IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB-REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 83 OF 2023

SUDHIR KUMAR LAKHANPAL ..... APPELLANT

VERSUS

AZIM ALARAKHIA HOODA ..... RESPONDENT

(Appeal from the Judgment and decree of the Resident Magistrates Court of Dar-es-Salaam at Kisutu)
(A. H. Msumi, PRM)
Dated 31st day of May 2023
In
(Civil Case No. 219 of 2022)

JUDGMENT

Date: 11/09/2023 & 18/03/2024

NKWABI, J.:

William Shakespeare, a renowned English poet, playwright and actor who died in 1616 once wrote, *"Hoist by own petard".* What he wrote is captured in a platitude thus, *"Curses like chickens come home to roost."* He is absolutely vindicated by this case. Parties to this case would definitely not dare challenge the epigram.

Before the trial court, the respondent sued the appellant for an assortment of reliefs namely, payment of T.shs 100 million being the loan advanced to the appellant, his allegedly very familiar to each other and close friends, T.shs 20 million being special damages incurred by respondent caused by the failure of the appellant to repay the loan in time.

In his written statement of defence, the appellant dead set denied not only being a friend to the respondent but also the claim. The appellant stated that sum of money at T.shs 100 million was part of his entitlement in respect of Regalia Tanzania Ltd; where the respondent is a director. In the reply to the written statement of defence, the respondent did not expound his allegation of being very familiar and a close friend of the appellant.

At the conclusion of the trial, the learned trial magistrate was of the view that the respondent was able to prove his claim of T.shs 100 million against the appellant because he was satisfied that the testimonies of the plaintiff's witnesses were coherent. He ordered the appellant to pay the respondent a sum of T.shs 100 million with interest as well as the costs of the case. The sum of T.shs 20 million as special damages was rejected for lack of proof.

The appellant was wronged by the judgment and decree of the trial court, as a result, preferred the instant appeal raising a total of eight grounds of appeal. I must point out at the outset that, the manner in which the grounds of appeal were drawn, offended the provision of Order XXXIX Rule 3 of the Civil Procedure Code, [CAP. 33 R.E. 2022], (the CPC) which sets out the manner in which the grounds of appeal should be drawn. The

said provision reads;

> *(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from* ***without any argument or narrative****; and such grounds shall be numbered consecutively.* [Emphasis mine].

The grounds of appeal raised by the appellant are fully of arguments and narration. Nevertheless, I find the unconformity not fatal as the respondent was not prejudiced. Having carefully gone through the said grounds of appeal, the 7th ground which appears to dispose of the appeal can be conveniently summarized into one ground as I emulate:

> *That the trial court erred in law and fact in awarding the respondent a sum of T.shs 100 million while there was insufficient and contradictory evidence.*

By consensus of the counsel of the parties, this appeal was disposed of by way of written submissions. The appellant was represented by Mr. Joseph Rutabingwa learned advocate, while the respondent was represented by Mr. Laurent Ntanga, also learned advocate.

Before canvasing merits of the appeal, a brief factual background as could be gathered from the record undelaying the appeal is apposite. The

respondent claimed that he advanced a sum of T.shs 100 million to the appellant. According to the evidence adduced by the respondent, the said loan was advanced in three instalments whereby the first instalment of T.shs 50 million was advanced to the appellant sometimes in February 2018. T.shs 40 million was advanced to the appellant sometimes in October 2018 and T.shs 10 million was advanced to the appellant a few days later in October 2018.

According to the respondent the total loan amount was to be paid back before May 2019. The respondent claimed that the appellant did not pay back the money instead he instituted in this Court Civil Case No. 125 of 2019 claiming a sum of T.shs 600 million against the respondent's company known as Regalia Tanzania Ltd. The appellant lost in the said case.

In his defence, the appellant claimed that he never applied for loan from the respondent. He claimed that he received a sum of T.shs 100 million from Regalia Tanzania Ltd as his shares. He also maintained that the amount he got paid was minimum compared to the value of his shares and that is why he filed Civil Case No. 125 of 2019 to claim for further payment.

