

TANZANIA / JUDGMENT

JUDGMENT PETER WAGESI CHACHA VS JACKSON MAHALI PC CIVIL NO 4271

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB-REGISTRY AT MBEYA PC CIVIL APPEAL NO. 4271 OF 2024 (Appeal from the District Court of
Mbeya at Mbeya, Civil Appeal No. 35 of 2023, Originating from Mwanjelwa Primary Court, Civil
Case No. 24 of 2021) PETER WAGESI CHACHA.....APPELLANT
VERSUS JACKSON W. MAHALI..... RESPONDENT

JUDGEMENT

Date of last Order: 20th May, 2024 Date of Judgment: 4th July, 2024 KAWISHE, J.: This being a second appeal originated from the Civil Case No. 24/2021 at Mwanjelwa Primary Court. The case was instituted by Jackson Mahali (respondent) against Peter Wagesa Chacha (appellant). The respondent advanced a loan to the appellant a total of Tshs. 36,000,000/= on 28th August, 2018. The house and blue card of the appellant car was kept as security. The appellant did not fulfil the loan 1 contract, the money was not paid on the agreed time that is, on 27th September, 2018. The appellant later on deposited in the respondent's son account a total of Tshs. 10,000,000/=. The total amount remain unpaid by the appellant is Tshs. 26,000,000/=. The loan agreement tendered before the trial primary court, was admitted as exhibit P1, but the same was not read before the court. On the side of the appellant did not dispute that he borrowed the stated loan, and he kept the above-mentioned property as security. That he agreed to pay Tshs. 1,500,000/= as an interest. He stated that, he paid the said loan as follows; that on 2nd March, 2019 Tshs. 12,000,000/= and its payment was witnessed by DW2 (Chacha Mwita) in the appellant's office. The respondent denied the same payment that it has to be adduced in writing. The second payment was on 17th March, 2019 he paid a total of Tshs. 15,000,000/=. the payment was witnessed by DW3 (Venance Kalenga) in the respondent's office. The payment was signed and witnessed by the parties but the respondent did not give them the copy of the said agreement. The last payment was Tshs. 10,000,000/= which was deposited in the respondent's son account as stated by the respondent, there is no dispute on this. DW3 witnessed the payment of Tshs. 10,000,000/= and 15,000,000/=. 2 Later on, the respondent surprisingly, he was issued with the demand notice. The appellant became worried he decided to prepare the witness affidavit and the same was sworn by an advocate. That the only remained amount was Tshs. 500,000/= was paid at TRA. The appellant tendered the loan agreement, DW2 affidavit, DW3 affidavit, slip of the bank, demand notice, the evidence to prove

money paid at TRA, PCCB information, demand note and the appellant (DW1) affidavit. The exhibits were tendered and the same were admitted as exhibit D1 and D2. The same was not read before the trial court. The trial primary court decided the case in favour of the appellant, with no order to costs. Being dissatisfied with the said decision the respondent filed an appeal before the District Court of Mbeya, in Civil Appeal No. 35 of 2023. The first appellate court held in controversy and decided in favour of the respondent, that the appellant had to pay the outstanding balance of Tshs. 26,000,000/= to the respondent, with order to costs. The appellant being dissatisfied, he filed an appeal before this court with four grounds of appeal reproduced hereunder regardless of errors present: 3

1. That, the first appellate court erred in law and fact when he decided on the issue of Affidavit of SM1 (DW1) and SM2 (DW2) by ruled that affidavit cannot accord weight to shake the weight and strength of claim without consider the same persons they gave their oaths orally and he only confirmed their testimony through his affidavit.
2. That the first appellate magistrate erred in law and fact when he allowed appeal and nullified the proceedings and judgement of the trial court by relying on one side evidence and ignore the evidence of appellant and his witnesses.
3. That, the appellant magistrate erred in law and fact when he allowed appeal without giving any sufficient ground.
4. That the first appellate court erred in law and facts for failure to observe the civil procedure for the burden of proof is on each side. In reply to the petition of appeal the respondent was against the grounds of appeal raised by the appellant. The parties prayed that the appeal be argued by a way of a written submissions. The court granted the prayer and scheduled for submission. The parties adhered to the order of submission accordingly. The appellant enjoyed the service of Ms. Irene Mwakyusa, learned counsel. The respondent fended for himself unrepresented. In her submission the counsel submitted only three grounds of appeal. On the first ground she argued that, the first appellate court erred to allow appeal basing on the attached affidavit of SU2/DW2 and SU3/DW3. The counsel referred page 3 of the typed trial court's proceedings that, the witnesses adduced their oral evidence under oath 4 according to the requirement of the Evidence Act, and lastly, they produced affidavit. The first appellate magistrate turned blindly to the witnesses' evidence because of the additional evidence from their affidavit. The counsel cited rule 48(1) and (2) of the GN. No. 250 of 2012 and Item 5.1 of the Third Schedule, which provides that, the witness statement is equivalent to oral evidence. She also cited the case of Nas Hauliers Limited & 2 Others vs. Equity Bank (T) Limited & Another, Commercial Case No. 105 of 2021 to cement her position. She averred that there is no law which prohibit the witness to testify by a way of an affidavit. The primary court has discretional power to direct on how evidence may be adduced under rule 45(1) of the Magistrate Courts (Civil Procedure in primary courts) Rules. Turning to the second ground the counsel argued that, the first appellate court erred to nullify the proceedings and judgement of the trial court. She submitted that, it is a settled law that in deciding cases the court must confine to the facts adduced in court, and not to

