IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOROGORO

AT MOROGORO

CIVIL APPEAL NO 16 OF 2023

(Appeal from the decision of the Resident Magistrate Court of Morogoro at Morogoro in Civil Case No 1 of 2022 before I. G. Lyatuu Esquire Senior Resident Magistrate dated 14. 4. 2023)

BETWEEN

SPEAR AMANI KOMANYA.. APPELLANT

VERSUS

FUJO JUMA KALUSUSU...1ST RESPONDENT

FARIDA KALUSUSU...2ND RESPONDENT

JUDGMENT

MRUMA, J

The Appellant Spear Amani Komanya was the Plaintiff in Civil Case No 1 of 2022 before the Resident Magistrate Court of Morogoro at Morogoro. The present Respondents Fujo Juma Kulususu and Farida Kulususu were Defendants in that case. In that case the Appellant herein was claiming against the Respondents jointly ~~and severally~~ for payment of Tanzania shillings 123, 000,000/=being the outstanding loan amount advanced to

them by the Appellant pursuant to a written agreement entered between the parties. After hearing the evidence of both sides the trial court dismissed the Appellant's claims with costs on the ground that he had failed to prove his case to the required standard. Aggrieved with the findings and decision of the trial court the Appellant has lodged this appeal on the following grounds:

1. That the learned trial magistrate erred in law and in fact in holding that there was no valid agreement between the parties while in their pleadings the Respondent never dispute the existence of the same;
2. That the learned trial Magistrate erred in law and in fact in grounding its decision on extraneous matters not borne by evidence on record;
3. That the learned trial magistrate erred in law and in fact in not holding that the Respondents breached the loan agreement and'
4. That the learned trial magistrate erred in law and in fact for failure to properly evaluate the evidence on record thereby reaching at an erroneous conclusion in not holding that the Defendant breached the loan agreement.

Initially this appeal was assigned to his Lordship Malata J, who handled all preliminary stages. Upon his transfer to another working station, the appeal was re-assigned to me for hearing and composing judgment.

At the hearing parties were represented. The Appellant was represented by Ms Alpha Alex Siklaumba while the Respondent was represented by Mr Ignasi Seti Punge both learned advocates.

Briefly, the material facts of the case as can be discerned from the pleadings of the parties and trial court's records may be recapitulated as follows; that parties in this appeal are long-timer business friends and they used to support each other. Due to their long-time friendship in the year 2018 the Appellant advanced to the Respondents a loan of one Hundred and Twenty-Three Thousand Million (123,000,000) only which was to be paid within a period of six months. According to the Appellant the purpose of the loan was for construction of the Respondent's building known as Samaki Samaki which was owned by the Respondents and in which they were conducting a bar business. According to the Appellant despite involving their friends and sending demand notices through and advocate the Respondent did fail to honour the terms of the agreement and hence the matter at hand.

During the trial, apart from himself the Appellant called one witness namely Damari William Nyange (PW2) an advocate of the High Court who told the court that she prepared and witnessed the signing of the loan agreement between the parties (Exhibit P1).

In his defence the 1st Respondent (the Defendant therein), Fujo Juma Karurusu testified himself and called one witness his wife Petronila Vincent (DW2). He denied to have entered into a loan agreement (Exhibit P1) with the Appellant. She told the trial court that the Appellant advanced to them Shillings 40,000,000/= which was deposited in his bank account with Azania Bank which he had re-paid since then. He tendered in evidence a Current Customer's Account Statement of one **Fine And Fabulous Boutique** (Exhibit D1) which indicated that the Appellant did on 17th August 2019 did make an Internal Transfer of Shillings 40,000,000/=to that account. It was further testimony of the 1st Respondent's that, that was the only amount they received from the Appellant as a loan. His story was supported by that of his wife Petronila Vincent (DW2) who told the court that on 17th August 2019 her husband informed her that the Appellant Spear Amani Komanya had deposited Shillings 40,000,000/= into their business current account (Exhibit D1). It is worth noting here that Petronila Vicent (DW2) denied to be the same person as Farida

Kulususu, the second Respondent herein who was the second Defendant in the original suit.