Arguing the appeal, Mr. Rutabingwa faults the trial court in awarding the

respondent a sum of T.shs 100 million while the evidence on the record stated otherwise. He argued at length referring to some contradiction between the evidence and findings of this Court in Civil Case No. 125 of 2019 and the evidence adduced by the respondent at the trial court.

Mr. Rutabingwa asserted that from the pleadings, the sum of T.shs 100 million claimed and awarded to the respondent by the trial court was the same amount surfacing in the High Court Civil Case No. 125 of 2019 and the evidence before the trial court was to that effect. The magistrate refused and/or failed to warn himself on whether he could safely adjudicate on that issue again, instead he proceeded as if it was a separate claim.

He further beefed up that PW.2 never stated that he was with PW.1 when appellant is alleged to have sought a loan from respondent. The counsel for the appellant also asserted that the appellant did not confirm to have approached the respondent for a loan. It was therefore wrong for the trial magistrate to hold that there was indeed conclusion of on oral agreement between plaintiff and defendant an oral loan request, expressed Mr. Rutabingwa.

The learned advocate for the appellant further criticizes the trial court in relying on the bank statement. He explained that, the bank statement was

never pleaded by respondent if at all it was an essential document. He added that the bank statement can only confirm a status of a bank account but cannot confirm that a certain amount was indeed paid out to the appellant without the particulars of the cheque. There was no entry on the statement of account to the extent that the withdrawn sum was paid to the appellant, Mr Rutabingwa impressed upon me.

The learned advocate for the appellant expanded that if truly the respondent has advanced the loan to the appellant, then why did the respondent give conflicting account on the dates and instalments at this Court and the trial court. The learned advocate argued that in Civil Case No. 125 of 2019 DW.1 (PW2 at the trial court) testified that the sum of T.shs 100 million came from Regalia Tanzania Ltd.

Mr. Rutabingwa again observed that there was no document requesting for a loan, no document of undertaking to pay or confirming indebtedness, no written demand notice and no third party was ever involved in the alleged attempted amicable settlement. He argued that, even the purpose of loan was never revealed. The counsel for the appellant thus prayed the appeal be allowed, the judgment of the trial court be set aside and respondent be ordered to pay costs of the appeal and in the trial court.

In reply to the submission, Mr. Ntanga remarked that the trial magistrate

was right to decide in favour of the respondent's claim of T.shs. 100,000,000/=. He pointed out that the claim originated from the loan between the respondent and appellant and argued that there was an oral request between the respondent and the appellant. He added that when the time for paying money was due, the appellant rushed to file Civil Case No. 125 of 2019 in which T.shs. 100 million included. He also observed that in the case the appellant admitted to receive T.shs. 100 million from Regalia Tanzania Ltd through respondent while Regalia Tanzania Ltd completely denied that. He added that PW.2 who is the Managing Director of Regalia Tanzania Ltd denied that T.shs. 100 million were from Regalia Tanzania Ltd but from respondent.

Mr. Ntanga also submitted that the allegation that the bank statement exhibit P.1 cannot prove if the withdrawn money were exactly paid to the respondent does not have weight, he argued that the admission by the appellant that he received T.shs. 100 million from the respondent weight much. He argued that each case is to be dealt according to its own merit, the case at the High Court Civil Case No. 125 of 2023 was in respect of the appellant claiming against Regalia Tanzania Ltd and Rajan Kapoor, whereby claims based on the so-called profit-sharing agreement, the claim which were not sustained before the Court. That the case which this appeal is preferred is claim of T.shs. 100 million which was advanced to

the appellant by respondent as the loan. In addition, he explained that the evidence cannot be the same since they are different in terms of claims and parties. That the kernel of this appeal is to ascertain if the said T.shs.100 million were advanced to the appellant. He argued that there was enough evidence that the appellant received T.shs. 100 million from the respondent not Regalia Tanzania Limited. As it has been clearly stated by the Managing Director of Regalia Tanzania Ltd and PW.2 that Regalia Tanzania Ltd gave nothing to the appellant, and it was the same PW. 2 who directed the appellant to the respondent.

