THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

CIVIL APPEAL NO. 39 OF 2022

(Originating in the Resident Magistrate Court of Mbeya in Civil Case No. 14 of 2019)

LETSHEGO BANK (T) LTD .....1ST APPELLANT

DABRI AUCTION MART CO. LTD.....2ND APPELANT

VERSUS

DICKSON NGONYANI ..... RESPONDENT

JUDGMENT

Date of hearing: 17/5/2024

Date of judgment: 27/5/2024

NONGWA, J.

In the Resident Magistrates' Court of Mbeya at Mbeya in Civil Case No. 14 of 2019, the respondent sued the appellants for a claim of Tsh. 30,000,000/= as specific damage, Tsh 15,000,000/= for general damage and costs of the suit.

Brief background of the case is that the first appellant is a banking institution duly established under the laws of Tanzania while the respondent is a businessman. Sometimes in 2016 the first appellant and

respondent entered into loan facility agreement of Tsh 28,900,000/= in which the first appellant became a lender and the respondent a borrower. The loan was secured by a motor vehicle make Toyota Land Cruiser with registration number T274 AGB. The loan was to be repaid within fifteen months in equal instalments. It was alleged that the respondent paid up to Tsh. 20,000,000/= and defaulted the remaining amount. To settle the debt, the first appellant appointed the second appellant to attach and sale the collateral, upon being issued with fourteen-days' notice, the respondent voluntarily handed the motor vehicle to the appellants. The exercise was conducted by executing the agreement which was signed by both parties to this case.

On unknown date, the respondent requested loan to CRDB Bank PLC which undertook to check the borrowing history of the respondent and through Credit Referral Bureau (CRB) noticed that had bad history of loan payment with the first appellant. The respondent wrote to the first appellant and was informed that he was still indebted to them. Believing that after taking his land cruiser debt was offset but the first appellant declined to clear him from the CRB system entitling him to damages, the respondent filed the suit for aforementioned reliefs.

The appellants disputed the claim of the respondent, they alleged that he was still indebted to them and had failed to honour his obligation to repay the loan. Therefore, prayed the suit to be dismissed.

At the final Pre Trial Conference the trial court framed four issues as seen at page 20 of the proceedings; **one,** whether there was loan agreement between the plaintiff and first defendant; **two,** whether there was breach of loan agreement; **three,** whether the plaintiff suffered any damage and **four,** to what reliefs parties are entitled to.

In a bid to prove the case, the respondent testified as PW1 and in support he called Iman Mwakalobo (PW2) from CRDB Bank PLC. Also tendered a total of three documentary exhibits, loan agreement (exhibit P1), *fomu ya makabidhiano ya gari* (exhibit P2) and demand letter (exhibit P3). Other documents were rejected.

Substance of respondent's case was that he took the loan of Tsh 28,900,000/= through exhibit P1 from the first appellant and managed to repay Tsh. 20,000,000/=. Thereafter, the appellants took his land cruiser valued at Tsh. 30,000,000/= to offset the loan, the exercise which was preceded by reducing into writing. PW1 tendered *fomu ya makabidhiano ya gari* which was received and marked as exhibit P2 after the appellants

had objected that it was secondary evidence, but the magistrate reserved his reasons to be embodied in the judgment.

PW1 testified that he requested loan of Tsh. 12,000,000/= to CRDB Bank but was told in writing that loan could not be processed due to his bad behaviour on loan payment with the first appellant. PW1 stated that he approached the first appellant but was told he was still indebted, this moved her to write demand letter through his advocate, the letter was received as exhibit P3. On his part PW2 testified that the respondent approached them for a loan but was not issued because it was discovered that had bad record of loan payment with other banks after checking through CRB.

The appellants' case was built on evidence of John Mtefu (DW1) recovery officer of the first appellant and Halid Magwayo (DW2) a director of the second appellant. Evidence of DW1 was that until when they embarked to take the collateral, the respondent had a debt of Tsh, 13,806,348/=. After taking the security of loan they sold it at Tsh. 6,000,000/= and then they decided to write off the debt because the respondent had no any other security. DW1 stated that as a banking institution they report to BOT which through the CRB there is information of bank customers available to other banks and it was not their

responsibility to delete the information in CRB. DW2 testified that he was engaged by the first appellant to attach and sale the collateral of the respondent after had failed to repay the loan. The respondent handed the car and reduced the handover in writing, thereafter the car was sold for Tsh. 6,000,000/=.

