IN THE HIGH COURT OF TANZANIA

(IN THE SUB-REGISTRY OF MWANZA)

AT MWANZA

CIVIL APPEAL NO. 01 OF 2023

(Originating from Civil Appeal No. 22 of 2022 and Civil Case No. 57 of 2022 in Geita District Court and Katoro Primary Court respectively)

PUDENSIA A. LUGEMARILA.....APPELLANT

VERSUS

KAMPUNI YA KUKOPESHA MSIRIKALE.....RESPONDENT

JUDGMENT

Date of Last Order:14/03/2023

Date of Judgment:24/03/2023

Kamana, J:

This is a second appeal in which Pudensia A. Lugemalira, the Appellant, is challenging the decisions of the lowers Courts which entered judgments in favour of Kampuni ya Kukopesha Msirikale, the Respondent. On 2nd May, 2022, the Respondent instituted a Civil Case No. 57 of 2022 in Katoro Primary Court against the Appellant. In that suit, the Respondent was claiming Tshs.2,730,000/= arising out of their loan agreement entered on 25th May, 2020. Upon hearing both parties, the trial Court entered judgment in favour of the Respondent and proceeded to order the Appellant to pay Tshs. 2,730,000/-.

Aggrieved by such a decision, the Appellant preferred an appeal in the District Court of Geita. Thereat, the appeal was dismissed for lack of merits hence this appeal.

In this appeal, the Appellant is armed with four grounds of appeal as follows:

1. That the first appellate Court misdirected itself by dismissing her argument with regard to the trial Court's decision of not considering her evidence that she has paid Tshs.330,000/- out of the principal debt of Tshs.300,000/- and interest of Tshs.140,000/-.
2. That the first appellate Court misdirected itself in dismissing her arguments that the trial Court erred in not admitting in evidence receipts that prove she has paid the Respondent in the name of Manya Micro Finance taking into consideration that the Respondent and Manya Micro Finance are owned by one person.
3. That the first appellate Court misdirected itself by concurring with the decision of the trial Court that ordered the Appellant to pay the Respondent Tshs.2,730,000/- without considering that the sum advanced as a loan was Tshs.300,000/- and the same has already been paid and the receipts thereof were not admitted by the trial Court.

4. That the first appellate Court misdirected itself by failing to observe errors in the decision of the trial Court that ordered the Appellant to pay the Respondent Tshs, 2,730,000/- and the fine of 25% for 48 months without considering that the total amount would be Tshs,3,900,000/- while the Respondent did not testify to have been paid Tshs. 1, 170,000/-.

At the hearing, the Appellant appeared in person. The Respondent, despite being issued with the summons to appear, did not show up for reasons best known to her. In that case, the matter proceeded *inter parte.*

Arguing in support of the appeal, the Appellant, being a layperson, reiterated what was in her grounds of appeal. Further, when the Court raised *suo moto* as to whether Exhibit P1 (Loan Agreement) was read over to her after the same being admitted, the Appellant told this Court that the same was not read.

Starting with the issue raised *suo moto,* it is trite law that when the exhibit is admitted in evidence, the witness tendering the exhibit is required to read out the contents of the exhibit. The rationale behind this practice is to allow the adverse party to understand the contents of the exhibit and be able to cross-examine the witness over the exhibit. While I understand that the rules governing evidence in primary courts do not carry such requirements, I am of the considered view that reading out the

contents of the exhibit is a cardinal principle that ensures a fair trial. In that case, I expunge Exhibit P1 from the records.

Concerning the first and the second grounds of appeal, I do agree with the decisions of the trial Court and the first appellate Court. The arguments of the Appellant that she paid Manya Micro Finance and the Respondent on the ground that the same are owned by one person are unreasonable in the eyes of the law. It is an established principle that an incorporated company is distinct from its owner. Though the two companies might be owned by one person that does not justify the payment to another company that did not enter into an agreement with the Appellant. That being the case, the first and second grounds are devoid of merits.

Coming to the third and fourth grounds, I partly agree with the Appellant that the first appellate Court misdirected itself in awarding the Respondent Tshs.2,730,000/-. Had the first appellate Court considered the inappropriateness of the admission of the loan agreement, it would have expunged it from the records and determined the matter based on the remaining evidence.

Indeed, both parties are not in dispute as to whether there was an agreement under which the Respondent advanced money to the Appellant. The amount claimed by the Respondent, which was

Tshs.2,730,000/-, is in dispute. The evidence adduced by the Respondent was to the effect that the Appellant did not settle the debt which was Tshs. 300,000/- as a principal sum and 120,000/- as interest which made the total debt to be Tshs.420,000/-. In such evidence, it was testified that it was agreed that in the case of default, the Appellant was supposed to pay 25% a month according to Clause 6 of the Agreement. It was not stated that 25% is charged on which determinant factor, whether on the principal sum or the principal sum and interest. Further, the evidence was not clear as to what 25% means, whether interest or penalty.

On the other hand, the Appellant contended to have paid Tshs. 330,000/- to Manya Micro Finance, a sister company to the Respondent. In her evidence, she testified that the remaining debt was Tshs.110,000/.

According to her evidence, the loan was Tshs.300,000/- plus interest of Tshs.140,000/-. It is clear from her evidence that she was in default for the period starting from May, 2020 to January, 2021 when she started to effect payments totaling Tshs.330,000/- which were not, not admitted in evidence for lack of proof. The Appellant denied knowing Clause 6 of the Agreement regarding the issue of 25%.

Under the normal course of business, a loan is accompanied by interest and penalties in case of default. In this matter as per the evidence of both

parties, the principal sum was Tshs.300,000/- plus interest of Tshs.140,000. The contentious issue now is the issue of 25%.

In this regard, it is my considered view that the Respondent is entitled to Tshs.440,000 as a principal sum and interest on the debt since there is no proof that she was paid by the Appellant as correctly viewed by the lower courts. Further, I am of the opinion that the Respondent is entitled to 25% as a penalty for the Appellant's default. I hold so because both parties agree as to the fact that there was a fixed interest on such debt though they slightly differ as to the sum. In that case, the 25% testified by the Respondent is likely to be a penalty for default.

However, since there is no evidence of the period within which the Appellant was supposed to settle the principal sum and the interest, I am of the view that the 25% was not supposed to be entertained by the lower courts.

Under normal circumstances, this being the second appellate Court was not supposed to interfere with the concurrent findings of the lower courts. However, the Court may interfere if it appears there are misdirections or non-directions on the evidence by the first appellate court. Fortified by that position, it is my view that the first appellate Court did not appraise itself properly on the evidence adduced in the trial Court. In that case, I stepped into its shoes and came up with my findings.

I allow the appeal with costs to the extent stated herein. Order accordingly. Right to Appeal Explained.

DATED at **MWANZA** this 24th day of March, 2023.

KS KAMANA

JUDGE