

TANZANIA / JUDGMENT

CIVIL APPEAL NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB REGISTRY AT
ARUSHA CIVIL APPEAL NO. 4544 OF 2024 (C/f Civil Case No. 25 of 2023 at the District Court
of Arusha at Arusha) UPENDO KIMAMBO..... APPELLANT
VERSUS HAPPY ROMAN..... RESPONDENT

JUDGMENT

5h September & 5h November 2024 Masara, J In this Appeal, the Appellant is challenging the decision issued by the District Court of Arusha at Arusha ("the trial court") in Civil Case No. 25 of 2023. Before the trial court, the Respondent sued the Appellant claiming for a sum of TZS 30,800,000/= being the outstanding loan as per the loan agreement entered between them (exhibit P1). The said loan was secured by two sales contracts of the Appellant's landed properties (exhibits P2 and P3). The Respondent also tendered a deposit slip (exhibit P4) evidencing part of the deposits made in the Appellant's Bank Account. The Respondent also claimed for general damages, costs of the suit and any other relief that the court deems fit and just to grant. The Appellant did not accept the claims made by the Respondent. It was her defence that she is only indebted to the Respondent for an amount of 1 | Page TZS 2,440,000/= having paid back substantial amount of the loan extended to her by the Respondent. She also objected to the authenticity of the loan agreement and that the only amount extended to her was TZS 9,190,000/=. The trial court agreed with the Respondent and entered judgment against the Appellant who was asked to pay the whole amount of TZS 30,800,000/=. It also awarded general damages to the tune of TZS 5,000,000/=. interest on the decretal sum at the rate of 12% per annum from the date of judgment till payment in full and costs of the suit. The Appellant being dissatisfied with the said judgment and decree, preferred the current Appeal on eight grounds as reproduced hereunder:

- 1) That, the learned trial magistrate grossly erred in law and fact by relying her decision on Exhibit P1, the loan agreement which is inadmissible as evidence for not having a stamp duty consequently arriving to an erroneous decision.

- 2) That, the learned trial magistrate grossly erred in law and fact by failure to appreciate that, the loan advanced to the Appellant by the Respondent was TZS 9,190,000/= and the Appellant had already paid TZS 6,750,000/= and she is only remained with unpaid sum of TZS 2,440,000/= consequently arriving to an erroneous decision.
- 3) That, the learned trial magistrate grossly erred in law and fact for failure to appreciate that, the Respondent advanced to the Appellant with interest contrary to the law consequently arriving to an 2 | Page erroneous decision, indeed the amount of TZS 30,800,000/= was accrued as interests serve for unpaid sum of TZS 2,440,000/= which the Appellant is ready to pay the Respondent.
- 4) That, the learned trial magistrate grossly erred in law and fact for awarding exorbitant, unjustified and excessive general damages in favour of the Respondent consequently arriving to an erroneous decision.
- 5) That, the learned trial magistrate grossly erred in law and fact for blessing collateral, that is Exhibit P2 and P3 which was placed to the Respondent by the Appellant in contravention of law consequently arriving an erroneous decision.
- 6) That, the learned trial magistrate grossly erred in law and fact for failure to scrutinize and evaluate the evidence adduced during the trial hence arriving to an erroneous decision.
- 7) That, the learned trial magistrate grossly erred in law and fact for being bias by completely disregarding the appellant's adduced evidence and testimony and retying only on the Respondent's adduced evidence and testimony and his witnesses hence arriving to an erroneous decision.
- 8) That, the learned trial Magistrate reached an erroneous decision by granting judgment in favour of the Respondent without considering the required standard and proof required by the law. At the hearing of the Appeal, the Appellant was represented by Ms Glory Komba, learned advocate, while the Respondent appeared in person with no legal representation. The Appeal was heard through filing of written

submissions.