At the conclusion of trial, the magistrate answered the first issue in affirmative, the second issue was split into two limbs, one, he found that the plaintiff breached the loan agreement after he failed to repay instalments in the timeline and two, the first appellant failed to clean the respondent after she had taken the motor vehicle to offset the loan. The third issue was also answered in affirmative that the respondent suffered damage. Having answered the issues as above, the magistrate held that the respondent failed to prove specific damage, thus declined to award it. But was satisfied that the respondent suffered damage at the instance of the first appellant, he awarded Tsh. 20,000,000/= with interest at the court rate of 7% per annual from the date of institution of the case to full payment. The first appellant was condemned to pay costs and ordered to clean the respondent in CRB system.

The above decision aggrieved the appellants who filed memorandum of appeal consisting of seven grounds; **one,** that the trial

magistrate erred in law and fact by determined that the 1st appellant breached a contract with the respondent without any evidence on records to prove the purported breach of contract; **two,** that the trial magistrate erred in law and facts by shifted the blame on appellant while the trial records evidencing that it is the respondent who breached the loan contract and the collateral was sold in a public auction without his objection or any contention and the remained balance after auction without his objection or any contention and the remained balance after auction was legally reported to the Bank of Tanzania as per the law; **three,** that the trial magistrate erred in law by admit (Exhibit P2) being a secondary document instead of original document despite of the objection from the appellant and without assigning any reason; **four**, that, the trial magistrate erred in law and facts by considering and relied on the letter from CRDB refusing to give loan to the respondent in making decisions despite of the fact that the document was rejected by the court and there was no any other sufficient evidence on records to prove the allegation that the applicant applied loan from other bank; **five,** that the trial magistrate erred in law and fact for not analyzing well the evidence of the appellant, instead relied on the evidence of the respondent only and reached to unjustifiable decisions; **six,** that, the trial magistrate erred in law and fact by awarding general damages to the respondent without

considering legal principles of award general damages; and **seven,** that, the trial magistrate erred in law by failure to adhere with the law in conducting the trial.

When the appeal was called on for hearing, the appellants were represented by Mr. Isaya Mwanri, learned counsel whereas the respondent has the service of Ms. Martha Walema, also learned counsel. The appeal was heard through filing written submissions, parties conformed to the scheduling order.

In his submission, Mr. Isaya combined ground one and two and the rest were argued separately. Arguing the amalgamated grounds, counsel for the appellants stated that the respondent did not prove his case as required by section 110 of the Evidence Act. He referred to the case of **Paulina Samson Ndavanya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 [2019] TZCA 453. Elaborating, Mr. Isaya stated that the respondent admitted to have breached the contract after failing to repay loan instalments as agreed. That from the evidence adduced there was no complaint that the motor vehicle was undervalued and that it was sold at Tsh 6,000,000/= while the outstanding loan was Tsh. 13,806,348/=.

The appellant's counsel went on the state that the information that the appellant was indebted was provided through CRB which is the automated system controlled by BOT and is visible to all banks. That so long as the respondent did not finish repayment of loan then is the one who breached the contract.

In ground three that exhibit P2 was secondary evidence, Mr. Isaya submitted that it was admitted contrary to section 66 and 67 of the Evidence Act. The case of **Anthony M. Masonga vs Penina & another,** Civil Appeal No. 118/2014 was cited to support the argument.

With regard to CRB in ground four, counsel for the appellant argued that although the CRB was rejected but it was relied by the magistrate in the judgment.

On evaluation of evidence in ground five. Counsel for the appellants submitted that the magistrate considered only evidence of the respondent, thus leading to wrong conclusion.

Arguing ground six on award of general damage, Mr. Isaya said, principles for awarding general damage was not considered in that it was not direct, natural or probable consequence of the act complained of. He cited the case of **Stanbic Bank Tanzania Limited vs Abercombie & Kent (T) Ltd**, Civil Appeal No. 21 of 2001 [2006] TZCA 7 to support the

preposition. He contended that the respondent did not suffer any damage from the act of the first appellant because the respondent is the one who breached the contract and it was the first appellant who suffered damage.