take into account any relating facts to the case which heard out of the court. She cited regulation 7 of the Magistrate's Court (Rules of Evidence in Primary Courts) Regulation. She insisted that the trial court evaluated and analysed well the evidence of both parties as evidenced at page 4 5 and 5 of the typed judgement, but the first appellate court relied on the evidence of one side and ignored the evidence of the appellant. On the third ground of appeal, the counsel went on to submit that, the first appellate court erred in law and fact when allowed the appeal without giving any sufficient ground. The sufficient ground was not given on how he reached to believe that the appellant has a debt of Tshs. 26,000,00/=. The first appellate magistrate allowed the appeal basing on affidavit adduced by SU2 and SU3 while there is no prohibition on legislation. Having submitted so, the counsel prayed this court to allow the appeal and to set aside the decision reached by the first appellate court, and upheld the decision reached by the trial court, with costs. In reply the respondent, in his introductory part argued that, the submission was written in the district court thus it is wrongly filed in this court. But he left the court to decide on it. He submitted on the first ground of appeal that, the appellant's counsel submitted on witnesses' statement as opposed to the evidence by affidavit which was complained before the first appellate court. He went further to argue that, it is impossible for a witness to adduce oral evidence and at the same time to tender affidavit as a prove of his oral evidence. He added 6 that a witness gives oral evidence in fresh suit as opposed to suit which are proved by affidavit. He insisted that affidavit evidence is a substitute of oral evidence. In this case at hand after the trial magistrate had received the oral evidence of DW1 and DW2, he was not required to receive the affidavit of the witnesses as proof of what they have stated. He referred to page 3 of the trial court court's judgment where the trial magistrate relied on oral and affidavit evidence. The appellant went further to state that, the Rule 45(1) of the Magistrates Courts Act (supra) is distinguishable, the rule states who should begin to adduce evidence in the case. The act done in the trial court is contrary to Rule 46(1) of the Magistrate Courts Act (supra). He prayed the first ground to be dismissed. Submitting on the second and the third ground of appeal, he argued them jointly, that the first appellate court did not analyse and evaluate the evidence. He argued that, the burden of proof lies to a person who alleges in his favour. He asserted that in the primary court it was decided basing on the weight of evidence. The rules keep on changing depending on the evidence led. He cited the case of Yusufu Seleman Kimaro vs. Administrator General & 2 Others, Civil 7 Appeal No.266 of 2020 [2022] TZCA 306 (TANZLII) to insists his position. The respondent argued that, the main issue is whether the appellant had paid the whole loan to the respondent. There was no dispute that the respondent advanced a loan of Tshs. 36,000,000/= to the appellant. The appellant testified that, the respondent managed to repay Tshs. 10,000,000/=. But the appellant claimed to have repayed Tshs. 12,000,000/= on 2nd March, 2019 and Tshs. 15,000,000/= on 7th March, 2019 and on unmentioned date Tshs. 10,000,000/=. That the claimed amount of Tshs. 12,000,000/= was paid by the appellant when the respondent went into his office. But the evidence is silent indeed this is a lot amount of money to have been kept in the appellant's office waiting for the respondent while, the appellant never stated if he is a businessman. That, clicks in my mind to have been the reason why they rushed to prepare affidavits. On payment of Tsh.

