

IN THE HIGH COURT OF TANZANIA

DODOMA SUB – REGISTRY

AT DODOMA

PC. CIVIL APPEAL NO. 32 OF 2023

(Arising from the District Court of Dodoma in Civil Appeal No. 95 of 2022, Originating from the Primary Court of Makang'wa in Civil Case No. 14 of 2022)

YOHANA MZUKO APPELLANT

VERSUS

JOSEPH CHIBONI RESPONDENT

JUDGMENT

29th April & 11th June 2024

MUSOKWA, J:

The respondent herein, was the complainant in a suit that was instituted before Makang'wa Primary Court (trial court), in Dodoma District, for a claim of TZS 2,160,000/= against the appellant herein. The dispute between the parties is premised on breach of an agreement entered between the parties on 6th April, 2021. The appellant borrowed TZS 735,000/= from the respondent, in agreement to repay the loan with 210 sunflower pods (*debes*) after harvesting. Instead, the appellant repaid 66 pods only of sunflower.

In the trial court, the judgment was entered in favour of the appellant. Aggrieved by the decision thereof, the respondent successfully filed and prosecuted Civil Appeal No. 95 of 2022 in the District Court of Dodoma.

Before this court, the appellant has preferred the present appeal based on two (2) grounds of appeal: -

- (i) That, Hon. Senior Resident Magistrate erred in law and facts by quashing and setting the decision of the trial court magistrate while the respondent failed to prove his case on the required standard of balance of probability.*
- (ii) That, Hon. Senior Resident Magistrate erred in law and facts by allowing the appeal and ordering the appellant herein to pay the respondent 144 debe of sunflowers equivalent to 21 sacks (gunia) worth Tanzania shillings Two million and one hundred and sixty thousand (TZS 2,160,000/=) without taking into account that the appellant had already paid to the Respondent the total of 66 debe of sunflowers worth Tanzania shillings Nine hundred and ninety thousand (TZS 990,000/=) with an excess of Tanzania shilling two hundred and fifty-five thousand (TZS 255,000/=) to the undisputed borrowed money Tanzania shilling seven hundred and thirty-five thousand shillings (TZS 735,000/=).*

In the hearing of this appeal, the appellant was represented by Mr. Mselingwa learned advocate whereas the respondent was represented by the learned counsel, Mr. Lucas Komba.

Submitting on the 1st and 2nd grounds of appeal, Mr. Mselingwa learned counsel for the appellant argued that, the 66 pods which the respondent repaid the appellant were valued at TZS 990,000/=. The appellant's counsel asserted that in consideration of the value of the pods, the appellant had not only repaid, but had exceeded the amount he owed the respondent, to wit, TZS. 735,000/=. On this basis, the decision of the trial court was proper as the respondent was unable to prove his claim. Mr. Mselingwa prayed that the decision of the District Court be quashed and the decision of the Primary Court be upheld.

In reply, Mr. Lucas Komba learned counsel for the respondent argued that parties are bound by contractual terms and conditions they willingly entered into. Further, that each party to the contract is under an obligation to perform their duties and liabilities accordingly. Mr. Komba averred that the appellant failed to execute his obligations in accordance with the terms of the agreement between the parties. Emphatically, the appellant's counsel submitted that the agreement was very clear; that for the borrowed amount of TZS 735,000/=, the appellant was required to repay the respondent with 210 pods of sunflower. The learned counsel explained that the security for the loan was the appellant's building (business frame). Further, that the agreement was witnessed

by the Ward Executive Officer (WEO), one George Steven who testified as (SM2) before the trial court. Mr. Komba submitted that the appellant acknowledges partial compliance to the agreement. The appellant admits repaying the respondent with 66 pods of sunflower. To this effect, he still owes 144 pods of sunflower to the respondent. Mr. Komba contended that the agreement did not provide that the pods of sunflower to be repaid would be valued at the market price. The agreement was simply to repay the respondent 210 pods of sunflower in return of the loan amount of TZS 735,000/=. Therefore, by failing to repay the remaining 144 pods, it was the submission of the respondent's counsel, that the appellant was in breach of the agreement.

