IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CORAM: BWANA,J.A., MANDIA,J.A., And ORIYO, J.A

CIVIL APPEAL NO. 43 OF 2013

MR. MATHIAS ERASTO MANGA .....APPELLANT
VERSUS
M/S SIMON GROUP (T) LIMITED.....RESPONDENT

(Appeal from the judgment and Decree of the High Court of Tanzania Commercial Division, At Arusha)

(Makaramba, J.)

dated the 28th day of September, 2012
in
Commercial Case No 268 of 2001

JUDGMENT OF THE COURT

26th February & 19th March, 2014

MANDIA, J. A.:

On 14th March, 2010, the respondent entered into an oral loan contract with the appellant, in which the appellant lent the respondent the sum of Sh.45,000,000/= (forty five million shillings), to be repaid without interest on 13th April, 2010. On the date due, the respondent did not repay the loan. Two days after the due date, i.e on 15th March, 2010, the respondent issued a cheque for the loan amount. When the appellant presented the cheque to the drawee bank at Arusha for encashment, the cheque was dishonoured . The appellant informed the respondent that the

cheque issued by him (respondent) had been dishonoured, and asked the respondent to effect payment by other means. The respondent never did so despite incessant reminders from the appellant. On 20th November, 2011, over one year and seven months after the due date of the loan, the appellant sent a demand notice to the respondent requiring the latter to settle his liability. The respondent never responded to the demand notice. On 18th January, 2012, the appellant sued for the loan amount in the High Court of Tanzania at Arusha. The respondent was served but never appeared in the High Court. The appellant prayed to the court to proceed ex-parte and his prayer was granted. The High Court then proceeded to accept the evidence of PW1 Mathias Erasto Manga in ex parte proof of the claim, after which the High Court reserved judgment. In its judgment the trial High Court framed three issues for determination as follows:-

1. Whether there was a loan agreement between the defendant and the plaintiff.
2. Whether the defendant breached the loan agreement.
3. To what relief is the plaintiff entitled to.

In his judgment the learned trial High Court judge expressed doubts on the existence of the oral loan because a witness who was present when

the loan money was given was not called to testify. This was one **Mr. Charles Gabochozika**. At page 44 of the record the trial judge made the following remark:-

> *"In my considered view, the absence of the witness who Pw1 claims witnessed the handing of the loan money to Mr. Robert Simon Kiseno, the Managing Director of the Defendant's Company, and failure by Pw1 to produce the Bank Statement in Court as evidence of transfer of the said sum of money, has greatly impacted on the balance of probability required to establish that indeed there was an intention to form an oral contract. It is for the foregoing reasons that the Court finds it extremely difficult to invoke the provisions of section 122 of the Evidence Act to infer the existence of any fact which it thinks is likely to have happened. The mere existence of a dishonored cheque (Exh P1) purportedly issued by the Defendant is not sufficient for constituting inference of the existence of an oral contract".*

The above quoted reasoning led the trial High Court to answer all issued framed in the negative and dismiss the suit with costs.

The appellant was aggrieved by the dismissal of the suit and filed an appeal to this Court. The memorandum of appeal filed by the appellant contains three grounds, namely:-

1. *That on the available evidence the trial court erred in failing to hold that there was a loan agreement between the appellant and the respondent.*
2. *That the trial High Court clearly erred in imposing a very high standard of proof in civil action.*
3. *That the trial High Court erred in demanding corroborative evidence in civil action.*

At the hearing of the appeal the appellant was represented by Mr. Elvaison Maro, learned advocate. The respondent, who was duly served on 17/2/2014, was absent. The Court therefore allowed Mr. Elvaison Maro to argue the appeal ex parte under Rule 112(2) of the Court of Appeal Rules, 2009. Mr. Elvaison Maro had lodged in this Court written submissions in support of his appeal which he adopted. We appreciate the industry he put in elaborating his case through the written submissions, particularly the authorities cited in support of the submissions.

We are of the opinion that an answer to the first issue on the existence of an oral contract is the key to the case. We observe that the trial High Court judge found it positively that the appellant and the respondent met to discuss the loan agreement. His only grouse is that the two met in the presence of a third party but the third party was not called in evidence which made him entertain doubts that the contract between the appellant and the respondent was concluded. The learned High Court judge went on to entertain doubts even in the presence of a dishonoured cheque which the respondent issued in an effort to settle the loan.