Mr. Rutabingwa, in rejoinder submission, reiterated his submission in chief and added that it is not true that appellant admitted to have received the money allegedly withdrawn from respondent's bank account, it is his contention that what he stated is that the said money was withdrawn from the account of Regalia Tanzania Limited by cheques cashed by respondent.

Having gone through the parties' rival submissions, as well as the record of the trial court the issue for my determination is whether the appeal has merits. In determining this appeal, this Court sitting on the first appeal has the duty to reassess the evidence on record, and come up with its own findings. This position was taken in **Selle & Another v. Associated**

Motor Boat Company Ltd & Others [1968] 1 EA it was underscored that:

> *"... An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions ..."*

On the ground of appeal, the trial court is being faulted for awarding the respondent a sum of T.shs. 100 million. Going by the record, three issues were framed for determination by the trial court. The first issue was whether the appellant requested for loan of T.shs. 100 million. Having gone through the evidence on record, the trial court was satisfied that there was indeed a request of loan made by the appellant to the respondent, and the respondent duly extended the loan to the appellant.

The reason advanced by the learned trial magistrate is that the appellant and the respondent knew well each other hence there was a possibility that they could enter into a loan agreement. The trial court's stance was further fortified by the fact that the appellant had also approached PW.2 asking for a loan.

In civil cases the standard of proof required is that on the balance of probabilities, as provided under sections 110 through to 113 of the Evidence Act, [Cap. 6 R.E. 2019]. See the case of **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017. Court of Appeal of Tanzania at Mwanza (unreported).

The respondent being the plaintiff before the trial court, was required to lead evidence to establish that the appellant applied for the loan. Going through the evidence on record, it was not certain as to when exactly the appellant did make loan request to the respondent. There was no tangible evidence to establish that the appellant had applied for the loan from the respondent.

Even the evidence by PW.2 could not prove whether the appellant had requested loan from the respondent. He just told the trial court that the appellant approached him requesting for the loan of T.shs 100 million. He then told the trial court he later heard that the appellant had requested for the loan from the respondent. But PW.2 could not tell when the appellant applied for the loan from the respondent and also PW.2 never witnessed the appellant receiving loan from the respondent. Most of the PW.2's evidence is hearsay evidence incapable of proving a fact, see **Jadili Muhumbi v. The Republic,** Criminal Appeal No. 229 of 2021, CAT

(unreported) where it was held that:

> *"What is normally done with hearsay evidence is to attach little or no value to such evidence while it remains on record. Vumi Liapenda Mushi v. Republic, Criminal Appeal No. 327 of 2016 (unreported)."*

Who paid the amount of T.shs 100 million and was it a loan or appellant's part payment? This was hotly contested issued both at the trial court as well as in this appeal. While the appellant maintained that the sum was not only paid to him as his shares but also it was paid by a company called Regalia Tanzania Ltd and not the respondent. On the other hand, the respondent claimed that the money was advanced to the appellant as loan and it was not paid by the company as claimed by the appellant.

I am satisfied that the case of the respondent was tainted with irreconcilable contradictions on the evidence of each respondent witness and the totality of the evidence of the respondent. The contradiction is even glaring once one looks at exhibit D.1 the proceedings of Civil Case No. 125 of 2019, at page 43 where the respondent was quoted to testify that:

> *"Later on, it appears that the letter to immigration office, gave the plaintiff permission to work in Regalia from*

15/06/2016 to 22/10/2017. ... The plaintiff was never a signatory of Regalia's accounts. What he had was an authorization to get certain information from the bank."

