

TANZANIA / JUDGMENT

SAMSON FOR TANZLII

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THE HIGH COURT OF TANZANIA GEITA SUB-REGISTRY AT GEITA DC. CIVIL APPEAL No. 16906 OF 2024 (Appeal from the decision of the District of Geita at Geita, in Civil Appeal No. 780 of 2024 dated 16 June 2024) EMANUEL SAMSON -----APPELLANT VS NG'WANDU NG'AMBI -----RESPONDENT

JUDGMENT

Date of last Order: 29/08/2024 Date of Judgment: 12/09/2024 K. D. MHINA, J. This is a second appeal. The appellant herein, EMANUEL SAMSON, brought this appeal against NG'WANDU NG'AMBI, having been dissatisfied with the decision of the District Court of Geita in Civil Appeal No. 780 of 2024, which quashed the decision of the Nyankumbu Primary Court in Civil Case No. 115 of 2023. The brief background to this matter is that the respondent in this appeal, Ng'wandu Ng'habu, was the plaintiff before Nyankumbu Primary 1 Court in Civil Case No. 115 of 2023, claimed against the appellant Emanuel Samson a sum of TZS. 2,676,000/= as a loan advanced to him. After the determination of the trial court, the respondent was awarded TZS. 1,100,000/= out of TZS. 2,676,000/=: which he alleged was the amount he claimed from the appellant. Dissatisfied, the respondent appealed to the District Court vide Civil Appeal No. 980 of 2024. After hearing the appeal, the first appellate court (District Court) quashed and set aside the amount of TZS. 1,100,000/= ordered by the trial court. Instead, it ordered the respondent to be paid TZS. 2,676,000/= as the amount of loan he advanced to the appellant. Aggrieved, the appellant appealed to this court against the decision of the District Court. He fronted two grounds of appeal that: - 1 That the first appellate court erred in law and, in fact, for holding that the appellant has to pay TZS. 2,676,000/- without considering the weight of evidence adduced before the trial court that ordered the appellant to pay TZS. 1,100,000/- 2 That the first appellate court erred in law by receiving new evidence which was not given before the trial court in civil case No. 155 of 2023. 2 Pursuant to the court order of 13 August 2024, the appeal was argued by way of written submissions. Ms. Bestina Malila, learned advocate, represented the appellant, while the respondent had the services of Mr. Paulo Hombo, also the learned advocate. Faulting the first appellate court on the 1st ground of appeal, Ms. Malila argued that the 1st appellate court failed to appreciate the weight of evidence before the trial court, which ordered the appellant to be paid TZS. 1,100,000/=. Referring to the evidence before the trial court, she claimed that the parties agreed on a loan of TZS. 2,676,000/- and there was evidence before the trial court that the appellant had paid a total of TZS. 1,576,000/=. He further argued that no proper modes of