15,000,000/= it has left a lot to be desired, why he did not call some leaders to witness the same while it was a lot of money. It has been claimed that mode of payment was in three instalments, Tshs. 12,000,000/=, Tshs. 15,000,000/= and Tshs. 10,000,000/= the amount in total is Tshs. 37,000,000/= and Tshs. 8 500,000/= was paid to Tanzania Revenue Authority (TRA). The amount stated by the appellant is contradictory, because it is the law that, once a transaction is reduced into writing no oral evidence will be admitted to contradict it. He cited the case of Charles Richard Kombe t/a Building vs. Evarani Mtungi & Others [2017] TLR 153. In this case at hand, the respondent did not claim to be paid in excess. Therefore, the first appellate court considered the evidence of both parties. The appellant's evidence failed to shake the evidence of the respondent. He prayed the appeal to be dismissed with costs. In her brief rejoinder the appellant's counsel submitted that, the respondent took long time to present stories that are not the essence of the appeal. She then submitted what has been submitted in her submission in chief. She added that, the respondent is doing the business of lending money thus, the appellant was charged Tshs. 1,000,000/= as interests, and Tshs. 500,000/= was paid to TRA. After having a summary of submission made by parties, and having a thorough perusal of the court records there are two issue to be discussed, first issue is whether the first appellate court relied on affidavit made by DW2 and DW3 in making decision, and the second 9 issue is whether the first appellate court evaluated and analysed the evidence made by parties. In the first issue as to whether the first appellate court relied on the affidavit of DW2 and DW3 tendered by DW1 when making decision. It is a settled principle of law that an affidavit is a substitute of an oral evidence. This means it is a substitute of evidence given by a witness orally before the court. This general rule of practice and procedure on affidavit was stated in the case of Jamal S. Mkumba & Another vs. Attorney General, Civil Application No. 240/01 of 2019, where they cited the famous case of Uganda vs. Commissioner of Prison Ex parte Matovu [1966] EA 514, which also cited the case of Phantom Modern Transport (1985) Ltd vs. DT Dobie (TZ)Ltd, Civil References No. 15/2001 and 3 of 2002, it was stated as follows: "As a general rule of practice and procedure on affidavit for use in court being a substitute for oral evidence....". The same was stated by this court, in the case of Standard Chartered Bank Ltd vs. Justin Tineishemo, Revision Application No. 184/2022. Therefore, the process of the trial primary court to allow oral evidence of DW2 and DW3 and at the same time to allow the affidavit of the same parties to be admitted is contrary to the law. The act done by 10 the trial court to admit the affidavit of the witnesses, is like that their oral evidence which was given under oath were not believed by the court. Consequently, the affidavits of the parties tendered were not supposed to be admitted and were not supposed to be relied upon by the trial court and first appellate court when composing their judgements. In this ground, I concur with the respondent's submission that, adducing oral evidence and at the same time allowing oral evidence is unknown procedure in law. The provision cited by the appellant's counsel and the cases are distinguishable from this case at hand. In the trial court, the magistrate in his decision at page 4 and 5 relied on the admitted affidavits by the witnesses, and decided the case in favour of the appellant. But the first appellate court relied on witnesses' affidavits, but in its decision stated that, the same has no weight to shake the evidence of the respondents. As a

result, the appeal was decided in favour of the respondent. In both courts did not state the legal effect of admitting witnesses' affidavits while, there is oral evidence of the same witnesses. Where a witness cannot be traced, the witness' statement can be admitted by the court. See the case of Edson Simon Mwombeki vs. Republic (Criminal Appeal No. 94 of 2016) 11

[2016] TZCA 266 (20 October 2016). Also, the provisions of the Evidence Act are very clear on direct and statement made by a person, refer section 34C of the Act. Due to the anomaly occasioned, therefore, the first ground of appeal has no merit. On the second and third grounds of appeal, the issue is whether the first appellate court evaluated and analysed the evidence of both parties. The appellant claimed that, the first appellate court erred in law to allow an appeal and to nullify the proceedings and judgment of the trial court by basing on the evidence of one side and ignored the evidence of the appellant, without providing any sufficient reason why allowed the appeal. The law is very trite that, in civil cases the court before reaching its decision has to consider the following principles: first that burden of proof in civil cases lies to the person who alleges anything in his favour, the Evidence Act provides for this principle under section 110(1), (2) and 111, second is that, burden of proof is on balance of probabilities. This has been stated in various decisions of the Court of Appeal. In the case of Anthony Masanga vs. Penina Mama Mgesi and Another, Civil Appeal No. 118/2014 and in the case of Hamza Byarushengo vs. 12 Fulgencia Many & 4 Others (Civil Appeal No. 246 of 2018) [2022] TZCA 833 (12 April 2022), the Court stated that: "It is a cherished principle of law that, generally, in civil cases, the burden of proof lies on a party who alleges anything in his favour. The principle is embraced in section 110 of the Evidence Act [CAP 6 R.E.2002]. It is also common knowledge that in civil proceedings, a party with legal burden also bears the evidential burden and the standard of proof is on the balance of probabilities." The appellant claim is that the first appellate court did not evaluate the evidence of both parties, that it relied on the evidence of the respondent only and denied the evidence of the appellant. Having perused the first appellate court's typed judgement at page 6 and 7, it is very open and clear that, the first appellate court evaluated the evidence of both parties and reached its own decision. The law is very strict that, this being a second appeal, this court is not required to re-evaluate the evidence. That is a duty of the first appellate court which must review the evidence and consider the material before the trial court. This was held in the case of Pandya vs. Republic [1957] E.A 336 the East African Court of Appeal stated that: "The second appellate court has no duty to re-evaluate the evidence adduced at the trial but it has the duty to consider the facts of the appeal to the extent of considering the relevant points of law or mixed law and facts as raised in the second appeal. In the process it may review the evidence (i.e. facts) 13 adduced at the trial and particularly so if the first appellate court failed to discharge its primary obligation to rehear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion." The same was decided also in the case of Okena vs. Republic [1972] E.A 32, Godfrey Chilongola vs. Nicodemus Martine and 19 Others, Land