The contradictions just put the lies of the respondent to the spot light. The first lie is about when the money was extended to the appellant, PW.2 indicated that the money was handed over to the appellant within a short time, but the evidence reveals that it took more than seven months. Secondly, the respondent claims to be a friend to the appellant, but it appears that the appellant was related to the respondent through Regalia Tanzania Limited. It needs evidence for one to accept that a person who works in the same institution is a friend to another, because it is not usually that every person who work in the same institution are friends. Even if there were such evidence, the pleadings of the plaintiff do not bear that, the details of the claim of friendship, thus it should crumble to the ground because parties are bound by their pleadings as per **Captain Harry Gandy v. Caspar Air Charter** (1956) 23 EACA it was observed that:

"The object of pleadings is, of course, to ensure that both parties shall know what are the points in issue between them, so that each may have full information of the case

he has to meet and prepare his evidence to support his own case or to meet his opponent."

In the case of **Maria Amandus Kavishe v. Norah Waziri Mzeru & Another,** Civil Appeal No. 365 of 2019, CAT, it was underscored that:

"We also feel compelled, at this point, to restate 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 originally pleaded. Furthermore, the court itself is as bound by the pleadings of the parties as they are themselves."

See also **Barclays Bank (T) Ltd v. Jacob Muro,** Civil Appeal No. 357 of 2019 CAT where it was stated thus:

"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."

It should be borne in mind that a witness who tells lies on one fact, should hardly be believed in others unless corroborated in material particular. For that position of the law on may have reference to **Bahati Makeja v. Republic** Criminal Appeal No. 118 of 2006 (unreported) where it was stressed that:

> *"It is settled law that a witness who tells a lie on the material point should hardly be believed in respect of other points."*

See also **Mathias Bundala v. Republic,** Criminal Appeal No. 62 of 2004, CAT (unreported) where it was stated that:

> *"Good reasons for not believing a witness include the fact that the witness has given improbable evidence, or the evidence has been materially contradicted by another witness or witnesses."*

The same is true with the respondent. In actual sense, the falsehood given by the respondent tempts this Court to think that this case is instigated by the fact that the appellant was paid money as his due from Regia Tanzania Ltd, but the respondent indirectly wanted the money back through litigation. That cannot be tolerated by this Court because his evidence requires corroboration which is wanting.

In totality the evidence on record suggested that the relationship between

the appellant, respondent and PW.2 was because they had a relationship based on a company called Regalia Tanzania Ltd than that of close friendship as suggested by the trial court. While the respondent claimed that he owns a company by the name Regalia Tanzania Ltd, the appellant stated that he was a director of the said company from 2016 to 2019.

Rightly as pointed out by Mr. Rutabingwa, the transactions on the bank statement which the respondent claimed were monies paid to the appellant not necessarily establishes the money was received by the appellant. Indeed, the bank statement indicates that the respondent was heavily indebted to the bank so it is unlikely that the respondent was advancing a loan to the appellant. He was therefore merely discharging liability of a company , he as a director

As to who paid the amount, while the appellant claimed the money he received belonged to Regalia Tanzania Ltd the respondent claimed that the money was his property. Basing on the above analysis it is evidently clear that the money was from the company even if the same might have been paid by the respondent. After all companies work through the people. My position is fortified by the fact that there was a demand notice issued to the company and later on a case was filed against the company. This suggests that the appellant had some claims against the company which

were partly settled by payment of T.shs 100 million. Conversely, the case is on the balance of the scale, even, which entitles a court of law to dismiss the civil suit as exhaustively stated in **Miller v. Minister of Pensions** [1937] 2 All ER 340:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say – We think it more probable than not the burden is discharged, but if the probabilities are equal, it is not ..."*

In upshot and foregoing without going into detail on what transpired in Civil Case No. 125 of 2019, the evidence adduced at the trial court by itself is capable of determining the matter at hand in favour of the respondent.

I am satisfied that the trial court erred in awarding the respondent a sum of T.shs 100 million. Hence, I find merits on the ground of appeal, so is the appeal I have been deliberating on.

Determination as above sufficiently disposes of the appeal before me. Consequently, the appeal is allowed with costs in this Court and the trial court. The judgment and decree of the trial court are respectively quashed and set aside.

It is so ordered.

DATED at **KIGOMA** this 18th day of March 2024.

J. F. NKWABI

JUDGE