Ground seven was divided into two parts, right to be heard and granting reliefs not sought. Mr. Isaya submitted that PW2 shown ID and CRB but parties were not allowed to see it. Counsel referred to page 36 & 37 of the proceedings, contending that the act was contrary to Article 13(6)(a) of the Constitution. He added that the CRB was used in the decision referring at page 13 of judgment. The case of **Mbeya Rukwa Auto Parts & Transport Ltd vs Jestina Genge Mwakyoma** [2003] TLR 251 was cited to bolster the point that right to be heard in fundamental has to be granted to those who will be affected by the decision.

Before counsel for the appellants round up his submission, introduced two points which according to him touches jurisdiction of the trial court on the matter. One, that the complaint was premature because the respondent had a concern with the information in the CRB and the dispute was to be referred to the Credit Reference bureau which is mandated to resolve the dispute in two weeks. He referred to the case of **Salim O. Kabora vs TANESCO Ltd & Others,** Civil Appeal No. 55 of

2014, CAT at DSM in which the court held that where a certain law provides for a specific forum to first deal with a certain dispute, a resort to it first is imperative before one seeks recourse to court.

Two, that nature of case was professional misstatement and not breach of contract. Mr. Isaya submitted that facts of the case did not fit for breach of contract.

Responding to the appellant's counsel submission, Ms. Walema submitted that the respondent proved his case that the whole loan was repaid after the appellants took the motor vehicle. She complained that the appellant did not disclose proceeds of the sale of the motor vehicle of the respondent adding that there was no auction, notice and information of sale to the respondent.

Counsel for the respondent had long submission on ground one and two but all boils on argument that the respondent discharged his burden of proof under section 110 of the Evidence Act mainly after the appellants took the respondent's vehicle to cover the loan.

Regarding reliance on Secondary evidence, counsel submitted that the same was certified as required by section 67 of the Evidence Act.

On argument that the magistrate relied on documents which was rejected, it was submitted that decision of the magistrate did not base on

rejected exhibits. Counsel contended that magistrate decision was based on oral evidence of PW1 and PW2.

Regarding ground five on analysis of evidence, the same was dismissed by the respondent's counsel for lack of merit.

Replying to ground six that award of general damage was based on wrong principles. Ms. Walema submitted that the magistrate took into consideration the relevant principles governing award of general damage. She said that as the respondent discharged his loan after the appellants took his vehicle then a comment by CRDB Bank that has bad debt payment history and denial of the loan made him to suffer and loose business.

On failure to accord right to be heard when ID and CRB was shown to court, counsel for the respondent stated that parties were given the said ID to see and that it had nothing to do with the decision.

Regarding the issues introduced by the appellant on jurisdiction of the court, Ms. Walema submitted that it was new not raised as grounds of appeal.

During rejoinder, Mr. Isaya argued that it was the respondent who breached the contract. He lamented that the respondent's counsel did not cite any law or case law to support her arguments and section 12(7) of

the Auctioneer Act was not existing. On whether the respondent applied loan to CRDB Bank it was submitted that there was no documentary proof.

Having considered the record, grounds of appeal and rival arguments, in the journey to dispose of the appeal I will start with ground three, four, six, seven and then amalgamated ground one and two together with ground five. However, before going to grounds of appeal, I will first discuss the issue of jurisdiction of the trial court raised in written submission of the appellants. The respondent's counsel replied to those points as new.

The law is that parties are not allowed to argue new issues in the submission not raised as ground of appeal unless leave of the court is sought. The caveat is provided under Order XXXIX rule 2 of the Civil Procedure Code [Cap 33 R: E 2019], memorandum or petition of appeal or any other document which initiate appeal is a pleading to which parties are bound with. In the case of n **Bahari Oilfield Services FPZ Ltd vs Peter Wilson,** Civil Appeal No. 157 of 2020 [2021] TZCA 250 (11 June 2021; TanzLII) the court held that;

> '... *the principle that requires parties to be bound by their pleadings extends to grounds of appeal in an appeal which means that in so far as an appeal is concerned an appellant's*

written and/or oral submission must be in consonance with the grounds of appeal.'