3 | Page In support of the 1st ground Appeal, Ms Komba submitted that the trial court decision is largely based on the presence of exhibit P1, the loan agreement, which does not qualify to be on the court record as it does not bear stamp duty as required by law. To cement on this point, she referred this Court to the decisions in *Zakaria Barie Bura vs Theresia Maria John Mubiru* [1995] TLR 211 and *Suleyman Nassor Muyugumbi (The Administrator of the Estate of the late Nassor Suleyman Muyugumbi} vs Issa Jabiri & Another* (Land Appeal No. 551 of 2024) [2024] TZHC 438. Based on the authorities cited, she prayed that exhibit P1 be expunged from the court records. On the second ground of Appeal, Ms Glory submitted that in the paragraphs 6 to 9 of the amended plaint the amount claimed by the Respondent is TZS 9,190,000/= as reflected in the bank transactions tendered. That, if she avers that the other amount of money was advanced in cash

then the same had to be pleaded and proved. As she failed to do so, it is obvious that the trial magistrate issued an erroneous decision. Regarding the third ground of Appeal, Ms Glory was of the view that, as per exhibit P4, the amount proven by the Respondent is TZS 9,190,000/= and the rest of the amount, save for the unpaid TZS 2,440,000/=, accrued 4 | Page as interest on the loan amount. That, it was not in order for the Respondent to impose such interest because that contravened section 3(1) of the Business Licensing Act Cap. 208 [R-E 2002] which requires a person to hold a valid business licence for him to do business in Tanzania. Expounding the fourth ground, Ms Glory averred that, general damages awarded by the trial court to the Respondent was exorbitant, unjustified and excessive considering the fact that the only amount of money proved by the Respondent was TZS 9,190,000/=. She also made reference to the wordings of section 73(2) of the Law of Contract Act, Cap. 345 [R-E 2019] that compensation is not to be given for any remote and indirect loss or damages sustained by reasons of the breach. To support that assertion, she relied on the decision of *Amandus Ziky Masinde vs Nyamsera Marumba* (Civil Appeal No. 88 of 2016) [2028] TZHC 2954. Canvassing the fifth ground of Appeal, Ms Glory stated that section 24(1) of the Banking and Financial Institutions Act, No. 5 of 2006 and regulation 5(4) of the Banking and Financial Institutions (Licensing) Regulations, G.N No. 297 of 2014 as well as the case of *ULF Nilson vs Tito Mziray Ndrew* (Land Case No. 66 of 2007) [2014] TZHC 2143, prohibits an individual who is not licenced to engage in lending activities and mostly accept deposits such as exhibit P2 and P3. 5 | Page Elaborating the sixth ground of Appeal, Ms Glory submitted that, other than the TZS 9,190,000/= there is nowhere in the Respondent's Amended plaint did the Respondent prove to have given the Appellant an amount of TZS 30,800,000/= hence the trial magistrate erred to order the Appellant to pay such an amount of money to the Respondent. She referred to the decision in *Stanslaus Rugaba Kasusura and another vs Phares Kabuye* [1982] TLR 338. Submitting on the seventh ground of appeal, it was the learned advocate's assertion that the Appellant does not contest the loan amount to the tune of TZS 9,190,000/= as per exhibit P4. That, the trial magistrate erred when he purported to rely on the evidence by the Respondent and her witnesses and completely disregarded the Appellant evidence and what was pleaded in the Amended Plaint. On the eighth and last ground of the Appeal, Ms Glory argued that the standard of proof required by law; specifically, section 110 and 111 of the Law of Evidence Act, Cap. 6 and the decisions in *Antony M. Masanga vs Penina (Mama Mgesi)* and *Another* (Civil Appeal No. 118 of

2014) [2015] TZCA 556 and *Ikizu Secondary School vs Sarawe Village Council* (Civil Appeal No. 163 of 2006) [2008] TZCA 444 is for the person claiming the existence of a fact to prove the same on the 6 | Page balance of probability. That, the Respondent failed to prove the purported loan of TZS 30,800,000/=. Rather the only loan amount proven was TZS 9,190,000/=. Basing on the strength of the submissions made, the Appellant prays that the Appeal be allowed by setting aside the whole judgment and decree issued by the trial court. The Respondent, on her side, supported the trial court's decision in its entirety. She responded to grounds 2, 6, 7 and 8 of the appeal jointly, while the remaining grounds of appeal were responded to separately. Responding to the 1st ground of appeal, the Respondent stated that, while it is a legal requirement that an agreement such as Exhibit P1 ought to have been stamped as per

