cross-examination. The exhibits has to be expunged from the record. The respondent needed to be made aware of the content of the exhibits. She cited the case of **Robinson Mwanjisi and Others vs. Republic [2003] TLR 218** to support the position.

On the last ground of appeal, the counsel said that the respondent claimed for recovery of 28,700,000/= he lent to the appellant. The trial Court awarded Tanzania shillings 23,000,000/= to the respondent from the claimed amount. No proof is available for the awarded amount or claims.

In response, the counsel for the respondent opposed the appeal. He said that there was an oral contract between the parties. The appellant was paying the loan through cheques issued by Asajile Builders Company Limited, which is sufficient proof that there was an agreement between the appellant and the respondent. On such grounds, the trial court awarded the respondent the claimed amount. The process of a company taking a loan is an internal arrangement and has nothing to do with the loan. The appellant was paying for the loan through cheques bearing its name. The contract could be referred to by the conduct of the parties and the nature of their relationships as it was heard in **Rashid Mnyenyelwa vs. Ryoba Wantora Ryoba**, PC Civil Appeal No. 5 of 2022, High Court of Tanzania Iringa Sub Registry (unreported).

In response to the 4th ground of appeal, the counsel said that Asajile Mbwilo tendered the statement of his bank account to show that he had started to pay the loan. The Court relied on this evidence to award Tanzania shillings 23,000,000/= to the respondent, as the bank statement of Asajile Mbwilo shows that he paid shillings 5,000,000/= to the respondent.

In reply to the 5th ground of appeal, the counsel for the respondent said that the respondent tendered the cheques from the appellant according

to the law. The appellant did not object to the tendering of the cheques since the Company issued them.

The respondent's submission regarding the last ground of appeal was that the respondent's evidence in the record was heavier than that of the appellant, as the trial Primary Court and the appellate District Court found. He cited the case of **Hemed Said vs. Mohamed Mbilu [1984] TLR 113 in support of this position.**

In his rejoinder, the appellant reiterated his submission in chief and insisted that the payment of the loan by cheque does not prove the presence of the contract between the appellant and the respondent.

Having heard the submissions from both parties the issue for determination is whether the appeal has merits.

In determination of this appeal, I will go on each ground of appeal in sequence as submitted by both parties. Starting with the 1st, 2nd, and 3rd ground of appeal about the absence of cause of action against the appellant, the counsel for the appellant said that it was Asajile Mbwilo who took the loan from the respondent and not the Company. In contention, the counsel for the respondent said that, impliedly, there was a contract between the appellant

and the respondent.

Indeed, as stated by the appellant, once a company is incorporated, it bears the ability to sue and to be sued as per section 15 (2) of the Companies Act. Rule 13 (1) of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, G.N. No. 310 of 1964 provides that proceedings by or against a firm may be in the name of the partners or the name of the firm. The Merriam-Webster online dictionary defines the word firm as the name or title under which a company transacts business. See. <https://www.merriam-webster.com/dictionary/firm>.

The counsel for the appellant is claiming that there is no cause of action against the Company. The court is aware that cause of action is every fact necessary for the plaintiff to prove to support his right to a judgment of the Court. In **Stanbic Finance Tanzania Ltd v. Giuseppe Trupia & Another [2002] TLR 217**, it was held that cause of action is a set of facts which give a person (plaintiff) a right to a judicial redress or a relief against another (defendant). In another the case of **Mashando Game Fishing Lodge and 2 Others vs. Board of Trustees of TANAPA [TLR] 2002 on page 319**, the Court stated that:-

"A person is said to have a cause of action against another where that person has a right and other person has infringed that right with result that the person with right suffers material loss or any other loss".

Suit is always based on a cause of action. There can be no suit without a cause of action accrued to the plaintiff. Ascertainment of a cause of action is done by reviewing the facts and all its attachments as it was held in **Stanbic Finance Tanzania Ltd v. Giuseppe Trupia & Another**, (supra), and **John M. Byombalirwa vs. Agency Maritime Internationale (Tanzania) Ltd, [1983] T.L.R 1**. Thus, this Court has to look at the plaint in the trial Court and the evidence available to ascertain whether the respondent had a cause of action against the appellant.

In the plaint, the respondent said he loaned the money to the appellant. However, the appellant was a company, and the respondent did not say how the appellant was borrowing and receiving the loaned amount. The evidence of the respondent (SM1) and Asajile Simon Mbwilo (SU1) gave clues about the loan. In his evidence, the respondent said there was an oral agreement with Asajile Mbwilo to lend him money. He lent Tanzania shillings 28,700,000/= to Asajile Simon Mbwilo, the owner and the Director of Asajile Builders Company Limited (appellant). SU1 issued cheques in advance as

security for the loan and paid some of the loans through company cheques. The record shows that Asajile Simon Mbwilo (SU) admitted there was a loan agreement between himself and the respondent. Nowhere in the respondent's testimony did he say that he lent the money to the Company.

In law, a party can only be sued on contract if he is a party to that contract. A person not a party to the contract could not be bound by the terms of a contract to which he is not a party under a principle of privity of contract. It is settled law that parties are bound by the agreements they freely entered into, as it was held in the case of **Simon Kichele Chacha vs. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, Court of Appeal of Tanzania at Mwanza, (unreported). The doctrine of privity of contract bars the plaintiff from suing a person who is not part of the contract. In the case of **Chesano Cotton Ginnery vs. Jielong Holding Tanzania Ltd**, Civil Appeal No. 187 of 2017, Court of Appeal of Tanzania at Dar Es Salaam (unreported), the Court of Appeal insisted that only parties to the contract can sue and be sued.

The counsel for the respondent said that the trial Court inferred the terms of the oral agreement from the conduct of the appellant and the nature

of the transaction. He stated that the appellant was issuing company cheques as security for the loan, and some payments were made through the company cheques. However, the evidence in the record shows that Asajile Simon Mbwilo was paying some of the loans through company cheques and some from his account. Also, Asajile Mbwilo issued company cheques in advance as a security for the loan. Issuing cheques in advance as security for the loan could not change the oral loan agreement between the respondent and Asajile Mbwilo. The terms of the contract may be inferred from the conduct of the parties and the nature of the transaction as it was held in the case **Leonard Dominic Rubuye T/A Rubuye Agrochemical Supplies vs. Yara Tanzania Limited**, Civil Appeal No. 219 of 2018, Court of Appeal of Tanzania, at Dar Es Salaam, (unreported). But, the evidence in record shows the oral loan agreement was between the respondent and Asajile Mbwilo. Thus, the respondent sued the wrong party (appellant), not party to the oral loan agreement. The appeal has merits. This ground alone disposed of the appeal and as result I'm not going to consider the remaining grounds of appeal.

Therefore, the appeal is allowed. The proceedings, judgments, and orders of the trial Primary Court and appellate District Court are quashed and

set aside accordingly. Since the circumstances of the case show that the respondent is claiming for the payment of his debt and the appeal was allowed because he failed to sue a proper party to the oral agreement, each party shall bear own cost of the suit. It is so ordered accordingly.

Dated at Iringa this 26th day of March, 2024.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

A.E. MWIPOPO

JUDGE