payment were indicated by the parties in the document. Therefore, there were witnesses who testified before the trial court and proved that TZS. 1,576,000 was paid to the respondent, which made the remaining balance TZS. 1,100,000/= On the 2nd ground of appeal, she submitted that the 1st appellate court erred in law for receiving new evidence from the witness who never testified before the trial court and his evidence was used to determine the appeal. On this, she referred to the case of Huruma Sibonike vs. Republic, Criminal Appeal 91 of 2020 (Tanzlii) and insisted that as a matter of principle, the appellate court cannot allow the issues not raised and decided before the court below. In his reply regarding the 1st ground, Mr. Hombo submitted that the respondent proved his case before the 1st appellate court as the appellant admitted the claim of TZS. 2,676,000/=. Further, the respondent tendered a letter dated 17 October 2023 (exhibit KE) in which the appellant acknowledged the debt of TZS. 2,676,000/=. On the 2nd ground, Mr. Hombo submitted that there was no reception of new evidence during the hearing of the 1st appeal. He said that the exhibit KE mentioned in the 1st appellate court judgment was tendered before the trial court and not before the 1st appellate court. In a brief rejoinder, Ms. Malila reiterated her earlier submission. She further insisted that the 1st appellate court did not consider the weight of the evidence record in holding the appellant to pay TZS. 2,676,000/= while the evidence at the trial proved that the remaining unpaid amount of debt was TZS. 1,100,000/=. She further raised that the exhibit KE had anomalies and was not complete in the eyes of the law; therefore, other evidence was needed to support it so that the court could reach a just decision. On the issue of the reception of new evidence, she referred to page 6 of the 1st appellate court proceedings that on 18 April 2024, the prayer to call a new witness was granted, and the witness testified on 23 April 2024. She further explained that new evidence was used by the 1st appellate court to determine the appeal before it. Therefore, that was the error committed by the 1st appellate Court. After a detailed review of the records, the impugned decision, and the submissions by the parties, the primary issue in this appeal is whether the appeal has merit. Before going into the merits or demerits of the appeal quickly, I wish to discuss the matter raised by Ms. Malila in her rejoinder when rejoining the 1st ground of appeal. She raised a new issue that the exhibit KE, which was admitted at the trial, had anomalies and was not complete in the eyes of the law; thus, other evidence was needed to support it. I have the following; 5 One, the issue raised is a statement from the bar as it was never raised as the ground of appeal in this court and even the 1st appeal. The law is clear, and a statement from the bar should be ignored. Introducing the new issues during the submission is not a new phenomenon in our jurisdiction, as there is a plethora of authorities. The Court of Appeal in Yusuf Khamis Hamza vs. Juma Ali Abdallah, Civil Appeal No. 25 of 2020 (Tanzlii), held that; “In this case, the issue of time bar was not raised by the parties in their pleadings. In this sense it was quite in order and absolutely perfect for the court below not deal with matters which was not canvassed in pleadings”. Further, in Rosemary Stella Chambe Jairo vs. David Kitundu Jairo, Civil Reference No. 6 of 2018 (Tanzlii), it was held that; “The respondent's submission under the circumstance was akin to testimony from the bar, the practice abhorred and discouraged by the Court. Second, on 21 November 2023, when exhibit KE, the appellant never objected to the same. Further, he did neither cross-examine nor deny it in his defence. In fact, in his defence, he admitted that they signed exhibit KE. Thus, the failure of the appellant to object to the tendering of exhibit KE, cross-examine it or deny it in