item 6(1) of the Stamp Duty Act, failure to pay stamp duty on exhibit Pl does not invalidate the trial court proceedings as the document was admitted without any objection. For this she referred to the decision of the Court of Appeal in Makumbi Dogani vs Ndogondogo Maganga, Civil Appeal No. 78 of 2019 (unreported). The Respondent further submitted that failure to stamp the contract has not occasioned any injustice on the part of the Appellant and supported this stance with the decision in Elizabeth Mboya vs Amina Abeid

[2000] TLR 12 which was cited with approval in the case of Fatuma S. 7 | Page Bassebe vs Jackson Mutagulwa Rwiza, Civil Appeal No. 4 of 2021

[2024] TZCA 381. Countering the 3rd ground of appeal, the Respondent contended that, pursuant to exhibit Pl, the loan, TZS 30,800,000/=, was extended to the Appellant without any interest. That her evidence (PW1) to that effect was not contravened by the Appellant during cross examination. That, the fact that the Respondent was not a registered and licenced businessperson under the law does not preclude her from demanding repayment of money advanced to the Appellant. She supported this with the decision of Private Agriculture Sector Support Trust and Another vs Kilimanjaro Cooperative Bank Ltd, Consolidated Civil Appeals Nos 171 and 172 of 2019 [2022] TZCA 637 cited with approval in the case of CRDB Bank PLC vs Symbion Power Tanzania Limited, Civil Appeal No. 371 of 2022 [2023] TZCA 17594. On the 4th ground of Appeal, the Respondent responded that, in awarding general damages, the law does not require the amount to be stated in the pleadings and be proved. That, damages are awarded at the discretion of the court and are presumed to be direct, natural and probable consequences, as was held in the case of Tanzania Saruji Corporation vs African Marble Company Limited [2004] TLR 155 and M/s 8 | Page Tanzania China Friendship Textile Co. Ltd vs Our Lady of the Usambara Sisters [2005] TLR 70. Contesting the 5th ground of appeal regarding the collateral for the loan, the Respondent argued that the law does not prohibit parties from enforcing terms of a free executed contract merely because a party thereto is not a financial institution. That, the important aspect is that there be sanctity of contract. To back up that position, reference was made to the case of Simon Kichele Chacha vs Avelline M Ki I a we, Civil Appeal No. 160 of 2018. Responding to grounds 2, 6, 7 and 8 of the appeal combined, the Respondent submitted that the issue for consideration is whether the Respondent proved her case to the required standard as per sections 110 and 111 of the Evidence Act, Cap. 6 and as was held in the case of Peters vs Sunday Post Ltd [1958] EA 424 and Stanislaus Rugaba Kasusura and Another vs Phares Kabuye [1982] TLR 338. The Respondent stated that upon evaluating the Appellant's evidence viz a i//5the evidence of the Respondent at the trial court, there is no dispute that the Respondent's case was heavier than the Appellant's case. That, the Respondent was able to satisfy the trial court through oral and documentary evidence. Hence, the trial court properly awarded TZS 9 | Page 30,800,000/= to her as it was effectually proved. She, thus, prayed that the Appeal be dismissed for want of merits. Having considered the evidence on record, the grounds of appeal advanced by the Appellant and the submissions by the parties in respect of this Appeal, the issue for determination is whether the appeal has merit. In order to determine the issue above

