

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC APPLICATION NO. 118 OF 2020

(C/f PC Civil Appeal No. 3 of 2020 at the High Court of the United Republic of Tanzania at Arusha and Civil Appeal No. 13 of 2019 at the District Court of Arusha at Arusha, Original Civil Case No. 1 of 2019 at Arusha Urban Primary Court.)

GODFREY CYPRIAN JAMESAPPLICANT

Vs

GRACE NDEWARIO MANANG RESPONDENT

RULING

Date of last order:16-12-2021

Date of ruling:15-02-2022

B. K. PHILLIP, J

Before me is an application for leave to appeal to the Court of Appeal of Tanzania against the decision of this Court in PC Civil Appeal No. 3 of 2020. The application is made under the provision of Section 5 (1) (c) of the Appellant Jurisdiction Act, supported by an affidavit sworn by the learned Advocate Ally A. Mhyellah, the applicant's advocate. The respondent filed a counter affidavit in opposition to the application. she is unrepresented, thus appeared in person. I ordered the application to be disposed of by way of written submission.

A brief background this application is that in the year 2019, the applicant herein lodged a case against the respondent vide Civil Case No.1 of 2019 at the Primary Court of Arusha, claiming for payment of Tshs 18,000,000/= which included a principal sum to tune of Tshs 15,000,000/= and interests, arising from a loan agreement between the applicant and the respondent. The basis of the applicant's claim was the loan agreement between the applicant and the respondent and its addendum thereto which were all admitted in evidence by the trial Court. The applicant alleged before the trial court that the respondent failed to repay the loan as agreed.

At the hearing the case before the trial Court the respondent admitted among other things that she was granted by the applicant a loan to a tune of Tshs 5,000,000/= and had not repaid the same, though she denied to have breached the contract. Upon hearing of the case inter-parties the Primary Court entered judgment in favour of the respondent and ordered her to pay to the defendant the principal loan amount (Tshs 15,000,000/=) plus Tshs 5,000,000/=, being compensation for delay in repayment of the principal loan amount.

Being aggrieved by the judgment of the Primary Court , the respondent appealed to the District Court of Arusha at Arusha on the following ground;

- i) That the trial Court failed to interpret the terms of the contracts between the parties and as a result it reached into an erroneous conclusion.*
- ii) That the trial Court erred both in law and fact by basing its findings on insufficient evidence.*
- iii) That the trial Court misdirected itself by ordering the appellant to pay shillings Five Million as general damages.*

The major arguments which were raised by the respondent in the District Court were two; first, that the contract between the applicant and the appellant involved a business transaction contrary to section 6 (1) of the Banking and Financial Institutions Act No. 5 of 2006, therefore was illegal in terms of section 10 of the Law of Contract Act and not enforceable.

Second, that the contract between the applicant and respondent, and the addendum thereto were wrongly admitted on the ground that the same were not stamped, thus contravened the provisions of section 47 (1) of the Stamp Duty Act.

Relying on the case of **Mohamed Idrissa Mohamed Vs Hashimu Ayoub Jaku (1993) TLR 280**, the District Court made the following findings; That the loan agreement between the applicant and respondent was valid and enforceable in terms of section 10 of the Law

of Contract Act, except the addendums thereto . It is in the interest of justice that parties should fulfill their promises, to hold otherwise would amount to legalizing unjust enrichment on part of the respondent to the detriment of the applicant who had acted in good faith.

Moreover, the District Court held that even if the contract between the parties would be expunged from the Court's records, the evidence adduced was sufficient to grant the applicant's claim since the respondent admitted to have received the loan alleged by the applicant. Thus, the respondent's appeal was dismissed.

The respondent did not despair, she preferred another appeal to this Court, on the following grounds;

- i) *That both the trial Court and the 1st appellate Court erred in law and fact by holding that the loan agreement between the parties was valid and enforceable under the law.*
- ii) *That both trial and appellate Courts failed to correctly assess general damages hence reaching into erroneous conclusion.*

In its decision this Court (Hon, Robert J) allowed the appeal and set aside the judgments of both lower Courts. It expunged from the Court's record the loan agreement and the addendum thereto which were admitted in evidence for not being stamped as required under the Stamp Duty Act and made the following findings; That since the transaction

between applicant and the respondent involved charging of interests , it implies that the loan transaction was a business transaction which could only be done by a licensed institution. No evidence was adduced to show that the applicant was licensed to conduct financial transactions, therefore the agreement between the parties was illegal and void.