This is not the first time the court is faced with tendency of parties to raise new issue in the submission, in the case of **Q-bar Limited vs Commissioner General Tanzania Revenue Authority**, Civil Appeal No. 163 of 2021 [2022] TZCA 381 (16 June 2022; TanzLII) the court stated;

'With respect, we find the submissions by both counsel for the parties to be misconceived. This is so because, in his written submissions, the appellant's counsel instead of clarifying issues alleged in the grounds of appeal, he introduced new issues on points of law. We find this to be irregular as, in a written submission, a party to the appeal is expected to only explain and clarify the grounds of appeal before the Court and not to introduce new matters based on new views. We need to emphasize the principle that litigants should not be allowed to change their goal posts when new views are discovered in the course of litigation, unless expressly permitted by the law.'

The above law is based on good conscience that if parties are allowed to raise new issue wherever they discover it, there is a danger of taking the other party by surprise thus leading to affording inadequate time to the other party to prepare and respond to the raised issue thus leading to improper administration of justice. The court expressed this concern in

Joseph Kahungwa vs Agricultural Inputs Trust Fund & Others, Civil Appeal No. 373 of 2019 [2021] TZCA 325 (23 July 2021; TanzLII) and held that;

> *'It is instructive to interject a remark, by way of a postscript that this is uncalled for, parties are bound to stick to the grounds of grievance raised in the memorandum of appeal and not to raise new points of grievances midway through submissions at their own convenience.* ***We think that, it should be in very rare occasion and only with the leave of the Court that a party can argue a ground not specified in the memorandum of appeal or in a notice of cross-appeal. To allow otherwise is not healthy for the proper administration of justice and more in particular in the spirit of affording each party adequate opportunity to address the court on matters in controversy. This is because the purpose of memorandum of appeal is to inform the court and the other party or parties the points of contention.'*** Emphasize supplied.

In the present appeal, the appellants counsel has raised new points in his written submission and without leave of the court. As rightly submitted by the respondents' counsel, the tendency is not allowed by the law and therefore those new points are rejected.

The above give chance to determine grounds of appeal in the order stated a while ago, in ground three the appellant complain that exhibit P2

was secondary evidence. I have considered the argument and perused the records, indeed when PW1 sought to tender exhibit P2 it was objected on ground that it was secondary evidence. The magistrate found the objection unmerited, admitted the said document but reserved the reason to be given in the judgment. I have read the judgment and found no such reason was given in the judgment for admitting secondary evidence as promised.

The law prohibits use of secondary document which falls under the category of secondary evidence under section 65 of the Evidence Act, however secondary evidence can be received in evidence if it satisfies conditions laid under section 67(1)(a) of the Evidence Act. It provides;

> *'67(1)(a) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases-*
>
> *(a) when the original is shown or appears to be in the possession or power of-*
>
> *(i) the person against whom the document is sought to be proved;*
>
> *(ii) a person out of reach of, or not subject to, the process of the court; or*

(iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it.'

The argument of Ms. Walema is that it was certified. This is a misconception of the law because under section 65 of the Evidence Act certified copy of document make it secondary evidence which must be admitted after complying with conditions laid under section 67(1)(a) reproduced above. Otherwise, the respondent was required to invoke the provisions of section 68 of the Evidence Act by either serving the party in possession of the document with a notice to produce the document in court, or requesting the court to issue summons to the party in possession of the document to appear in court and testify. See **Oliva James Sadatally vs Stanbic Bank Tanzania Limited,** Civil Appeal No. 84 of 2019 [2022] TZCA 388 (17 June 2022; TanzLII).

Upon perusal of exhibit P2 I have found it to be a photocopy, when PW1 was about to tender it laid no foundation for relying on secondary evidence, without such foundation upon which the court must satisfy that conditions for admission of secondary evidence are meet makes such document inadmissible in evidence, I therefore expunge exhibit P2 from record. Ground three has merit.

Ground four is that CRB was not admitted but relied in the judgment. In reply it was argued that the magistrate did not base the

decision on rejected document but oral evidence of PW2. My reading of trial court judgment has found that the magistrate did not mention anywhere worth a word CRB when answering framed issues. Reference of information of the respondent having bad history of loan payment is discerned when answering the second issue that BOT got information of the respondent indebtedness from the first appellant and is the one who was bound to provide the information that the respondent had cleared the loan payment. I therefore find nowhere the magistrate used a document which was rejected to reach the decision he did. Ground four is thus, dismissed.