referred, I will endeavour to canvass the same based on the grounds and the sequence proffered by the Appellant starting with the 1st ground of Appeal. In this ground, the Appellant faults the decision of the trial court on the ground that the loan agreement (Exhibit Pl) admitted and relied upon by the trial court lacks stamp duty as the law dictates. At the outset, I do agree with the Appellant that Exhibit Pl on record does not bear stamp duty. But, I also agree with the submissions made by the Respondent to the fact that the omission to pay stamp duty on exhibit Pl does not render the agreement between the parties invalid nor does the same vitiate the trial court proceedings in that regard. The reason for saying so is simple, failure to stamp the document was an irregularity not affecting the jurisdiction of the trial court. In the case of Fatuma S. Bbasse (Supra) the Court of Appeal, after observing that the admitted document lacked the appropriate stamp duty, it ordered that stamp duty 10 | P a g e be paid at the rate the instrument was a chargeable at the time of executing the sale. One may also be tempted to ask whether exhibit Pl is a contract or whether it was merely a letter admitting the existence of a contract between the parties. Although it was treated to be a contract exhibiting the loan purportedly extended to the Appellant, the best the trial court should have done is to receive it as one of the documents supporting an oral agreement between the parties. The said document does not state whether the loan was extended, but shows that the Appellant had requested a loan from the Respondent. In addition, other than stating the amount of the requested loan, it does not spell out the time frame for issuing the loan. This was important considering the dates of the supporting evidence for giving the money to the Appellant. On the 2nd and 3rd grounds of Appeal, the Appellant contends that the trial court erred for its failure to appreciate that the amount of loan extended to the Appellant by the Respondent was of TZS 9,190,000/= only and the Appellant paid some of the amount and that the loan issued was with interest, contrary to the requirement of law. The Appellant claims that the amended plaint filed before the trial court by the Respondent stated in paragraph 3 that the loan advanced to the Appellant was TZS 30,800,000/= interest free, but that the various bank 11 | P a g e transactions done between parties as per paragraphs 6 to 9 of the same amended plaint evidences that the amount of loan was only TZS 9,190,000/=. The Respondent, on the other hand, contended that as per the amended plaint, various transactions had been pleaded and proved to have existed between the parties. In order to grasp the issues in contention of the parties herein, I had to go back to the pleadings filed at the trial court. This is keeping in line with the settled principle of law that, in civil litigation, parties' pleadings set a road map of their cases and are binding upon them. The Court of Appeal has repeatedly insisted on this position of law in a number of decisions. In Barclays Bank T. Ltd vs Jacob Muro, Civil Appeal No. 357 of 2019 r20201 TZCA 185, the Court stated as follows: "We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored." The above position was reiterated in the case of Indo- African Estate Ltd vs District Commissioner for Lindi District & Others (Civil Appeal No. 90 of 2023) [2024] TZCA 450,

which cited with approval the previous decision in the case of James Funke Gwagilo vs The 12 | P a g e Attorney General, Civil Appeal No. 67 of 2001, where it was held that: "The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate to determine the matters in dispute..." Suffices to state that parties to a dispute appear before a court for a specific purpose. That purpose is garnered from the pleadings and the court is bound to adjudicate on that purpose and decide either way. From the trial court records, the so called amended plaint does not exist. Notably, from the trial court proceedings dated 12/09/2023, an order was issued to allow the Respondent to file documents to be relied upon, that is when the Respondent filed a different document in the name of amended plaint. There is no record to show that this document was treated as an amendment to the original plaint. Thus, since the amended plaint and its annexures were filed contrary to the law, it is hereby expunged from the court record and it will not be regarded by this Court in reaching its decision. 13 | P a g e Reverting to the determination of the two grounds of appeal, as per the plaint, the Respondent pleaded that the amount extended to the Appellant as loan was for TZS 30,800,000/= without any interest as per exhibit Pl. The Appellant claims otherwise. In the written statement of defence, she only made a general denial of the claim and did not provide any elaborations. Unfortunately, the record of the trial proceedings also appears to show that the Appellant did not cross examine the Appellant on the contents of exhibit Pl. The defence features in her evidence after he had obtained the services of a lawyer. As it is the Appellant who claimed that the Respondent only issued her with the loan to the tune of TZS 9,190,000/= and that the loan was repaid save for TZS 2,440,000/= which is the outstanding debt, then the burden to prove the same lied on her. This is the position of the law; specifically, section 110(1) & (2) and 112 of the Evidence Act, Cap. 6 fR.E 20021. That position was reemphasized in the case of Anthony M. Masanga vs Penina (Mama Mgesi) {Supra}. Notably, the evidence on record, other than exhibit Pl vindicates the Respondent's version. She received through bank transactions the amount totalling TZS 9,190,000/=. The amount was received by the Appellant before the execution of Exhibit Pl. The Respondent's witness (PW2) testified that he is the one who deposited 14 | P a g e the said amount. He also testified that during the execution of Exhibit Pl, the Appellant received a further TZS 4,500,000/=. Regarding the repayment of some of the loan amount, the same was not proved and the trial court cannot be faulted for not deducting the amount allegedly repaid. From the defence evidence and following cross examination, the Respondent did, in a way, acknowledge receiving some amount from the Appellant. But the onus still remained with the Appellant to substantiate the same including tendering evidence of the deposits she made in the account given to her by the Respondent. Since the Appellant failed to prove that she repaid the loan, then the claims made by the Appellant regarding the amount of loan and the repayments remain unproven. On whether the loan advanced was with interest or not, this will not detain me much. As per

