

TANZANIA / JUDGMENT

Land Appeal No

COURT
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THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LAND DIVISION AT PAR ES
SALAAM LAND APPEAL NO. 26784 OF 2023 (Originating from the Judgment and Decree of the
liaia District Land and Housing Tribunal in Land Application No. 76 of 2021) PHILEMON
ELIESIKA MAVOO..... APPELLANT VERSUS DCB COMMERCIAL BANK
PLC..... 1STRESPONDENT SIHA DEBT MANAGEMENT & AUCTION MART
LIMITED..... 2nd RESPONDENT

JUDGMENT

Date of last Order: 06/11/2024 Date of Judgment: 25/11/2024 LALTAIKA, J, The Appellants herein
PHILEMON ELIESIKA MAVOO is dissatisfied with the decision of the District Land and Housing
Tribunal for Ilala in Land Application No. 76 of 2021. He has appealed to this Court by way of a
Petition of Appeal containing the following grounds: Page 1 of 12

1. That Hon Chairperson erred in law and fact as the same failed to consider and take into account default to pay as a result of force majeure arising from change of public policy as an exonerating factor absolving the Appellant from liability
2. That Hon Chairperson failed to consider the evidence adduced by the second and third witnesses in support of ground one. When the appeal was called for mention, parties opted for hearing by way of written submissions. With a nod of approval by this Court, a schedule was accordingly ordered. The Appellant and the first Respondent enjoyed the legal services of Messrs. Amin Mohamed Mshana and Alexander Mzikila, learned Advocates, respectively. I take this opportunity to register my commendations to Counsel for their spotless compliance with the scheduled order. This sense of time management which is growing among Counsel in this country is essential for enabling this Court to fulfil its Constitutional mandate of timely dispensation of justice. The next part of this Judgment is a summary of submissions by both parties, my analysis of the law and the verdict. Mr. Mshana indicated that the grounds of appeal were consolidated and argued generally, emphasizing that in dismissing the original application and upholding the Respondent's counterclaim, the Tribunal failed to consider the doctrine of force majeure, which resulted in frustration due to a Page 2 of 12 change in public policy regarding the business for which the loan was obtained. He noted that it was undisputed that the Respondent was aware of the nature of the business for which the loan was taken. He stated that for the bank to approve the loan, it

required the Appellant to present samples of the crops involved in the business. This evidence, he added, was supported by the testimonies of witnesses PW1 (Philemon Eleskia Mavoo), Safiel Philemon Mbwanbo (PW2), and Fidelis Hendrick Mlewa (PW3). From this, Mr. Mshana argued that the Respondent was estopped from denying knowledge of the business and the associated risks. He referred to section 123 of the Evidence Act, Cap 6 R.E 2022, which establishes that a party cannot deny a fact if their declarations, acts, or omissions caused another party to believe and act upon it. He contended that the Respondent's requirement for evidence of the business type and subsequent satisfaction implied both parties shared a common understanding of the risks involved. He emphasized that the loan was specifically for the cashew nut business, which lacked formal documentation such as licenses, making the display of physical goods essential. Thus, he submitted, the parties were bound to share the successes or failures of the venture. Page 3 of 12

