

TANZANIA / JUDGMENT

CIVIL APPEAL NO

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA (CORAM: LEVIRA, J.A., MAIGE. 3.A. And MASOUD. J.A/1 CIVIL APPEAL NO. 477 OF 2021 MOHAMED OMARY MAGAYU..... -APPELLANT VERSUS NADIR KAWOGO..... .1st RESPONDENT HOSIANA FRANK KIONZO 2nd RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Mbeya) (Mambi, J) Dated the 23rd day of December, 2020 in Civil Appeal No. 16 of 2019 JUDGMENT OF THE COURT 1st s 5th November, 2024 LEVIRA. J.A.: The appellant, Mohamed Omary Magayu was dissatisfied with the decision of the High Court of Tanzania at Mbeya in Civil Appeal No. 16 of 2019 which quashed the decision of the Resident Magistrate's Court of Mbeya at Mbeya (the trial Court) in Civil Case No. 05 of 2018. Before the trial court, the appellant claimed to be repaid TZS. 70,000,000.00 by the respondents which they allegedly took from him on 23rd January, 2017. At the end of the trial, the trial court was satisfied that the appellant was able to establish his claims against the respondents to the required standard. Therefore, it ordered the respondents to pay him the claimed amount. Aggrieved, the respondents appealed successfully to the High Court, hence the present appeal. The background of this matter shows that the appellant and the first respondents were friends for quite a long time. Sometimes in early 2016, they agreed to do business together. They further agreed to take a loan from FINCA Microfinance Bank Limited to facilitate their business. Each of them involved his spouse in their plan as they had to mortgage their personal properties as guarantee to the loan of TZS. 70,000,000.00 they intended to take. The appellant mortgaged his property, a title deed of Plot No. "E" Iwambi Area, Mbeya City, L.O. 535281 Title No. 38078-MBYLR and the respondents mortgaged a title deed of Plot No. 771 Block "E" Iwambi Area, Mbeya City, L.O. No. 432193 Title No. 33631-MBYLR. Having met the conditions, they secured the said loan and the same was deposited in the appellant's Bank Account No. 30220600596, on 20th January, 2017. The appellant claimed that the first respondent requested to be given the whole loan amount for him to buy some products for their business. Upon being given, he did not use the money as agreed and also did not participate in repaying the loan. As a result, the appellant paid the whole loan alone. The appellant continued with his own business separate from the one he had agreed to do with the respondents, but it did not last long due to fire accident at his shop which occurred on 14th August, 2017. He approached the first respondent asking for the status of their joint business 2 which was under the supervision of the first respondent and assistance following fire incident. It was alleged that the first respondent cheated the appellant that the business was not good and he refused to give him assistance. However, in early December, 2017, the respondents persuaded

the appellant to take another loan facility in order to boost / rise their joint business capital. The appellant agreed and reapplied for a loan of the same amount (TZS. 70,000,000.00) from the same bank with the same security. The said loan matured on 15th December, 2017. Again, the respondents approached the appellant asking him to give them the whole amount for their business. The appellant asked them to substantiate their business plan for the requested money, but they failed. Thus, the appellant refused to give them the money. On that account, dispute arose between them and the first respondent wrote to the bank to withdraw his security. The appellant was aggrieved and he decided to institute a case against the respondents at the trial court claiming for repayment of the first loan facility amounting TZS. 70,000,000.00. The respondents denied the appellant's claims in their joint written statement of defence asserting that, they had never taken the amount of money claimed by the appellant. The trial court having heard the parties, it found in favour of the appellant. Consequently, it ordered the respondents to pay the appellant the whole amount claimed. The respondents were not satisfied with the decision of the trial court. As a result, they successfully appealed to the High Court. The appellant was aggrieved by that decision and thus preferred the present appeal on the following grounds:

1. That, the High Court erred in law for not considering the contract between the appellant and the first respondent of TZS. 70,000,000.00.
2. That, the High Court erred in law to rule that the respondent was not entitled to pay TZS. 70,000,000.00 as unpaid balance.
3. That, the High Court erred in law for failure to consider that the respondents disputed the amount of loan obtained from the appellant and they have started paying the same. At the hearing of the appeal, the appellant was represented by Mr. Chapa Alfred, learned advocate whereas, the respondents had the services of Mr. Kamru Habib Msonde, also learned advocate. Upon taking the floor, Mr. Alfred adopted the appellant's written submissions to form part of his oral arguments. He further made a brief submission in support of the grounds of appeal. He argued the first ground of appeal separately and the second and third grounds together. As regards the first ground of appeal, it was Mr. Alfred's argument that the High Court erred in law for not considering the contract between the appellant and the first respondent of TZS 70,000,000.00. He referred us to page 70 of the record of appeal where the appellant claimed that on 23rd January, 2017 the defendants went to him to take that amount of money and he gave them in cash. He went on submitting that, the first respondent was repaying the loan as it can be seen in the deposit, he made in exhibit P3, the transaction of 23rd February, 2017 up to July, 2017 where he paid TZS. 3,907,718.000. It was the contention by Mr. Alfred that since the first respondent did not deny to be given that amount of money (TZS. 70,000,000.00) in cross examination and in his defence, it was wrong for the High Court Judge to hold that there was no contract between the appellant and first respondent. He referred us to page 73 of the record of appeal where the first appellant stated that they processed a loan of TZS. 70,000,000.00. He as well, referred us to page 74 of the record of appeal where during cross - examination by the counsel for the appellant, the first

respondent stated that he paid TZS. 4,000,000.00 vide the appellant's account to cement the argument that the first respondent was given the amount of money in question by the appellant. The learned counsel took us to page 160 of the record of appeal to establish the existence of the contract. Mr. Alfred faulted the High Court Judge for holding that the trial magistrate did not make proper analysis of evidence to see that the appellant was supposed to be paid TZS. 70,000,000.00. According to him, the High Court misdirected itself because the evidence was on the record and the second respondent at page 76 to 77 of the record of appeal said 5 that, her husband who is the first respondent took the money from the appellant. It was his conclusion that, the High Court did not analyse the evidence on the record and all the exhibits (PI, P2 and P3) tendered during trial. Otherwise, he said, it would not have quashed the decision of the trial court on account that it did not analyse the evidence. When probed by the Court to state what were the terms of the contract and consideration, Mr. Alfred referred us to page 70 and line 26 of the record of appeal where it was indicated that the implementation of loan repayment started on 23rd February, 2017. As regards, the terms of the contract, he referred us to paragraph 13 of the plaint found at page 4A of the record of appeal. He also referred us to page 73 of the record of appeal where the first respondent stated that they got loan amounting to TZS. 55,000,000.00 and he took TZS. 30,000,000.00 and the appellant took TZS. 25,000,000.00 as a proof of terms of contract. He admitted that there was no written contract between the appellant and first respondent. Regarding the second and third grounds of appeal, Mr. Alfred submitted that it was wrong for the High Court Judge to hold that the respondents were not supposed to pay the appellant because at page 73 of the record of appeal the first respondent agreed/conceded to have taken the money which in total was TZS. 91,000,000.00 with interest. Besides, he said, the first respondent said that he continued to deposit money in the appellant's account as per page 74 of the record of appeal. He argued that 6 the trial court considered the evidence of both parties and rightly held that the first respondent was supposed to pay the appellant TZS. 70,000,000.00 contrary to the holding of the High Court. Finally, he urged us to quash the decision of the High Court and uphold that of the trial court. In reply, Mr. Msonde adopted the respondent's written submissions as part of his oral arguments before the Court. Having done so, he stated that the problem in the present appeal is on the burden of proof. According to him, the gist of agreement of parties herein is found at paragraph 13 of the plaint which is at page 4A of the record of appeal. In this paragraph, the appellant claimed that he gave the first respondent TZS. 70,000,000.00, which he also prayed to be refunded in his prayers. Therefore, he said, it was for the appellant to prove that he gave the first respondent that whole amount of money. But the appellant did not prove or show that indeed he gave him that amount and what was the consideration in his evidence found at page 69-72 of the record of appeal. He went on to state that, the only evidence to that effect can be traced from the evidence of the first respondent from page 73 to 78 of the record of appeal. In those pages, the first respondent testified that his relationship with the appellant started by borrowing TZS. 30,000,000.00 from FINCA Bank and they received TZS. 29,000,000.00 which they divided between the two. The appellant took TZS 10,000,000.00 and the first respondent TZS. 19,000,000.00. Thus, having succeeded in the first loan, they took 7

the second loan of TZS. 70,000,000.00. Since repayment of the first loan was not complete, the TZS. 70,000,000.00 which they had applied had to be deducted as well, the outstanding loan and insurance. So, they were left with TZS. 55,000,000.00 which again they divided, the appellant took TZS. 25,000,000.00 and the first respondent TZS. 30,000,000.00. The repayment was done basing on the amount each had taken. This, he said, was proved by exhibit P3, which basically indicates that the loan amount was TZS. 69, 442,860.00 and not TZS. 70,000,000.00 as claimed by the appellant in the plaint. According to Mr. Msonde, the proof of that amount can be seen on the transaction done on 21st January, 2017 as per exhibit P3 where the transfer of loan was TZS. 56,409,169.00. He insisted that the said evidence corroborates the first respondent's evidence that the loan was TZS. 56,409,169.00 and not TZS. 70,000,000.00 claimed by the appellant. In the circumstances, he argued, it was not proper for the trial court to order the first respondent to pay the appellant TZS. 70,000,000.00. The learned counsel referred us to pages 73 and 74 of the record of appeal where it was shown that, while going on with repayment of the loan, the appellant's business was affected by fire accident. However, it was indemnified since it was ensured. Thereafter, they processed another loan of TZS. 1,000,000,00. But the bank said it will give them TZS. 8 70,000,000.00. The said loan was different from the previous one of the same amounts which they had processed and serviced. The agreement in this new loan was that each of them would take half of it. However, when the loan was ready, the appellant was not ready to give the first respondent the agreed amount. As a result, the first respondent decided to withdraw his security for the loan and the bank charged him TZS. 5,025,000.00 for the withdrawal. Thus, following the first respondent's cancellation of the security, the appellant instituted a case before the trial court claiming TZS. 70,000,000.00 of the second agreement which was already paid. He wondered that the appellant was claiming as if it was the second loan while it was the third loan which was not given due to removal of security. He insisted that the problem was the third loan which was cancelled by the first respondent. Therefore, he said, the trial court ought to have analysed the evidence, which it failed. Mr. Msonde concluded by stating that the High Court was right in its decision. Therefore, he urged us to dismiss this appeal with costs. In answering the question by the Court as to whether there was contract between the appellant and the first respondent, Mr. Msonde responded to the effect that, the evidence of the appellant found from page 69 to 72 of the record of appeal did not state the gist of transactions made and the consideration thereof. Nonetheless, he said, the evidence of the first respondent as stated above, shows clearly the nature of the 9 transactions. He added that the evidence of the appellant on the record did not support his pleadings. Meaning that, he insisted, the appellant failed to prove the case against the respondents on balance of probabilities. He thus reiterated his prayer. Mr. Alfred made a brief rejoinder as he reiterated his submission in chief. He insisted that the appellant proved the case against the respondents on balance of probabilities. He urged us to consider exhibit P3 together with exhibits P1 and P2. While responding to the question by the Court, Mr. Alfred conceded that it is not in the record of appeal that the first respondent was given TZS. 70,000,000.00 by the appellant on 23rd January, 2017 as claimed. We have dispassionately considered submissions by both parties, grounds of appeal and the entire

record of appeal. The main issue for our determination is whether the appellant proved his claim against the respondents to the required standard. In answering this issue, we shall be guided by a well-established principle that he who alleges must prove as per section 112 of the Evidence Act, Cap 6 and since this is a civil matter, the standard of proof is on the balance of probabilities. Another principle that will guide us in this appeal is that parties are bound by their pleadings- see: NBC Limited & Another vs Bruno Vitus Swalo [2021] TZCA 122 (20 April 2021, TANZLII). 10 The gist of the appellant's claim is found at page 4A of the record of appeal, where he stated at paragraph 13 of the plaint as follows: "That, the 1st defendant [first respondent herein] asked the plaintiff to be given the whole loan facility in order-to-order Unilever Products via Bhojan Chemist, where the plaintiff gave the first defendant the whole loan amounting to Tsh/llings Seventy Million (70,000,000.00)". In the circumstances, therefore, since the appellant claimed as it appears in the extract above, that the first respondent requested from him the whole amount of loan of TZS. 70,000,000, which he gave, it was incumbent upon him to prove that, indeed he gave him the said amount. Before we go any further, we think, it is important to consider some incidental issues in this matter. In the first place, the appellant claimed that he entered in an agreement (contract) with the respondents to take some money (TZS. 70,000,000.00) from FINCA Microfinance Bank Limited for their joint business of Unilever products. He claimed further that he took that amount and gave it all to the respondents, a fact which was denied by the respondents. At this juncture, therefore, we need to consider whether there was a valid contract between the appellant and the respondents. By simple definition, a contract is a binding agreement between two or more persons or parties, enforceable by law. The said agreement can be li exchange of promises, business arrangements, to mention but a few. For a contract to be valid it must meet certain essential elements; to wit, offer and acceptance, consideration, an intention to create legal relations, capacity, consent, legality of the purpose and certainty. Section 10 of the Law of Contract Act, Cap 345 (the Contract Act) defines contract in the following terms: "10. A ll agreements are contracts if they are made by the free consent o f parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void." In the light of the above expression as far as valid contract is concerned, it was incumbent upon the appellant to prove, as we earlier said, that there was a contract between him and the respondents. We have examined the appellant's evidence before the trial court but we could not find anything establishing that the two had entered into a business agreement as claimed in the plaint. The appellant only stated that he knew the appellant as an accountant at Bhojani, and that on 25th November, 2016 the respondents went to borrow money (TZS. 70,000,000.00) from him. The appellant told them that he had no such money but could borrow it from the bank. Thus, he went to FINCA bank and processed the loan. He took his title deed but the same was not sufficient as security. Therefore, he informed the respondents who gave him their title deed so 12 as to continue with loan process. On 20th January, 2017, the amount of TZS. 70,000,000.00 was deposited in the appellant's account by the said bank. On 23rd January, 2017 the respondents and the appellant went together to the bank where the appellant withdrew that money and gave the respondents the whole of it. This can be seen at page 70 of the record of appeal. We wish to

observe that, the above evidence does not suggest that there was business contract between the appellant and the respondents as alleged in the pleadings. Even if one had to think that there was, which we do not, the evidence does not show that there was any consideration to make the contract valid and that terms and conditions were pleaded and established in evidence. If any agreement between the parties, we find it to be a social arrangement which did not intend to create legal relation worthy to be termed a contract before the eyes of the law. We agree with the High Court Judge that there was no contract between the parties herein. The appellant faulted the High Court Judge for making a finding that the claim was not substantiated (proved). We have revisited the evidence on the record. In his evidence found on page 70 of the record of appeal, the appellant claimed that he gave the first respondent the claimed amount on 23rd January, 2017. The following were his words: 13 "On 2Cfh January, 2017 the amount o f Tsh. 70,000,000/=was deposited into my account On 2 Jd January, 2017 the defendants came to take the money. I went with them to FINCA. I withdrew the money and gave them cash. I have a bank statement to evidence that, the amount was deposited in my account I pray for its admission". [Emphasis added]. As there was no objection from the respondents, the appellant's bank statement was admitted as exhibit P3. The question that follows is whether the appellant proved that he gave the first respondent the whole amount of TZS. 70,000,000.00 which was allegedly deposited in his account by FINCA bank. We shall start with the above extract. It appears to us that the appellant put reliance on exhibit P3 as a proof that the said amount of money was deposited in his account on 20th January, 2017; and he gave the same to the first respondent. Reading between the lines, the above extract reveals that the appellant went with both respondents to FINCA bank, he withdrew the money and gave them cash. The fact that the appellant withdrew money and gave the respondents cash in itself is not clear evidence that he gave them the whole amount deposited in his account. We say so because the term cash does not signify the whole amount of the alleged loan. In rebutting this argument, the first respondent in his evidence on page 73 of the record of appeal stated that, they processed loan of TZS. 70,000,000.00. However, because they had not finished the first loan of TZS. 30,000,000.00, they had taken earlier on with the appellant, the outstanding loan and the insurance was deducted. As a result, they got a loan of TZS. 55,000,000.00. We have thoroughly revisited exhibit P3 which was heavily relied by the appellant's counsel in his argument. With respect, we wish to state that the said exhibit does not have anything to do with disbursement of funds amounting to TZS. 70,000,000.00 as claimed by the appellant. According to the said exhibit, on a date (20/01/2017) which the appellant claimed that the amount in question was deposited in his account, it is indicated as follows. "Loan Disbursement to Deposit Account Multiple Transaction", the "Credit" was 67,522,000 and the "Balance" read 67,684,611. On 21st January, 2017, the said exhibit shows that there was "Loan Pay off By Transfer", and the "Debit" was 11,275,411 and the "Balance" was 56,409,169. However, on 21st January, 20217, the date which the appellant claimed that he withdrew TZS. 70,000,000.00 and gave it to the respondents, exhibit P3 shows that on that date "cash withdrawal" the "Debit" was 56,400,00 and the "Balance" was 9,169. Therefore, it is apparent on the record of appeal that exhibit P3 which was heavily relied upon by the appellant did

not support his allegation, that he actually gave the respondents the said amount of money after withdrawing it. 15 The counsel for the appellant urged us to consider exhibits PI and P2 as part of his evidence to prove that indeed, he gave the respondents the claimed amount. Again, with respect, we have revisited the record of the appeal, exhibit PI is found from page 132 to 140 of the record of appeal. The said exhibit is a "Mortgage of Right of Occupancy between Finca Microfinance Bank Ltd and Mohamed Omary Magayu". It has nothing whatsoever, to do with an agreement between the appellant and the respondents. Apart from that, exhibit P2 is also a "Mortgage of a Right of Occupancy between Finca Microfinance Bank Ltd and Nadir Johnson Kawogo". The same is found from page 145 to 153 of the record of appeal. This document also has nothing to do with the agreement between the appellant and the respondents regarding TZS. 70,000,000.00 allegedly given by the appellant to the respondents. According to the record, it is not in dispute that the appellant and the first respondent once mortgaged their rights of occupancies so as to secure a loan from FINCA Bank, which is why at page 2 of exhibit P3 it is clearly indicated that the first respondent on 20th April, 2017 credited TZS. 4,000,000.00 as part of loan repayment. In his defence the respondents did not deny to have received money from the appellant from the loan facility he got from FINCA bank. However, the said amount in total was not TZS. 70,000,000.00 as claimed by the appellant. Initially, he took TZS. 16 19,000,000.00 and in the second time TZS. 30,000,000.00, totalling TZS. 49,000,000.00 which amount was already repaid. Just as the first appellate court decided, we are not amused by the appellant's story as far as the claim against the respondents is concerned. We have weighed the evidence on record and it is our sincere finding that, the appellant failed to prove his claim against the respondents on the balance of probabilities. For the foregoing analysis and reason, we dismiss this appeal with costs. DATED at MBEYA this 4th of November, 2024. M. C. LEVIRA JUSTICE OF APPEAL I. J. MAIGE JUSTICE OF APPEAL B. S. MASOUD JUSTICE OF APPEAL The Judgment delivered this 5th day of November, 2024 in the presence of the Mr. Kamru Habib Msonde, learned counsel for the 1st and 2nd respondents also holding brief for Mr. Chapa Alfred, learned counsel for the appellant, is hereby certified as a true c E. G SENIOR DEPUTY REGISTRAR COURT OF APPEAL 17

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