the plaintiff, the Respondent stated that the loan was without any interest. The Appellant on the other side never pleaded existence of interest thereof. Again, it is settled law in contract that, parties are bound by the agreement they freely enter into. See the case of Simon Kichele Chacha {Supra}. With that in mind, this Court is unable to decide that the loan advanced to the Appellant was with interest. 15 | P a g e Turning to the 4th ground of appeal in which Appellant faults the award of general damages by the trial court, I need not reemphasize the cherished position of the law that this Court will only interfere with the quantum of the award of damages if it will be seen that the trial magistrate assessed the said damages by using a wrong principle of law. Where a wrong principle of law is applied, then the appellate court is entitled to vary or interfere with the quantum of damages awarded. This is what was stated in Cooper Motor Corporation Ltd vs Moshi/ Arusha Group Occupational Health Services [1990] TLR 96. In that decision, the Court of Appeal outlined conditions for the appellate court to properly intervene with the assessment of damages by a trial judge or magistrate. That, the said appellate court must be satisfied on the following things:

- i) Either that the judge or the trial magistrate, in assessing the damages, applied wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); ii) Or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. Applying the above principles to the current Appeal, it is obvious that other than awarding damages, the trial court never explained the basis for the award of general damages. Damages ought to be awarded where they 16 | P a g e are due. In this case, however, having held that the Appellant was in default and having awarded interest on the decretal amount, the award of general damage was unnecessary. The trial magistrate stated that since the main claim had succeeded, then general damages was thus awardable. That cannot be the only justification for the award of general damages. Further, in her evidence, the Respondent never pleaded that she suffered any damage. It is therefore incumbent on this Court to vary and interfere with the award of general damages given to the Respondent as the same was awarded without justification. In the 5th ground of Appeal, the Appellant faults the trial court's decision of blessing the collateral; that is, exhibits P2 and P3. As above stated, the annexures to the amended plaintiff being expunged from record the said exhibits also lacks legal effect and since they were not pleaded in the original plaintiff, their admission remains ineffective. In the 6th, 7th and 8th grounds of appeal, the Appellant challenges the >5: finding of the trial court in that the Respondent before the trjal court did not prove her case on the required standard. As the trial court evidence reveals, the Respondent together with her witnesses, PW2, PW3 and PW4, adduced their evidence at the trial court to substantiate the claims by the Respondent. As earlier stated, the Appellant herself does not dispute that 17 | P a g e she was given a loan by the Respondent. The only issue is on the amount extended. As expounded hitherto above, the amount of TZS 30,800,000/= was not proved. The only amount proved and which ought to have been awarded to the Respondent is TZS 9,190,000/=. In the final analysis, the appeal is partly allowed. The Appellant to pay the Respondent TZS

9,190,000/=. The Appellant shall also pay interest on the decretal amount at the simple interest rate of 12% per annum from the date the suit was filed at the trial court to the date of this judgment. As the Appeal has partly succeeded, I direct that each party bears its own costs for this Appeal. DATED and DELIVERED at ARUSHA this 8th day of November 2024
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