Regarding award of general damage in ground six, it was the argument of Mr. Isaya that the magistrate did not considers principles laid. According to him it was too remote and not the consequences of the acts complained of. As expected, Ms. Walema was in favour of the findings of the magistrate.

It is settled that, general damages are such as the law will presume to be direct, natural or probable consequence of the breach General damages generally are that sum of money which will reposition the party who has suffered loss to his previous position before the loss. See **Kinondoni Municipal Council & Another vs Oysterbay Villa**

Limited, Civil Appeal No. 152 of 2022 [2024] TZCA 378 (21 May 2024; TanzLII) and **Anthony Ngoo & Another vs Kitinda Kimaro**, Civil Appeal 25 of 2014 [2015] TZCA 269 (25 February 2015; TanzLII).

In the plaint the respondent pleaded general damage under paragraph 4 and 15 of the plaint and prayed to the tune of Tsh. 15,000,000/=and interest thereto at the court rate. The trial court awarded Tsh. 20,000,000/= plus interest of 7% per annual from the date of institution of the case to full payment. It is trite law that, the appellate court cannot interfere with award of general damage unless the magistrate or a judge assessed the said damages by using a wrong principle of the law. After considering circumstance of this case, I find this is one of the circumstances in which the appellate court has to interfere with award of general damage.

One, it is clear in the plaint that the respondent prayed to be awarded Tsh 15,000,000/= but was awarded Tsh 20,000,000/= quite above the amount claimed. Although general damage needs to be pleaded and quantified, so long as the respondent was satisfied that Tsh. 15,000,000/= would meet the end of justice on his part, it was wrong for the magistrate to award above what was claimed. This offended the principle of pleading that one cannot be given a relief not asked for. For

a good reason that parties are bound by their own pleadings, so the court is bound by party's pleadings.

Two, there was no evidence upon which assessment of general damage could be made, in the case of **Mexon's Investments Limited vs DTRC Trading Company Limited,** Civil Appeal No. 91 of 2019 [2021] TZCA (16 November 2021; TanzLII) the court that;

> *'We have taken liberty to examine the evidence by the plaintiff's witnesses both in their respective witness statements and oral accounts, unfortunately, we were unable to find evidence, however slight, establishing loss, injury or damage the respondent sustained following failure to be paid the outstanding debt which was to be made good by the damages to be awarded. In the absence of such evidence we do not see how the court could assess the extent or determine the amount to be awarded. The duty lay on the respondent and was not discharged.'*

[See also: **Grace Olotu Martin vs Ami Ramadhani Mpungwe alias Ami Mpungwe alias A.R. Mpungwe**, Civil Appeal No. 91 of 2020) [2023] TZCA 193 (20 April 2023; TanzLII).]

The evidence is the bases from which the magistrate or judge will provide reason for awarding general damage, without such evidence, there is a danger of making wrong assessment of the amount of general damage to be paid to the wronged party. In this case there was no such

evidence justifying the magistrate to grant Tsh. 20,000,000/= which was not even asked for in the plaint. The reason provided above justifies this court to interfere with award of general damage assessed by the trial court. I find merits in ground six.

Adverting to ground seven that the appellants were not given right to be heard. The argument is that the appellants were not given chance to be shown ID and CRB introduced by PW2. Record at page 36 of proceedings, PW2 shown to the court ID that he was the employee of CRDB Bank PLC and at page 37 PW2 prayed the court to shown CRB, which he did. However, such documents were not intended to be introduced in evidence for the appellants to have been given chance to comment on it. This is not the instance in which a document is admitted without the opposite party being given chance to object or otherwise to its admissibility. From the record there was no dispute from the appellants with documents shown to the court, otherwise the issue of ID and CRB could have cropped in cross examination of PW2. I therefore dismiss ground seven.

Last is grounds one, two and five which raise common issue of evaluating evidence, it was submitted by the appellants' counsel that the

respondent did not prove the case, adversely Ms. Walema was confident that the respondent proved the case.