Now, back to application at hand, Mr Mbwapbo, submitted that the applicant filed an application in this Court and obtained a certificate on points of law worth the attention of the Court of Appeal Vide Misc Civil Application No.117 of 2020 which was granted by this Court (Hon. Mzuna J). The points of law which were certified by this Court are;

- i) Whether the Law applicable in interpreting the contract entered between the applicant and the respondent ought to have been the Financial Institution Act No. 5 of 2002 or the Law of Contract Act Cap (Cap 345 R.E 2019).*
- ii) Whether it was proper to expunge the voluntary contract entered between the applicant and the respondent simply because they had not been stamped with the stamp duty and therefore not legally enforceable.*

Mr Mbwapbo submitted further that, Mr Hon Mzuna, J certified the points of law stated herein above and granted leave to the applicant to appeal to the Court of Appeal, but inadvertently ordered that the applicant has to file his appeal to the Court of Appeal within twenty one

(21) days from the date of his order. Mr Mbwambo was of the view that the time to lodge the appeal to the Court of Appeal is supposed to be granted in the instant application. He invited this Court to grant the applicant leave to appeal to the Court of Appeal and grant her reasonable time for lodging his appeal to the Court of Appeal ,and indicate that Certification on the existence of point of law has been sought and obtained.

The respondent did not file his submission as ordered by this Court. Thus, I have been compelled to compose this ruling without the respondent's submission since failure to file submission as per the Court Order amounts to failure to prosecute the case. [see the case of **National Insurance Corporation of (T) Ltd and another Vs Shengena Ltd, Civil Application No.20 of 2007** (unreported)]

Let me point out at the onset that this application is misconceived as I shall elaborate soon hereunder.

There is no dispute that this Court granted the applicant leave to appeal and enumerated the certified points of law as required by the law vide its ruling in Misc Civil Application No. 117 of 2020 which was delivered on 15th October 2021. Now the applicant has brought this application under the provisions of Section 5 (1) (c) of the Appellate

Jurisdiction Act, seeking for another order of this Court for leave to appeal to the Court of Appeal and requests to be granted reasonable time for lodging her appeal to the Court of Appeal. In the aforesaid Misc. Civil Application No.117 of 2020 the applicant moved this Court under the provisions of section 5 (2) (c) of the Appellate Jurisdiction Act to certify that there are points of law worth to be determined by the Court of Appeal. It has to be noted that leave to appeal to the Court of Appeal is normally granted once. It is either granted under section 5 (1) (c) of the Appellate Jurisdiction Act for matters originating from the District Court, the Resident Magistrates' Court or the High Court of Tanzania OR under the provisions Section 5 (2) (c) of the Appellate Jurisdiction Act for decisions of the High Court in any proceedings originating from the Primary Court.

From the foregoing it is the finding of this Court that the applicant's advocate misdirected himself by lodging this application after obtaining a leave to appeal when this Court certified that there are points of law worth the consideration of the Court of Appeal pursuant to the provisions of Section 5 (2) (c) of the Appellate Jurisdiction Act vide the aforesaid Misc Civil Application No. 117 of 2020.

With regard to the concern raised by Mr. Loitha that this Court while granting the certificate on point of law inadvertently ordered the

applicant to file his appeal within twenty one (21) days, I wish to point out that I have no powers to deal with the said concern since the said order was issued by my fellow judge of the High Court.

In addition, just by passing and without prejudice to what I have stated herein above, one of the remedies available to the applicant is to file an application for review before the same judge, if he believes that there is an error on the face of the record as far as the said ruling is concerned.

In the upshot, this application is struck out. I give no order for costs since the application has been struck out on the ground raised by the Court *suo moto*.

Dated this 15th day of February 2022



B. K. PHILLIP

JUDGE