his defence made that evidence go into the record unchallenged. In law, once certain evidence goes into the record unchallenged, it is taken to have been admitted. See *Anna Moises Chissano vs. The Republic*, Criminal Appeal No. 273 of 2019(Tanzlii). Further, in *Eupharacie Mathew Rimisho T/A Emari Provision Store & Another vs. Tema Enterprises Limited & Another*, Civil Appeal No. 270 of 2018, CAT (unreported) at page 15, the Court of Appeal held that: "...it is settled law that the contents of an exhibit, which was admitted without any objection from the appellant, were effectually proved on account of failure to raise an objection at the time of its admission in evidence." Therefore, for the reasons above, I ignore that submission regarding the validity of exhibit KE. Reverting to the 1st ground of appeal. As reflected in the court proceedings, it is not disputed that parties had entered into an agreement (exhibit KE) 7 whereby the appellant had received a sum of TZS. 2,676,000/- from the respondent. Both parties signed exhibit KE before the Ward Executive Officer of Mugusu. An extract from exhibit KE reads as follows; "...ndugu Emanuel Samsoni ambaye ni mdaiwa wa fedha tajwa hapo juu, amekiri yeye mwenyewe kulitambua deni hilo kuwa kweli anadaiwa na Ndugu Ng'wandu Ng'abi kiasi cha Tshs 2,676,000/=" This fact is not disputed by the appellant, but what is in dispute is that, on the amount of 2,676,000/= stated on exhibit KE, a sum of TZS. 1,576,000/- was already settled, and the remaining balance is TZS. 1,100,000/= The appellant claimed to have settled the amount through SU2. As observed by the 1st appellate court, though SU2 testified that he witnessed the payment between the appellant and the respondent, he could not provide the court with proof to contradict exhibit KE. On this, the law is settled under regulation 14(1) of the Magistrate Courts (Rules of Evidence in Primary courts) Regulations GNS: 22 of 1964 and 66 of 1972 that:- 8 "Where an agreement is in writing, no oral evidence may be given by the parties to the agreement or their representatives, in a civil case, to contradict or vary the written terms." Sarkar on Evidence, Fifteenth Edition at page 1269, expounded in detail regarding the best evidence as the exclusion of oral evidence: "If it is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, where written documents exist, they shall be produced as being the best evidence of their own contents. Whenever written instruments are appointed, either by the requirement of law or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instrument or to contradict or alter them." The principal was reiterated by the Court of Appeal in *Agatha Mshote vs Edson Emmanuel and ten others*, Civil Appeal No. 121 of 2019 (Tanzlii), where it was held that documented agreement cannot be superseded by an oral account. In the instant appeal, the evidence that the appellant settled the sum via SU2 is not indicated in exhibit KE or any subsequent legal document. Therefore, in the circumstances in this suit, where the parties put their initial agreement in writing for the payment of TZS. 2,676,000/= before the Ward Executive 9 Officer, and later, a person indebted claimed that he paid part of the sum without any tendering any document, in my opinion, that cannot contradict and supersede the written document. In that regard, this ground fails. The first appellate court correctly analysed the trial court's record, law, and governing principles regarding written and oral evidence. Regarding the 2nd ground, as per the records, it is evident that exhibit KE was tendered before the trial court and not before the 1 st appellate court. The claim that the 1st appellate court received new evidence does not align with exhibit KE. Further, on perusal of the 1st appellate court records, it is well shown that

there was no reception of new evidence. The records in the electronic case management system (eCMS) dated 18 April 2024 indicate as follows: Mrufani: Ninao ushahidi wa maandishi ambao uliandikwa na mtendaji wa kata ya Mgusu ambaye anaweza kuitwa kuthibitisha hali ya kunipokonya karatasi ya makubaliano yangu na mrufaniwa. Mrufaniwa: Huo ni uongo, mtendaji aliandika isivyo. Mrufani: Naomba mtendaji aitwe. Mahakama: Ombi limekubaliwa. Kusikiliza tarehe 23/4/2024. Mtendaji wa kata ya Mgusu aitwe. 10 On 23 April 2024, the record does not reveal if the Ward Executive Officer of Mgusu testified. That day, the appeal was adjourned for judgment. There was an order to call a witness during the appeal; however, the record does not indicate if that witness had testified. Furthermore, having perused and inspected the impugned decision of the 1 st appellate court, I failed to find any page, paragraph or even a single line indicating that there was evidence of the additional witness discussed and used by the 1 st appellate court in its decision. In principle, the law allows the taking of additional evidence. See *Bhoke Kitang'ita vs. Makuru Mahemba*, Civil Appeal No. 222 of 2017 (unreported), in which the Court of Appeal relied on the conditions described in the case of *Kamali Tarmohamed and Another vs. I.H. Lakhani & Co. (3) [1958] E.A. 567*. However, as per the records, apart from the order of calling the witness by the 1st appellate court. But, the same record does not reveal whether that witness attended and testified before the 1 st appellate court. Further, the impugned judgment does not reveal the inclusion of any added witness and testimony that was used to decide the appeal. 11 Therefore, in that regard, I differ with the appellant's counsel that there was new evidence taken by the 1st appellate court and used in determining the appeal. Thus, this second ground also lacks merit. To that end, I find that the grounds of appeal lack merits. The grounds of appeal failed to persuade this Court to interfere with the decision of the District Court. Consequently, the appeal is dismissed with costs. It is so ordered. K. D. MHINA JUDGE 12/09/2024 12 Court The right to appeal is fully explained. K. D. MHINA JUDGE 12/09/2024 13

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