As the complaint relates to analysis of evidence, I find it apposite to look on some of the principles. The law under section 110(1) of the Evidence Act [Cap 6 R: E 2022] is that he who alleges must prove his allegation to succeed in a suit. It is equally the law that, unlike in criminal trials, the burden of proof in civil cases is not static. See **Bright Technical Systems & General Supplies Limited vs Institute of Finance Management**, Civil Appeal No. 12 of 2020 [2023] TZCA 17284 (30 May 2023, TanzLII).

It is also trite that, a party who has the burden of proof must discharge his burden on balance of probabilities regardless of the weakness in the case of his opponent. For this proposition, the Court's decision in **Paulina Samson Ndawavya vs Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017 [2019] TZCA 453 (11 December 2019; TanzLII). In this case the Court drew inspiration from the distinguished authors of commentaries in the works of Sarkar's Laws of Evidence, 18th Edition, **M.C. Sarkar, S.C. Sarkar and P. C. Sarkar**, published by Lexis Nexis and extracted an excerpt to the effect that, the burden of proving a fact rests on the party who substantially asserts the

affirmative of the issue and not upon the party who denies it for a negative is incapable of proof.

Another principle is the time-honoured principle of law that parties are bound by their own pleadings and they cannot be allowed to raise a different matter without amendments being properly made. That, no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded. Furthermore, the court itself is as bound by the pleadings of the parties as they are themselves. See **Barclays Bank T. Ltd vs Jacob Muro,** Civil Appeal No. 357 of 2019) [2020] TZCA 1875 (26 November 2020; TanzLII) and **Maria Amandus Kavishe vs Norah Waziri Mzeru & Another**, Civil Appeal No. 365 of 2019 [2023] TZCA 31 (20 February 2023; TanzLII)

Last is the principle is that the first appellate court is duty-bound to subject the evidence on record to a fresh analysis and arrive at its own conclusions understanding that such revaluation of evidence must be done cautiously since the trial court was in a better position to see, hear and appreciate the adduced evidence. See **Amos Njile Lili vs Nyanza Cooperative Union (1994) Ltd & Others** Civil Appeal No. 126 of 2020 [2024] TZCA 13 (31 January 2024; TanzLII) and **Abraham Sykes vs**

Araf Ally Kleist Sykes, Civil Appeal No. 226 of 2022 [2024] TZCA 20 (7 February 2024; TanzLII).

I will be guided by the above principle in resolving the issue under controversy. Before moving forward, one, it was undisputed fact that the respondent took the loan from the first appellant; two, that the respondent did not repay the loan as agreed; and three, that the appellant took the Land cruiser, security of loan for realisation of the unpaid amount. The epicenter of the dispute is whether the taking of the land cruiser had the effect of making the whole loan paid.

From evidence of PW1 it was that after the appellant took his land cruiser the whole loan was marked paid. On their part DW1 and DW2 testified that at the time of taking the land cruiser, the respondent had a debt of Tsh 13,804,438/= and the motor vehicle was sold at Tsh. 6,000,000/=. Meaning that the proceeds of sale of the motor vehicle did not realize the maximum to repay the unpaid part of the loan. DW1 further testified that after learning that the respondent had no other security to realize the loan, they decided to write off the debt.

After subjecting the evidence in record, there was no evidence from the respondent that he paid the whole loan. The appellant relied on action of the appellants to take his land cruiser as discharging him from payment

of the loan. The fact that a collateral was taken from the respondent is not a grantee that was relieved from payment of the loan, this is so because putting security to the loan is only intended to show the commitment and assurance of the borrower that has something to offer and in case, he fails to meet obligation to pay the loan as agreed, the lender has in hand something to realise and get the money paid back. In the case of **CRDB Bank Plc vs True Colour Limited & Another**, Civil Appeal No. 29 of 2019, [2021] TZCA 3533 (21 December 2021; TanzLII) the court stated;

> *'... a mortgage is made for the purpose of securing the repayment of the loan, it is not the law that; in the absence of negligence or bad faith, a mortgagee who fails to realize the full loan from the proceeds of the mortgage is barred from claiming the outstanding loan balance.'*

In this appeal, the appellants agree that they took motor vehicle from the respondent and after sale it yield Tsh. 6,000,000/= there was concern for the respondent counsel that there no auction, notice and it was sold at lower price. After perusing the pleading, I have noted that sale of the motor vehicle was not pleaded by the appellants, what is clear is that under paragraph 6 of the written statement of defence only explained that as the borrower failed to repay the loan they had right to realise security

of the loan. I therefore disregard evidence that the vehicle was sold and realised Tsh. 6,000,000/=

The above is not evidence that taking of the motor vehicle discharged the respondent from the loan, as taking of the security of the loan is not evidence of payment and discharge of the loan. Likewise, evidence that the land cruiser was valued at Tsh. 30,000,000/= was not substantiated by any evidence for which the lender could make good for it.