First of all, we are minded to observe that the appellant gave evidence ex parte because the respondent, though duly served, did not appear in court to defend the action by filing a written statement of defence and also attending hearing to defend the suit. All the averments put forth by the appellant in the trial court therefore remain uncontroverted. Secondly, this was an action based on an oral contract subject to the law of contract. The essential elements of a contract are spelt out in Section 10 of the Law of Contract Act, Chapter 345 R.E 2002 which provides:-

"10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:

Provided that nothing herein contained shall affect any law in force, and not hereby expressly repealed or disaplied, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

Section 10 is augmented by Section 13 which defines consent thus:-

> *"Two or more persons are said to consent when they agree upon the same thing in the same sense."*

It is trite law that for parties to enter into contractual relations there must be an offer, acceptance and lawful consideration. Based on the facts as adduced by PW1 Mr. Mathias Erasto Manga, the appellant and the respondent met and agreed orally for the appellant to advance to the respondent a loan of Shs. 45,000,000/= to be paid back in one month's time. Here there was an offeror, an offeree, and valuable consideration.

Consideration has been defined in **Currie V Misa** (1875) LR 10 Ex 153; (1875 – 76) LR 1 App- Cas 554 thus:-

" A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other.."

Again in **Thomas V Thomas** (1842) as quoted in the text **Contract Cases & Materials** by H.G. Beale, W.D. Bishop & M.P Furmston 4th Edition, consideration in defined thus:-

> *"Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some detriment to the plaintiff or some benefit to the to the defendant, but at all events it must be moving from the plaintiff ."*

The evidence shows that consideration moved from the appellant in the form of the loan money, and this completed the contract. The contract was doubly executed, with the appellant giving out the loan money and the respondent promising to pay back in one month's time.

Since the parties' minds met on the day the agreement was made, the contract was complete. The observation that a third party should have been present to witness the contract is not supported by the law particularly sections 10 and 13 of the Law of Contract Act. By insisting that a third party who witnessed the contract appear in court to corroborate the existence of the contract the trial High Court went above and beyond the requirements of the law of contract. In TANZANIA CIGARETTE COMPANY LTD Vs MASTERMIND TOBACCO (T) Limited, Commercial Case No. 11 of 2005 it was held thus:-

> *"I am aware that this is a civil case and that as a rule no corroboration is required to prove any allegation. What is required of any party in such case is to prove her case on a balance of probabilities."*

We are satisfied that the trial High Court judge erred in insisting on corroboration in the suit before him. All he was required to do was to find, on a balance of probabilities, and on the basis of the evidence before him, whether or not there was a contract for the loan of money or not. Lord Denning (M.R.) in **MILLER vs MINISTER OF PENSIONS** (1937)2, ALL-

E.R372 at P. 374 puts down the standard of proof on a balance of probability thus:-

> *"It must carry a reasonable degree of probability but not so high as required in a criminal case. If the evidence is such that the tribunal can say "We think it is more probable than not" the burden is discharged, but if the probabilities are equal, it is not".*

Again in RE MINOR (1966) AC 563 at 586 it was held:-

> *" The balance of probability standard means a court is satisfied an event occurred if the court considers that,* ***on the evidence*** *the occurrence of the event was more likely than not".*

Necessarily, the cases quoted above insist on the principle that the yardstick of proof is **the evidence available on record** and whether it tilts the balance one way or the other. Departing from this yardstick by requiring corroboration as the trial High Court did is going beyond the standard of proof in civil cases.

The learned trial High Court judge also found that indeed the respondent issued a cheque to the appellant for an amount which equaled

the loan amount, but held that this was not proof enough of the existence of the contract for the loan of money. We are of the opinion that, since the of evidence of the appellant was uncontroverted, demanding further proof than the dishonoured cheque was going beyond the balance of probabilities yardstick. We are satisfied that, based on the evidence before him, the learned trial judge should have found for the appellant, whose evidence was not contested anyway. We accordingly reverse the finding of the learned trial High Court judge and find the claim proved. The appeal is therefore allowed with costs in this Court and in the court below.

DATED at **ARUSHA** this 15th day of March, 2014.

S. J. BWANA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL