

TANZANIA / JUDGMENT

CIV APP 125 2023 KIMBAU VS HAIDARI Final

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IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM SUB-REGISTRY) AT DAR ES SALAAM
CIVIL APPEAL NO. 125 OF 2023 (Originating from Resident Magistrate's Court of Dar es Salaam,
at Kisutu, in Civil Case No. 276 of 2020) OMARY AYOUB KIMBAU
APPELLANT VERSUS HAIDARI YAHAYA RASHIDI RESPONDENT

JUDGMENT

19th September & 29th January, 2024 BWEGOGGE, J.: This is an appeal preferred by the appellant herein above named respecting the judgment and decree entered by the Resident Magistrates' Court of Dar es Salaam wherein the appellant's monetary claim against the respondent founded on the alleged breach of contract was dismissed in its entirety. Before delving into the substance of this appeal, I find it pertinent to revisit the factual background of this case. The parties hereto were once pals. Before their friendship turned sour, allegedly, the respondent sought 1 and obtained loans from the appellant in 2016 which to date, despite the follow-ups, has deliberately absconded to repay. Hence, the appellant opted to commence civil proceedings in the trial court claiming TZS 68,000,000/= being the principal amount and profits accrued thereto and general damages to the tune of TZS 200,000,000/=, among others. The appellant (PW1) herein was a sole prosecution witness in the trial court. It was the appellant's case in the trial court that on 21/5/2016 the respondent requested a loan of TZS 13,000,000/= to resolve his financial constraints. He provided the required loan; and a written loan agreement (exhibit P1) was executed to that effect. Further, it was the appellant's case in the trial court that on 09/06/2016 the respondent asked for an additional loan of TZS 20,000,000/= with a promise to repay the same with an interest rate of 100% within sixty days. The appellant admitted that no document was executed in respect of the second loan. It was alleged by the appellant that the respondent defaulted to repay both loans despite constant reminders and follow-ups as exhibited by a string of text messages (exhibit P2). Conversely, the respondent herein who was a sole witness for the defence vehemently refuted the alleged breach of the loan agreement and denied to have asked for and obtained the loan from the appellant. He came up 2 with a diametrically opposed version of what transpired between the duo. It was the respondent's testimony that the appellant requested to join in his business transactions. The respondent agreed to the proposal and the appellant was joined as a business partner. In 2015 the respondent secured a tender to provide staff uniforms to the

Tanzania Electric Supply Company (TANESCO). And the appellant had contributed capital in the business whereas some of the capital was obtained from the appellant's brother as a loan. Unfortunately, the business earned little profit which was shared equally between the parties hereto. The respondent enlightened the trial court that later on, the partnership business collapsed following the disputes that ensued between the duo and consequential subversive acts of the appellant comprising a complaint lodged at the police station against the respondent alleging fraudulent transaction. The respondent tendered the purchase orders and delivery notes (collective exhibits D1 and D2 respectively), bank payment slip (exhibits D3), and cheque deposits (collective exhibit D4) for proof of the existence of the purported partnership. The trial court, having evaluated the evidence tabled by the parties hereto, reached the conclusion that the loan agreement (exhibit P1) depicts that the loan was provided by a third party whereas the appellant stood as guarantor to the respondent. Hence, it was the actual lender who could sue under the contract. Likewise, the trial court found that there was no evidence for proof of the agreement made by the parties pertaining to the purported loan of TZS 20,000,000/=. Otherwise, the trial court was satisfied that there was sufficient evidence suggesting the existence of the partnership business between the parties herein which was dissolved by the subsequent subversive acts of the appellant. Consequently, the suit was dismissed with costs. The appellant was disgruntled; hence, this appeal. In a bid to defeat the decision of the trial court, the appellant advanced overlapping twelve (12) grounds of appeal hereunder paraphrased:

- i. The trial magistrate erred in law and fact in deciding that the plaintiff had no locus standi to sue the defendant. ii. The trial magistrate erred in law and fact in deciding that there was no loan agreement between the parties hereto. iii. The trial magistrate erred in law and fact in deciding that the plaintiff was just a guarantor to the loan given to the defendant by a 3rd party. iv. The trial magistrate erred in law and fact in arriving at a finding that there existed a partnership agreement between the parties hereto respecting the supply of uniforms to the Tanzania Electric Supply Company Limited (TANESCO).
- v. The trial magistrate erred in law and fact in deciding that the plaintiff was responsible for a breach of the partnership agreement. 4 vi. The trial court erred in law and fact in failing to consider the admission made by the defendant respecting the payment to the tune of TZS 30,000,000/= received from the plaintiff. vii. The trial magistrate erred in law and in fact in failing to consider the contents of exhibit P2 between the plaintiff and the defendant. viii. The trial magistrate erred in law and fact in failing to find that the evidence adduced by the defence didn't link the plaintiff to the purported business transaction with TANESCO. ix. The trial magistrate erred in law and fact in deciding that the plaintiff was involved as a partner in a tender for the supply of uniforms worth TZS 3,800,000/= to TANESCO secured by the defendant.
- x. The trial magistrate erred in law and fact in deciding that TZS 1,610,000/= paid to the plaintiff's bank account by the defendant was his share in the payment made by TANESCO for the supply of uniforms. xi. The trial magistrate erred in law and fact in finding that TANESCO terminated the agreement with the defendant's company. xii. The trial magistrate

erred in law and fact in deciding that the complaint lodged by the plaintiff to the police caused TANESCO to withdraw the tender secured by the respondent. During the hearing of this appeal, the appellant was represented by Mr. William Yohana Fungo, learned advocate; and the respondent had the services of Mr. Sarmando Swenya, learned advocate. The appeal was argued by way of written submissions. In substantiating the appeal herein, Mr. Fungo argued the 1st, 2nd and 3rd grounds of appeal jointly. The counsel argued that it is evident from the pleadings of both parties and evidence adduced, especially the loan agreement (exhibit P1) and WhatsApp messages (exhibit P2) that the 5 plaintiff had a locus to sue the defendant for breach of the loan agreements. That the respondent admitted in his written statement of defence that he received a loan to the tune of TZS. 13,000,000 from the appellant herein as depicted by the loan agreement (exhibit P1). Hence, the respondent is bound to what he has averred in his written statement of defence and estopped from establishing new facts to the contrary. Therefore, it was wrong for the trial magistrate to hold that the appellant lacked the locus to sue the respondent. The case of Martin Fredrick Rajab vs. Ilemela Municipal Council & Synergy Company Limited (Civil Case No. 197 of 2019) [2022] TZCA 434 was cited to buttress the point that parties are bound by their pleadings. And the counsel asserted that based on the averment in the pleadings and evidence adduced in court (documentary evidence) the appellant proved the case in the trial court to the standard set by the law. The remaining 4th to 12th grounds of appeal were likewise argued conjointly by Mr. Fungo. The counsel argued that it is glaring on the pleadings, oral and documentary evidence adduced by parties herein during the trial that there is no proof of the existence of the partnership agreement between the parties herein respecting the deal to supply uniforms to the Tanzania Electric Supply Company Limited (TANESCO) 6 awarded to Nararisa Company Limited, the company owned by the respondent herein. That the respondent failed to produce any proof to establish the said partnership with the appellant or proof that he was awarded the said tender by TANESCO. Likewise, it was argued that the respondent failed to prove the purported withdrawal of tender by TANESCO and, or the alleged criminal report (complaint) made by the appellant. Further, the counsel argued that the respondent admitted to have received funds from the appellant which was claimed as a principal debt as per pleadings filed in court. Hence, since there is no proof of partnership agreement between the parties hereto, save proof of TZS 1,610,000/= paid to the appellant, the court should have found the respondent liable for breach of the loan agreement. To persuade this court, the counsel cited the case of Mary Agnes Mpelumbe vs. Shekha Nasser Hamad (Civil Appeal No. 136 of 2021) [2021] TZCA 667 wherein the court opined: “We are also guided by the basic rule that he who alleges has the burden of proof as per section 110 of the Evidence Act, Cap. 6 R.E. 2019 as well as the position that standard of proof in a civil case is on a preponderance of probabilities, meaning that the Court will sustain such evidence that is more credible than the other on a particular fact to be proved.” 7 Moreso, the counsel alleged that the trial magistrate erred in failing to take into consideration the text messages between the parties herein (exhibit P 2) without assigning any reason. On the above premises, the appellant’s counsel prayed this court to allow the appeal. In reply to the 1st, 2nd and 3rd grounds of appeal, Mr. Swenya contended that the respondent didn’t obtain

loan from the appellant but his young brother whereas the appellant herein stood as a guarantor. Hence, the appellant had no locus standi to sue the respondent on the respective loan agreement. The counsel cited the case of Lujuna Shubi Ballonzi vs. Registered Trustees of Chama Cha Mapinduzi [1996] TLR 203 to buttress his point. Hence, the counsel opined that the trial court properly decided the case in favour of the respondent based on the evidence adduced by the parties herein. Regarding the 4th, 5th, 6th, 8th, 9th, 10th, 11th and 12th grounds of appeal, Mr. Swenya contended that the documentary evidence adduced by the appellant proving that the loan in dispute was employed to further the joint venture business between the parties hereto was not controverted by the appellant. 8 In rejoinder, Mr. Fungo reiterated his submission in chief which I find needless to reiterate hereto. I shall canvass the 1st, 2nd and 3rd grounds of appeal conjointly as they are intrinsically correlated. In substance, the respective grounds of appeal allege that the trial magistrates erred in law and fact in finding that the appellant herein was a stranger (third party) to the loan agreement in question; hence, lacked locus standi to sue. Unarguably, having scrutinized the proceedings of the trial court, I am on all fours with the respondent's counsel that the only convincing evidence tendered by the appellant to buttress his claim in the trial court is the loan agreement (exhibit P1) dated 21st May, 2016. The respective agreement establishes that the respondent herein received a loan to the tune of TZS 13,000,000/-. However, it is apparent on the face of the relevant document that the appellant herein was named as a guarantor to the respondent and a witness to the respective agreement executed between the respondent herein and one Abdulswamad Kimbau who is the actual creditor. 9 Based on the above facts, the trial court opined that the actual lender mentioned above, who didn't even bother to appear in court to testify, is the proper party with a right to sue the respondent herein for recovery of funds advanced as a loan. Likewise, the trial court found that the appellant herein who was a mere guarantor to the respondent had no locus standi to sue on the contract; hence, dismissed the suit, among other reasons. The pertinent question arising herein is whether the trial resident magistrate strayed into an error in arriving at the impugned conclusion of the case. It is settled law in our jurisdiction that only the parties to a contract could incur rights and obligations under it. It is described as the doctrine of privity of contract. It protects the integrity of contractual agreements by ensuring that only those involved in a contract can enforce obligations, and prevents conferring of any rights or liabilities with respect to the contract to any third person who is not a party to the contract. The principle is appositely restated in the case of Austack Alphonse Mushi vs. Bank of Africa Tanzania Ltd & Another (Civil Appeal 373 of 2020)

[2021] TZCA 521 thus: "On our part,we would add that contract, as a juristic concept, is the intimate if not the exclusive relationship between the parties who made it – see Furmston, M.P., 10 Cheshire, Fifoot and Furmston's Law of Contract (16th edn.), Oxford University Press, Oxford, 2013 - Online Edition, at page 698." [Emphasis added]. Further, the Court observed: "A contract, being principally a matter between the contracting parties, will normally state the rights and duties of the parties but having nothing to do with other parties." Suffice it to say that our jurisdiction recognises the application of the common

law doctrine of privity of contract in that a stranger to a contract cannot sue upon it unless he is given a statutory right to do so. See also the cases; Tarlok Singh Nayar & Another vs. Sterling General Insurance Company Limited [1966] 1 EA 14; Kayanja vs. New India Assurance Company Limited [1968] EA 295; and Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Limited vs. Mbeya Cement & National Insurance (Tanzania) Limited [2005] T.L.R 41, among others. Therefore, based on the principles revisited above, I am on all fours with the trial court in that there was no privity of contract between the appellant and respondent herein, the breach of which would entitle the appellant to bring the action before the trial court. Hence, the trial court was right in finding that the appellant has no locus standi to sue. 11 I am alive that the appellant herein sued the respondent to recover a total of TZS 68,000,000/= being the principal sum of loan amount and profits accrued thereto. It was the testimony of the appellant in the trial court that apart from the loan of TZS 13,000,000/= advanced to the appellant; on 09th June, 2016 the respondent demanded an additional loan to the tune of TZS 20,000,000/-. And, the respondent promised that he would repay the respective loan with interest at the rate of 100%. Thus, it was agreed that the respondent would repay both the principal sum and interest to the tune of TZS 40,000,000/-. Unfortunately, the respective later loan advanced to the respondent, though involved a colossal amount of money, was not reduced into writing by the parties hereto. The appellant admitted that the agreement was entered orally. He mentioned one Aza Mbaga to have been a witness to the respective agreement. However, for reasons only known to the appellant, the respective material witness was not brought to testify in court. The respondent hit the sky denying entering any loan agreement with the appellant for the mentioned amount. Therefore, the only evidence for proof of the 2nd loan advanced to the respondent is the strings of mobile phone text messages between the parties hereto. 12 Having gone through the messages, admittedly, I apprehend that the parties herein were involved in deals which created liability to the respondent who made promises to pay the principal sum and interests. However, based on the respective text messages, I am unable to reach a conclusion that the respondent received the loan of TZS 20,000,000/= from the appellant with a promise to repay TZS 40,000,000/= in 60 days as asserted by the appellant. It was forcefully argued by the appellant's counsel that the trial court failed to consider the admissions made by the respondent in his defence in deciding the case. Admittedly, it is a well cherished principle in our jurisdiction that parties are bound by their pleadings. However, the purported admissions made by the respondent in his defence don't tally with the plaintiff's claim founded on the alleged breach of loan contract. Needless to reiterate that the respondent admitted to have received loan from the third party, not the appellant. This assertion is supported by the respective written agreement (exhibit P1). Likewise, the other lesser amount the respondent admitted to have received from the appellant, he ascribed as the appellant's contribution to the joint venture business they undertook. Hence, the purported admissions could not support the appellant's case. 13 I am constrained to restate that in civil proceedings of like nature, the burden of proof lies on the person who claims a legal right as provided under the provisions of sections 110 and 112 of the

Evidence Act [Cap. 6 R.E. 2022]. See also the cases: Mary Agnes Mpelumbe vs. Shekha Nasser Hamad (supra); The Registered trustees of Joy in the Harvest vs. Hamza K. Sungura, Civil Appeal No. 149 of 2017, CA (unreported); Godfrey Sayi vs. Anna Siame (as Legal Representative of the Late Mary Mndolwa), Civil Appeal No. 114 of 2014, CA (unreported) and Barelia Karangirangi vs. Asteria Nyalwamba, Civil Appeal No. 237 of 2017, CA (unreported); and Anthony Masanga vs Penina (Mama Mgesi) & Another, Civil Appeal No. 118 of 2014, CA (unreported), among others, in this respect. Likewise, it is the law that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his burden; and the burden of proof is not diluted on account of the weakness of the opposite party's case [Paulina Samson Ndawanya vs. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017 (unreported)]. In particular, in the case of Godfrey Sayi vs. Anna Siame as Legal Representative of the late Mary Mndolwa, Civil Appeal No. 114 of 2012 (unreported) the Apex Court emphasized that: 14 “ It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities.’ ” Suffice it to point out that based on the evidence on record, the appellant failed to prove, on balance of probability, that he advanced loan of TZS 20,000, 000/= to reap a hundred folds in sixty days, let alone the questionable interest rate charged on the purported loan. Thus, I lack cogent ground to fault the decision of the trial court in this respect. The 1st, 2nd and 3rd grounds of appeal fail. Likewise, the discussion above disposes of the 7th ground of appeal in which the appellant faulted the trial resident magistrate for failure to consider the text messages (exhibit P2) as material evidence in his favour. At this juncture, I proceed to determine the remaining grounds of appeal which were likewise argued jointly by the appellant’s counsel. In substance, the charge made by the appellant in the respective grounds of appeal is that the trial resident magistrate strayed into an error in arriving at the conclusion that there existed partnership business between the parties herein which had been dissolved having the appellant lodged the complaint at the police station alleging fraudulent transactions on the part the respondent. 15 Admittedly, as rightly found by the trial court, there was evidence adduced by the respondent pertaining to the joint business enterprise of supplying uniforms to the Tanzania Electric Supply Company Limited (TANESCO). Indeed, the local purchase orders (collective exhibit D1); delivery notes (collective exhibit D2); payment slip/cheque deposits (exhibits D3 and D4) as well as the text messages (exhibit P2) speak volumes about the joint business transactions involving the parties herein. However, as rightly submitted by Mr. Fungo, it cannot be ascertained that the employer (TANESCO) withdrew the respective tender and the appellant herein is responsible for such withdrawal. Be that as it may, the question pertaining to the existence or non- existence of the partnership business between the parties herein was not the kernel of the dispute before the trial court. The issue was raised during the defence by the respondent herein in a bid to contest the claim made by the appellant. The dispute before the trial court was in respect of the alleged breach of contract. Therefore, though I agree with the finding of the trial court in that there existed joint venture dealings between the parties herein, I am of the considered view that the respective finding was based on an

extraneous matter which could not resolve the central controversy between the 16 parties herein respecting the alleged breach of contract. Hence, I likewise find no substance in the 4th, 5th, 6th, 8th, 9th, 10th, 11th and 12th grounds of appeal. In fine, I find the appeal herein bereft of merit. The appeal is hereby dismissed. The decision entered by the trial court is hereby upheld. I so order. DATED in DAR ES SALAAM this 29th January, 2025. O. F. BWEGOGE JUDGE 17

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