Proceeding with the reply, Mr. Komba submitted that the respondent was able to prove his claim at the District Court, resulting in the decision that was entered in his favor. The learned counsel referred to the case of **Simon Kichele Chacha vs Aveline M. Kilawe**, Civil Appeal No. 31 of 2014, Court of Appeal of Tanzania (CAT) which establishes the principle of sanctity of contract. Mr. Komba restated that the appellant is bound to the agreement which he entered into of his own free will. The respondent's counsel maintained his stance that the decision of the

District Court was correct and he prayed that the same be upheld and this appeal be dismissed with costs.

In rejoinder, Mr. Mselingwa reiterated his submission in chief and emphasized that the decision of the District Court was erroneous. The learned counsel for the appellant prayed that the decision of the trial court be upheld.

Upon examination of the records of the trial court, the District Court and the grounds of appeal before this court, the issue for determination is whether this appeal is meritorious.

In reviewing the court records and considering the submissions by the parties, it is undisputed that the appellant borrowed the sum of TZS. 735,000/= from the respondent.

In civil cases, the burden of proof lies upon the claimant. Further, that the claim must be proven on the balance of probabilities. In the CAT case of **Antony M. Masanga vs Penina (Mmam Ngesi) and Others, Civil Appeal No. 118 of 2014** (unreported) at page 10 it was held that: -

"It is a common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities.

In Re B. (2008) UKHL 35, Lord Hoffman in defining the term balance of probabilities stated that: -

*"If a legal rule requires a fact to be proved (a "fact in issue") a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. **If the party who bears the burden fails to discharge, it, a value of 0 is returned and the fact is treated as not having happened.** If he does discharge it, a value of 1 is returned and the fact is treated as having happened"*

During the hearing of this matter before the trial court, the appellant herein denied the alleged claim. The duty to prove the claim was borne by the respondent herein, the complainant in the trial court. The handwritten proceedings at the trial court will partly be reproduced hereinafter for ease of reference. For instance, the respondent herein testified as SM1 that: -

"...SU1 alinifuata nyumbani tukaenda kwa VEO huko nikampatia fedha TZS 735,000/= ambayo aliahidi kulipa debe za alizeti 210 ambazo ni sawa na gunia 30 za debe saba saba. SU1 alinilipa debe 66 za alizeti na zikabakia debe 144 ambazo hadi sasa hajatoa ndipo nimeona nimfungilie madai. Wakati wa kuchukua fedha hizo, SU1 aliweka dhamana ya jengo lake na fremu. Hivyo naomba anilipe kwa kuwa hadi sasa hajatoa"

In cross examination, SM1 stated further that: -

"Tulifikia muafaka kuwa fedha TZS. 735,000/= ni sawa na gunia 30 kwa wakati huo..."

- *Ninayo barua ya makubaliano mbele ya WEO na tukaandikishana...*

- ***Gunia 30 hizo tulizokopeshana ziiikuwa na thamani ya TZS. 735,000/=***

- ***SU1 amelipa debe 66 za thamani ya TZS. 990,000/=, kiia debe iikiikuwa TZS. 15,000/= kwa 2021***

- ***Fedha aiizochukua ahadi ilikuwa ni kurudisha aiizeti.***

- ***Tuiikubailana kurudisha aiizeti zenye thamani ya fedha aiizochukua.***

-*Hakuna fedha nyingine ambayo SU1 alichukua zaidi ya TZS.735,000/=.*

-*SU1 alilipa alizeti 66 mwezi 8/2022.*

-*Mwaka jana gunia la alizeti lilikuwa TZS. 105,000/=.*

-***Fedha hizo hazikuwa na riba yoyote.***

-*Fedha ambazo namdai zimetokana na debe ambazo bado hajalipa 144.*

-***Makubaliano yalikuwa ni SU1 kuiipa debe za aiizeti ambazo zinaendana na thamani ya fedha aiizokopa TZS. 735,000/=."*** [emphasis added]

Notably, the respondent herein, the complainant at the trial court, acknowledges that the appellant had already repaid him 66 pods of sunflower worth TZS 990,000/=. The respondent further admits that the amount borrowed by the appellant was TZS 735,000/=. Expounding on

the terms of the agreement, the respondent testified that the agreement was to return pods of sunflower worth TZS 735,000/=, being the loan amount. The respondent also stated that the agreement did not provide for interest on the loan amount.