Case Appeal No. 29 of 2018 (unreported). Albeit in rare cases where the first appellate court fails to re-evaluate the evidence and consider the material issues involved, on a subsequent appeal the court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court, this was held in the case of Hassan Mzee Mfaume vs. Republic (1981) TLR 167, which has been referred in a number of cases such as in the case of Yohana Paulo vs. The Republic, Criminal Appeal No. 281/2012 [2019] TZCA 566. Having examined the evidence on record and the decisions of the two courts below, it is my considered view that, this is among the cases which calls for intervention of the second appellate court following the different decisions reached by the two courts below and relying on the evidence not required by the law. 14 In this appeal at hand, the respondent and the appellant entered into a loan agreement, of Tshs. 36,000,000/=. There was a loan agreement, it was tendered and admitted before the trial court as exhibit P1. The loan agreement was not read before the court. Therefore, as a general rule once the exhibit admitted not read before the parties after its admission the same has to be expunged. Thus, the loan agreement is expunged accordingly. The respondent alleged that, out of Tshs. 36,000,000/= the appellant paid only Tshs. 10,000,000/= which was deposited in the account of the respondent's son. The appellant did not dispute on this. The respondent claimed that, the remained outstanding loan is Tshs. 26,000,000/=. This is what disputed by the appellant. The appellant stated that, he repaid all the amount which made the total of Tshs. 37,000,000/= and Tshs. 500,000/= was paid to the respondent at TRA. That, the appellant charged him a total of Tshs. 1,500,000/= as an interest. He alleged that, the amount was paid in three instalments, the first one on 2nd March, 2019, Tshs. 12,000,000/= in the presence of Chacha Mwita, second instalment on 17th March, 2019 Tshs. 15,000,000 in the presence of Venance, and the third instalment is not disputable of Tsh. 10,000,000/=. 15 There were affidavits tendered by the respondent to prove that DW2 and DW3 witnessed the paid amount to the appellant. As discussed above that the said affidavit is not recognised under the law so the same is expunged. Also, the respondent (DW1) tendered the loan agreement, demand note, the amount paid at TRA, information from PCCB and the respondent's affidavit and witnesses' affidavit, were admitted as exhibit D1 and D2. But all admitted exhibits were not read before the trial court. Therefore, the two courts were not supposed to rely on the admitted exhibits when composing their judgements respectively. Having said so, therefore the only evidence available before the trial court was the oral evidence of the parties. Thus, the remaining issue to be determined basing on the available oral evidence, is whether the outstanding loan of Tshs. 26,000,000/= was repaid by the appellant. In my view, as stated above, that in civil cases the burden of proof is on balance of probabilities. Having considered the available evidence, the evidence of the respondent has more weight than that of the appellant, that the whole amount of money with interests was not repaid to the respondent. The court also is required to sustain such evidence which is more credible 16 than the other on a particular fact to be proved. The evidence of the respondent was more credible than that of the appellant. Where he stated that there was interest on the said loan, but when the respondent testified before the trial court that they entered into the loan of Tshs.

36,000,000/= the appellant did not cross examine on the interests charged to him. Therefore, the appellant is bound to repay the remaining outstanding loan of Tshs. 26,000,000/=. The law is very trite that parties are bound by the agreement they freely entered into as per section 10 of the Law of Contract Act. The same was so held in the case of Azizi vs. Bhatia Brothers Ltd [2000] TLR 288 and in Unilever Tanzania Ltd vs. Benedict Mkasa t/a Bema Enterprises, Civil Appeal No.41 of 2009 (unreported). Therefore, the second ground of appeal and the third ground has no merit. The decision reached by the first appellate court is not faulted. The fourth ground of appeal was not submitted by either party; thus, this court did not determine it. From the foregoing reasons, the appeal lacks merit and is hereby dismissed with costs. It is so ordered. 17 Right of further appeal explained. Dated at MBEYA this 4th day of July, 2024. E.L. KAWISHE JUDGE 18

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