Upon full trial the trial court found that on the evidence on record, the plaintiff had failed to prove the case to the required standard and it dismissed it with costs.

This is the first appeal, the first appellate court has the duty and power to revisit and re-evaluate the entire evidence in an objective manner and come up with its own findings of facts (See Civil Appel No 219 of 2018 between **Leonard Dominic Rubuye T/a Rubuye Agrochemical Supplies Versus Yara Tanzania Limited** CAT Dar Es Salaam (unreported)). This court in its appellate jurisdiction reviews the evidence and the decision of the trial courts to make sure that the proceedings were fair and that proper law was applied correctly.

The first complaint is that the trial magistrate erred in law in holding that there was no valid contract while the Respondents never disputed it in their pleadings.

I have carefully gone through the parties pleadings. The Appellant pleaded existence of the loan agreement under paragraph 3 of his plaint and the Defendants denied it under paragraph 2 of their Joint Written

Statement of Defence which was signed by both Respondents. Rule 3 of Order VIII of the Civil Procedure provides as follows:-

"*It shall be not sufficient for a defendant in his written statement to deny generally the grounds alleged by the Plaintiff, but the Defendant must deal specifically with each allegation of fact of which he does not admit the truth except damages*"

Under Rule 4 of the same Order, the law says:-

"*Where the Defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but must deny that he received that sum or any part thereof or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances*"

As indicated above in paragraph 3 of the Plaint, the Appellant alleged specifically that he advanced Tanzania Shillings One Hundred Twenty Three Million (i.e. TZS 123,000,000/=) to the Respondents. As can be discerned from paragraphs 2 and 3 of the joint written statement of defence, the Respondent on their part didn't deal specifically with the

point of substance the allegations, (that is to say that they received Shillings 123,000,000/= from the Appellant or any part or deny) as required by Rules 3 and 4 of Order VIII of the Civil Procedure Code, instead of denying spicically, under paragraph 2 of their defence statement they made a general denial of the allegations and claimed that the Appellant's claims were unreasonably inflated. I find this to be an evasive denial of the allegations of the facts. It is an evasive denial because they did not directly deny a particular fact or allegation made by the plaintiff to wit receiving shillings 123,000,000 as a loan, instead they made vague, ambiguous or evasive reply that the claims were unreasonable and vague. In law of pleadings a defendant should provide clear and specific response to every allegation put forward by the plaintiff. In the case of **Fikirini Issa Kocho Versus Computer Logix and Others Civil Case No 151 of 2012,** this Court (Twaib J, as he then was) held that:-

> *"It is insufficient for the Defendant to simply put the Plaintiff to strict proof of several allegations in the Plaint"*

Thus, by putting the Plaintiff to strict proof of the claims and vaguely suggesting that they were inflated, the Respondents did not provide a clear and specific response to the claims.

Moreover, under paragraph 3 the Respondents admit the allegations that they were close friends of the Appellant and that they had long business relationship with him. The Respondents further admitted that:-

> "*On various occasions, the Plaintiff advanced to the Defendants some amount of money which attracted extraordinary interests*"

They didn't specifically on which "various occasions" they received some amount of money from the Appellant apart from 17th August 2019 in which they admitted to have received Shillings 40,000,000/= from him. I take it that one of those "various occasions" was on 27th July 2018 in which they received Shillings One Hundred Twenty Three Million (TZS 123,000,000/=) and signed the **Mkataba wa Kukopeshana Fedha** (Exhibit P1), which was witnessed and attested by Damari William Nyange (PW2) an advocate of the High court. It was important for the Defendant to provide a specific denial in their Written Statement of Defence as required by Rule 5 of Order VIII of the Civil Procedure Code. Mere evasive denial cannot be considered as sufficient denial and the allegations made in the plaint may be treated as admitted.