Ironically, while the respondent testified that he had a copy of the agreement that was entered into before the WEO, the respondent did not tender the agreement before the trial court. Failure by the respondent to tender the agreement before the trial court has denied this court and other courts below, the opportunity to scrutinize the same. On the other hand, the testimony of the appellant (SU1) at the trial court, is recorded to read that:

"SM1 hanidai fedha wala alizeti".

As a result of the conflicting testimonies of SM1 and SU1, the respondent and the appellant herein respectively, the trial court ordered the appearance of the Ward Executive Office (WEO), who allegedly, witnessed the agreement in question. The WEO, testified as SM2 in the trial court and his testimony is recorded as follows: -

".....SM1 alinipigia simu kuwa SU1 anakopa fedha kwake kwa ajili ya kilimo. Baadae walifika wote SM1 na SU1 ofisini nikawasikiliza nao walikubaliana kuwa anakopa fedha TZS

735,000/= na atalipa gunia 30 ambapo bei kwa wakati ule alizeti ilikuwa 3,500/=. ”

In light of the proceedings of the trial court, and the evidence that was adduced in the course of the trial, it is evident that the appellant indeed owed the respondent TZS 735,000/= to be repaid by 210 pods of sunflower. It is further on record through the testimony of the respondent, that the agreement was to repay sunflower pods worth the amount of money borrowed. It is derived from the testimony of the WEO, that at the time of the agreement, a sunflower pod was worth TZS 3,500/=. The respondent in his testimony acknowledges repayment by the appellant of 66 sunflower pods each pod having the value of TZS 15,000/=. Further, the respondent states that the value of the 66 sunflower pods is TZS. 990,000/=. In essence, the respondent admits repayment of sunflower pods valued at an amount that is more than the loan amount.

The counsel for the respondent cited the CAT case of **Simon Kichele Chacha** (supra) specifically on the principle of sanctity of the contract. However, in my view, the cited case is distinguishable with the circumstances of the appeal before me. While the principle of sanctity of the contract is applicable in both oral and written agreements; the CAT

in **Simon Kichele's Case** deliberated upon a written agreement as opposed to the matter before me. Following the absence of a written agreement in this matter, this court had to determine the instant appeal based on other evidence on the record. Thus, in **Simon Kichele's case**, the determination of the matter including the deliberation on the principle of sanctity of the contract was conveniently and correctly held in its peculiar circumstances. For the purpose of transparency, the CAT held that:-

"In order to resolve this issue, it is imperative that we revisit the agreement concluded by the parties (Exhibit PI) on 14th May, 2012. Clause 2 of the agreement provides that the respondent advanced to the appellant TZS. 2,600,000.00 to be repaid on 13th July, 2012 with no interest chargeable therefrom. Further, Clause 3 of the agreement apart from stating that the appellant deposited his certificate of title as a security (Exhibit92) it also states that in case the appellant defaulted to repay the loan within the agreed timeframe, an interest of 30% per month would be chargeable and legal action would be taken against him. As alluded herein, the appellant does not dispute the conclusion of the agreement. As he is not disputing the agreement dated 14th May, 2012 (Exhibit PI) the appellant is bound by the terms and conditions of that agreement. [emphasis added]"

According to the aforementioned, I am of the settled view that the respondent failed to prove his claim against the appellant at the trial

court. The evidence adduced at the trial court establishes that the agreement was fully effected by the parties. Certainly, the respondent received from the appellant TZS 990,000/- which is more than TZS 735,000/=, the loan amount. Equally important, an extra amount of TZS 255,000/- paid by the appellant to the respondent is not contentious by both parties, and in that regard, I do not see the need to intervene.

Having said so, I find this appeal to be meritorious and the same is allowed. I further uphold the decision of the trial court. Accordingly, the decision and the corresponding proceedings of the District Court of Dodoma are hereby quashed and set aside. Considering the amount in dispute, each party to bear own costs.

It is so ordered.

Right of appeal explained.

DATED at **DODOMA** this 11th day of June, 2024.



A handwritten signature in black ink, appearing to read "I.D. Musokwa".

I.D. MUSOKWA
JUDGE

Judgment delivered on 11th June 2024 in the presence of the appellant;
and in the presence of the respondent and his advocate Mr. Lucas
Komba.



I.D. Musokwa
I.D. MUSOKWA
JUDGE