Turning to the change in public policy, Mr. Mshana highlighted a government directive during the fifth-phase government under President Dr. John Pombe Magufuli. This directive mandated that private entities withdraw from the cashew nut business, which became restricted to Agricultural Marketing Cooperative Societies (AMCOS). He provided context, explaining that the AMCOS facilitated the marketing of crops, and referred to a policy shift that led to the military (JWTZ) taking over the cashew nut trade. Mr. Mshana went on to recount that (in those days) private sellers were required to prove ownership of cashews or risk nationalization. He explained that the Appellant, having purchased cashew nuts before the directive, had to sell them through NAMBANA AMCOS in Liwale District. The policy, he said, was evidenced by receipts tendered and admitted as Exhibit KN-1 and supported by plaintiffs' witness testimonies. He also referenced a news report from The Citizen dated November 13, 2018, which detailed the policy shift. Despite complying with the directive, he noted, AMCOS failed to pay the Appellant, as evidenced by Exhibit KN-3, which documented a court order for AMCOS to pay Tshs. 35 million. However, being a public body under sections 6 and 6A of the Government Proceedings Act, Cap 5 R.E 2022, Mr. Mshana reasoned, execution of this Page 4 of 12 order was practically unenforceable under sections 16(3) and (4) of the same law. Mr. Mshana asserted that this legal and factual context constituted force majeure, as the government's actions were beyond the contemplation and control of the parties, frustrating the contract. He elaborated on the concept of force majeure under section 56(2) of the Law of Contract Act, Cap 345 R.E 2019, and cited this Court's case of A.M Trailer Manufacturer Limited v. NCBA Bank Tanzania Limited, Commercial Case No. 116 of 2022, which extensively discussed force majeure and frustration. He concluded by submitting that the Appellant, having already paid a substantial portion of the loan, should not be held liable for the interest and penalties, as these arose from circumstances beyond their control. He prayed for the Court to limit the debt to the principal amount and to expunge the interest and penalties, noting that the Appellant continued to make payments from other sources despite the legal proceedings. Mr. Mzikila, Counsel for the 1st Respondent, objected to the appeal and specifically disputed the first ground of appeal. He submitted that during the trial at the Ilala District Land and Housing Tribunal, no issue regarding Page 5 of 12 force majeure had been framed for determination. He argued that,

according to established legal principles, a matter that was not addressed or framed for determination at the trial court or tribunal could not be raised for the first time on appeal, unless it concerned the jurisdiction of the trial court or tribunal. To support this argument, the learned Advocate referred to the decision of the Court of Appeal in *Hotel Travertine Ltd and 2 Others v. National Bank of Commerce* [2006] TLR 133. Mr. Mzikila further submitted that if this Court found that the issue of force majeure had been determined by the trial tribunal, the 1st Respondent maintained that the circumstances described by the Appellant did not constitute force majeure. He referred to item No. 3 of "Exhibit KU2," the Offer Letter, which specified that the loan was granted for the purpose of conducting a cereal crops business. He contended that cashew nuts did not fall within the category of cereal crops, which included, for example, wheat, maize, rice, and sorghum. Mr. Mzikila stressed that the Appellant had diverted the loan funds into an unauthorized venture, contrary to the agreement set out in "Exhibit KU2." Consequently, he submitted that the provisions of section 56(2) of the Law Page 6 of 12 of Contract Act and the case of *A.M Trailer Manufacturer Limited* cited by the Appellant were irrelevant and inapplicable to the matter at hand. Turning to the second ground of appeal, Mr. Mzikila argued without pointing to specific parts of the arguments of his learned brother in the bar, that the ground lacked merit. He submitted that the tribunal chairperson had duly considered the evidence provided by the three named witnesses when reaching her decision, as demonstrated in pages 1 to 4 of the typed tribunal judgment. In conclusion, he prayed for the appeal to be dismissed with costs. Mr. Mshana, in his rejoinder submission, stated that he and his client stood by their submissions in chief and reiterated their prayers. Responding to the argument that no issue of force majeure was raised or decided at the tribunal level, he contended that the issue had indeed been raised, albeit not explicitly in those terms. He argued that the matter had surfaced by necessary implication after the evidence was heard, as it was the focus of much of the evidence presented. Mr. Mshana further submitted that the Tribunal was not strictly bound by the originally framed issues and could amend or frame new issues at any stage for the effective determination of the dispute, provided Page 7 of 12 evidence had been led or required for such issues. To support this argument, he referred to the decision in *National Microfinance Bank PLC and Reliance Insurance Company (T) Limited v. Lello Laurent Sawe*, Consolidated Civil Appeals Nos. 385 "A" & 339 of 2021, which emphasized that courts have the authority to frame or amend issues as necessary under Order XIV Rule 5(1) and (2) of the Civil Procedure Code. Regarding the allegation of misusing loan funds by applying them contrary to the business plan, Mr. Mshana refuted this assertion, claiming it was untrue. He argued that cashew nuts were part of the crops the Appellant had identified to the bank. He pointed out that the Tribunal's decision did not attribute the failure of the suit or application to any alleged misuse of funds, rendering the respondent's argument a misdirection. He also noted that the agreement cited by the respondent was not in the Appellant's custody, as all relevant documents were held by the bank. He argued that if the bank's intention was to restrict the loan to specific crops such as cereal crops, it would not have required the Appellant to provide physical samples. He questioned the necessity of this requirement, given that the identification of cereal crops