The second ground of complaint in this appeal is that the trial magistrate erred in law and in fact in grounding his decision on extraneous matters. In its judgment the trial magistrate stated at page 8 thus:-

"In my view, after going through the entire contract, especially clauses 1 and 2, I am satisfied that it is doubtful if at all the contract was signed in the presence of PW2 who according to his oath is an advocate. I am saying so because the two paragraphs indicated that the money were paid upon signing the said contract...

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1.Kwamba Mkopeshaji amewakopesha wakopaji fedha Taslim shilling Milioni Mia Na Ishirini na Tatu (123,000,000/=) tu kama ilivyoelezwa hapo juu leo tarehe 27 Julai 2018 kwa dhamana ya baa ya Wakopaji yenye maelezo yake hapo juu.

2. Kwamba Mkopeshaji amekwisha wakabidhi wakopaji fedha hizo wakati wa kutiliana saini Mkataba huu..........."

It was the findings of the learned trial court's magistrate that nowhere did the agreement show that the money was given to the Respondents in car and he wondered how such huge amount of money could be given inside a car and why the money was not given in presence of PW2. This is a bit strange because there is no law that requires the contracting parties to state in the agreement the place or even mode of delivery of the money and/or property the subject of their agreement. What is important is safety of both the cash and the contracting parties.

Secondly, according to PW2, an advocate of the High court what she witnessed was the signing of the loan agreement (Exhibit P1) between the lender and the borrower and not disbursements of the money loaned. Like any other loan facilities or agreement, the role of an advocate is to attest and see that parties have dully signed their agreement. Advocates do not witness disbursements of the funds to the borrowers. Looking at clause 2 of the **Mkataba wa Kukopeshana Fedha** (Exhibit P1), by the time of signing of the agreement the loaned money had already been handed over to the borrowers. The relevant part of that clause states in Kiswahili:-

"Kwamba Mkopeshaji amekweisha wakabidhi Wakopaji Fedha hizo Wakati Wa kutiliana Sain Mkataba Huu……."

In my translation of the above clause it means that by the time of signing of the agreement money had already been disbursed to the borrower and this is very common in business transactions and particularly so when the contracting parties are long- time friends like the parties in these proceedings.

There is another undisputed evidence on record which suggests the existence and therefore validity of the agreement. Prior to instituting these proceedings the Appellant through his advocates **Sikalumba Law Chambers** wrote a demand letter (notice) to the Respondent with reference number SLC/DOC/O8 dated 2/11/2021(Exhibit P2). The Respondents through their advocate one Mshikilwa Peter of **Petrus Consult Attorneys** responded to the demand through their letter with reference number PCA/DL/01/SLC/MOR (Exhibits P3), dated 8/11/2021 in which they stated thus:

"Kwamba tunakiri wateja wetu kuingia kwenye Mkataba wa kukopeshana na mteja Wako Bw. Spear Amani Komanya wa Kiasi Cha fedha taslimu TZS 123,000,000/= mnamo tarehe 27 Julai 2018"

The Respondent did not object to the tendering and admission of that letter (i.e. Exhibit P3) in evidence and the only question PW1 was asked in cross-examination about that letter is whether it was signed by the Respondents or not. The answer to that question was and I think rightly so that it was not signed by the Respondents but by their advocate on their behalf. That was an obvious reply. An advocate being a person who puts a case on someone else's behalf is an agent of his client and is the one who signs letters and other documents on behalf of the client(s). There was no complaint from the Respondents that Petrus Consult Attorneys did not have instructions to reply to the Appellant's demand letter on their behalf. It is therefore my findings that there was clear admission of the Appellant's claims by the Respondents through their pleadings and on the evidence adduced. Thus, pleadings of the parties and the evidence on record are sufficient to answer all grounds of appeal in appellant's favour. The evidence of PW1, PW2 and exhibit PI, P2 and PW3 sufficiently proved that there was a valid agreement between the parties in which the Appellant advanced Shillings 123,000,000/= as a loan to the Respondents.