The magistrate was impressed by evidence of DW1 that after they found the respondent had no other property to sale and recover the remaining loan opted to write off the debt. I understand that in the proceedings the magistrate used ''right off'' debt which might have been due to mis-spelling, the correct phrase as under in banking law is "write off". According to **Black's Law Dictionary**, Bryan A. Garner, 11th Edition at page 1929, the term write off is defined thus;

> *'Write off, vb (1891) Accounting. To transfer part of the balance (of an asset account) to an expense or loss account to reflect the asset's diminished value.'*

Faced with what entails to write off debt under banking law, in the case of **National Bank of Commerce Limited vs Stephen Kyando**

t/a Asky Intertrade, Civil Appeal No. 162 of 2019 [2022] TZCA 244 (2 May 2022; TanzLII) elaborated in detail the phrase write off. The court stated;

> *'In our view, the above definition of writing off, is based on the fact that debts due to banks are one of the categories of their assets. It entails also that there are circumstances where, in case of banks operating in Tanzania, the Bank of Tanzania (the BOT) in execution of its mandate to supervise and to regulate the financial sector, imposes regulations providing for specified periods of time beyond which, a bank is not permitted to retain a debt as an asset particularly if the debt is non-performing. In such circumstances, a bank is required to move the amount of the debt from its asset's portfolio to its expense's in its books of account in order to diminish or rather to match the realistic value of its assets in its books.*

In **National Bank of Commerce vs Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 52 of 2018 [2018] TZCA 83 (6 July 2018; TanzLII) the court stated that:

'According to the BOT Regulations, once a loan is classified as a loss, it has to be taken out in the period in which it appears as uncollectible. In other words, that loss has either to be charged off or written off from the financial statements of the bank...'

Having the understanding of the phrase write off, it was a misdirection of the trial magistrate to hold that as the debt of the respondent was written off in the books of the first appellant, then was duty bound to notify the BOT and clean him to have discharged the loan payment. Speaking of writing off debts the Court of Appeal in the case of **National Bank of Commerce Limited vs Stephen Kyando t/a Asky Intertrade** (supra) held that;

> *'Further, we have painstakingly studied the entire 2014 Regulations and the BFIA,* ***but have not been able to trace a regulation or provision providing that a defaulting borrower, whose debt has been classified as loss, like the respondent in this appeal, should benefit from the regulatory aspect of writing off his own non-performing asset. Thus, we agree with Mr. Ngogo, that the act of the appellant writing off the respondent's debt did not relieve or discharge the respondent from the obligation of liquidating his debt and the appellant retained a legal right to enforce recovery of the written off debt from the defaulting respondent.*** *Holding otherwise, which we cannot do, would be tantamount to condoning financial indiscipline by unscrupulous and dishonest borrowers who could deliberately, default in settlement of their financial liabilities with their lenders waiting for their debts to be classified into categories qualifying for writing them off, so that they can go scot-free without repaying the borrowed monies.' Emphasize supplied.*

The above applies to the case at hand, the fact that the debt of the respondent was written off in the first appellant book did not means that had discharged the repayment of the loan necessitating his information of debt to be deleted in the CRB. In this case it has been proved through evidence of PW1 and DW1 that the loan advanced to the respondent was not paid in full as agreed. Although it undisputed that the appellant took the security of loan from the respondent, there was no any evidence that the taking had effect of discharging the whole loan. This means that the respondent did not discharge burden of proof that he paid the whole loan which was upon him.

From the above discuss, the appeal is merited, the judgment, decree and any other order of the trial is quashed and set aside. I hereby allow the appeal with costs.

V.M. NONGWA

JUDGE

27/5/2024

Dated and Delivered at Mbeya this 27th May 2024 in presence of Mr. Isaya Mwanri advocate for the Appellant and Ms. Martha Gwalema Advocate for the Respondent.

V.M. NONGWA

JUDGE