could have been accomplished with a Page 8 of 12 simple dictionary reference. He asserted that their argument on this issue remained undefeated. On the respondent's claim that evidence was duly considered, Mr. Mshana reiterated his earlier submission that the Tribunal had failed to objectively evaluate or analyze the evidence presented. He emphasized that there was no indication as to whether the Tribunal believed or disbelieved the evidence or found it relevant. He argued that this failure rendered the Tribunal's judgment defective. To underscore the above point on analysis of evidence, Mr. Mshana cited Emmanuel Joseph v. Republic, Criminal Appeal No. 121 of 2022, which referenced the decision in Leonard Mwanashoka v. Republic, Criminal Appeal No. 226 of 2014. He highlighted the Court of Appeal's reasoning, delivered by Rutakangwa, JA (as he then was), that summarizing evidence without subjecting it to objective evaluation or analysis was insufficient. In conclusion, he reiterated that the appeal should be allowed with costs. I have dispassionately considered the rival submissions in the light of the grounds of appeal. I have also keenly scrutinized the tribunal's records. Issues for my determination are as follows:

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1. Whether the Tribunal erred in failing to address the issue of force majeure.
2. Whether the Tribunal erred in its evaluation of evidence.
3. Whether the Appellant misapplied the loan funds contrary to the agreed business plan. On the Issue of Force Majeure, the Appellant argued that the Tribunal ought to have considered force majeure as a central issue because the evidence led at trial implied this issue, even though it was not explicitly framed. Counsel relied on the decision in National Microfinance Bank PLC and Reliance Insurance Company (T) Limited v. Lello Laurent Sawe (supra) to argue that courts have the discretion to frame new issues during proceedings if they arise from the evidence presented. The Respondent countered that force majeure was not an issue framed for determination at trial and that introducing it at the appellate stage contravenes the principle established in Hotel Travertine Ltd and 2 Others v. National Bank of Commerce (supra). Upon review of the trial record, it is my finding that the issue of force majeure was indeed not expressly framed for determination. However, the evidence adduced, particularly regarding government directives that fundamentally altered the business environment for cashewnuts, clearly Page 10 of 12 raises the doctrine by necessary implication. The Tribunal, in its mandate to ensure substantive justice, had the discretion to consider such an issue even if it was not formally framed, as supported by Order XIV Rule 5(1) of the Civil Procedure Code (supra). The failure to do so constituted a material irregularity. On the Evaluation of Evidence, the Appellant argued that the Tribunal failed to evaluate the evidence properly, citing Emmanuel Joseph v. Republic (supra) for the principle that evidence must be subjected to objective evaluation and analysis. Counsel emphasized that critical evidence, such as the physical samples of the crops presented to the bank and the impact of government policies, was disregarded without any cogent reasoning. The Respondent, on the other hand, maintained that the Tribunal did consider the evidence presented, as reflected in its judgment. It is my considered view that while the Tribunal

summarized the evidence presented by both sides, it did not engage in an in-depth evaluation of its relevance or credibility, particularly regarding the Appellants claim that government directives frustrated the purpose of the loan agreement. This failure undermines the Tribunal's conclusion and necessitates Page 11 of 12 intervention by this Court. This, unfortunately, leaves me with only one option to contemplate upon for intervention and that is to order retrial. I am alive to the settled position of the law that an order for a retrial arises when the appellate court finds out that the judgment of the trial court or tribunal is defective for leaving contested material issues unresolved and undecided which error or omission renders the said judgment a nullity and incapable of being upheld. See, Stanslaus Rugaba Kasusura & Attorney General vs Phares Kabuye [1982] T.L.R. 192. In view of the foregoing, the Tribunal's decision is set aside. The matter is remitted to the Tribunal for retrial with directions to consider the issue of force majeure and to re-evaluate the evidence presented by the parties. I make no orders as to costs. It is so ordered. ? E.I. LALTAIKA JUDGE 21/11/2024 Court: Judgment delivered in Chambers this 25th day of November 2024 at 14:45 PM in the absence of parties and/or their Advocates. Page 12 of 12

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Prepared on 14 October 2026 · Esheria