On the other hand the Respondents didn't lead any evidence to show that the money borrowed from the Appellant or any part thereof was repaid. At page 31 of the trial court's typed proceedings the 1st Respondent is quoted to have told the court thus:

> *"It is not true that the Plaintiff gave me that huge amount of money. I did not sign the said contract in advocate Damari's office. I don't know where the office of the said advocate is located....He tell lies.....that I signed the said document.* ***It is true that we planned to take the money from the Plaintiff but it was not the amount stated (i.e. 123,000,000/=). He agreed to give me some amount of money but he only deposited Shillings 40,000,000/="***

[Emphasize is mine].

From the above excerpt from the testimony of the first Respondent, the first Respondent admits plan to borrow money from the Appellant and that at least they received Shillings 40,000, 000/= on 17th August 2019. Nowhere did he say anything concerning payments towards settling the amount which he admits to have borrowed from the Appellant. Similarly Patronila Vincent (DW2), the first Respondent's wife but who denied to be the second Respondent in this proceedings

told the trial court that the 1st Respondent informed her about Shillings 40,000,000/= which was deposited in their business account by the Appellant. She did not say anything about returning that money or any other money to the Appellant. This means that nothing was paid to the Appellant as repayment of the money he lent to the Respondents. Thus, because there is evidence that the Respondents borrowed Shillings 123,000,000/= and there was no evidence that the loan or any part thereof was re-paid, I find that the Appellant was entitled to be paid back the amount of Shillings 123,000,000/= as claimed in the plaint.

Apart from the principal outstanding sum of Shillings 123,000,000/= the Appellant claimed interest on the decretal sum at the rate of 21% per annum from 27th January, 2019 which was the due date for payment of the loan to the date of judgment and further interest at the rate of 12% per annum from the date of judgment till payment in full. The term interest simply means money paid regularly at a particular rate for the use of money lent. It is a profit of a financial nature (See **Black's Law Dictionary Bryan A. Garner** 10th Edition page 934). In the case at hand the Appellant lent money to the Respondents on the basis of love and affection. That is the position

because there was no evidence to show that the Appellant was doing financial business. When money is lent on the basis of love and affection the lender cannot be entitled to charge interest on the money lent. I therefore hold that the Appellant is not entitled to any interest on the money lent to the Respondents.

The Appellant also claimed for payment of general damages for breach of a contract. In law of contract general damages refers to harm which arises directly and inevitably from the breach of the contract. From the evidence on record the money lent were business money. The Appellant lent money to the respondents to enable them to carry out construction of their bar business called Samaki Samaki. A business money is that money which is available for investment. Instead of investing his money, the Appellant gave it to the Respondents for their own investments. Their agreement stated clearly that the lent money would be payable within six months from the date of they were borrowed. The Respondents didn't comply with the terms of their agreement and I am of the firm view that the Appellant was entitled to compensation for non-use of his money from the date the debt was due to the date the same shall be paid back and bearing in mind the fact that parties' were long-time friends, I fix

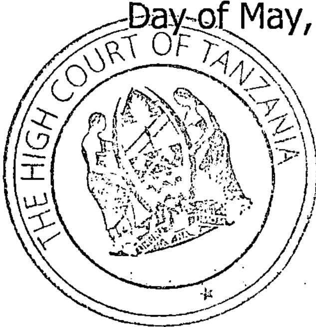
the compensation payable under this head at the rate of 2% of the money borrowed per annum from the date the debt was due to the date the same is fully settled. That said the appeal with costs to the Appellant here and in the court below.

A.R. MRUMA,

JUDGE

16. 5. 2024

Court: Judgment delivered in presence of the Respondent and his advocate but in absence of the Appellant and his advocate this 16th Day of May, 2024.



A.R. MRUMA

JUDGE.

16. 5. 2024.