IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWANGESI, J.A., NDIKA, J.A., And KITUSI, J.A.)

CIVIL APPEAL NO. 5 OF 2017

ASHRAF AKBER KHAN ..... APPELLANT

VERSUS

RAVJI GOVIND VARSAN ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Moshi)

(Fikirini, J.)

dated the 24th day of June, 2016
in
Civil Case No. 20 of 2013

.....

RULING OF THE COURT

(CORRECTION OF THE JUDGMENT OF THE COURT UNDER RULE 42(1) & (2) OF THE TANZANIA COURT OF APPEAL RULES, 2009.)

NDIKA, J.A.:

On 3rd day of April, 2019 we heard parties on Civil Appeal No. 5/2017 at Arusha. In our judgment delivered on 10th April, 2019 the title of the presiding Justice of Appeal Hon. S. S. Mwangesi was erroneously mistitled Chief Justice instead of Justice of Appeal. The title read:

"S.S. MWANGESI
CHIEF JUSTICE

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL"

In order to remove any confusion which may result from improper titling of the Justices of Appeal, we on our own volition invoke Rule 42 (1) and 2 of the Tanzania Court of Appeal Rules, 2009 as amended and correct the title of the presiding Justice of Appeal Hon. S. S. Mwangesi which shall now read:

"S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL"

We further direct the Registrar to immediately issue the corrected version of the judgment and the ruling of the Court to the parties.

It is so ordered accordingly.

DATED at **DAR ES SALAAM** this 30th day of April, 2019.

S.S. MWANGESI
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL

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dated the 24th day of June, 2016
in
Civil Case No. 20 of 2013

.....

JUDGMENT OF THE COURT

3th & 10th April, 2019

NDIKA, J.A.:

This appeal arises from the judgment of the High Court at Moshi (Fikirini, J.) against Ashraf Akber Khan, the appellant, for repayment of monies advanced loans, interest thereon, punitive damages, general damages and costs of the action. In its judgment dated 24th June, 2016, the High Court ordered the appellant to refund Ravji Govind Varsan, the respondent herein, unpaid loans amounting to US$ 1,100,000.00, interests thereon, general damages in sum of TZS. 100,000,000.00 and costs. The court dismissed the respondent's claim for an award of TZS.

100,000,000.00 as punitive damages. Feeling that justice was not rendered, the appellant now appeals to this Court on ten grounds.

The brief background facts of the case are as follows: the parties herein were bosom friends and business partners. They jointly owned and run a limited liability company known as Ash-Rav Investments Ltd. They also had a joint project for the construction of a commercial building going by the name Kibo Tower situate at Plot No. 7, Block 'B', Section I, Moshi Municipality, comprised in Certificate of Title No. 12419. It was the respondent's case that on 1st June, 2008 and 1st November, 2008, he advanced to the appellant the sums of US$ 500,000.00 and US$ 600,000.00 respectively. These transactions were effected at the respondent's office at Boma Mbuzi and that they were processed by PW2 Karoli Joseph Uiso and PW3 Emily Amecheka Mmari, employed by the respondent as the Managing Director and Cashier respectively. On both occasions, the money was issued by the cashier to PW2 who then handed it over to the respondent who then gave it to the appellant. The appellant acknowledged receipt by signing on a document – Exhibit P.2, on the first occasion, and Exhibit P.3, on the second. The respondent claimed at the trial that the said monies remained unpaid despite constant requests and

reminders and that at some point in 2012 he made a complaint to the police that his friend had obtained money by false pretences. The appellant was arrested and criminal proceedings were instituted against him in the District Court of Moshi District at Moshi on 30th July, 2012 for obtaining US$ 1,450,000.00 by false pretences. A year later, on 19th July, 2013 to be exact, the District Court (S. Kobero, RM) dismissed the charge for want of prosecution under section 225 (5) of the Criminal Procedure Act, Cap. 20 RE 2002 and discharged the appellant. The proceedings of the District Court were admitted at the trial as Exhibit D.3.

In the aftermath, the appellant retaliated by suing his adversary in the High Court of Tanzania at Moshi in Civil Case No. 5 of 2012 for libel claiming damages in the sum of TZS. 200,000,000.00. As the judgment of the court (Sumari, J.) bears out, that action came to naught as it was dismissed with costs on 30th March, 2015.

In his defence, the appellant specifically denied to have borrowed the two sums of money alleged by his friend-now-turned foe. He disputed the veracity of the two acknowledgement receipts – Exhibits P.2 and P.3 and disowned the signature on the documents. However, he acknowledged to have borrowed from the respondent in 2008 building materials worth US$

350,000.00, at the first instance, and further materials valued at US$ 250,000.00 the second time. All the materials were for the construction works of the Kibo Tower.

Subsequently, the appellant sold his 50% shares in the Kibo Tower to the respondent as evidenced by "An Agreement on the Modalities of Payment and Transfer of Shares in Ash-Rav Investments Limited and in Land on Plot No. 7 Block 'B' Section I, Moshi Municipality Under C.T. 12419" dated 22nd day of July, 2010 - Exhibit D.1. According to the appellant, by that agreement, drawn by their advocate, Mr. Eric Ng'maryo, it was agreed that the outstanding loans between the parties would be set off in that transaction and that the respondent would become the sole owner of the Kibo Tower. Accordingly, the loans taken in the form of building materials were set off and that the appellant was discharged from his indebtedness to the respondent. Moreover, the appellant admitted the facts regarding the aforesaid criminal proceedings and his action for libel. However, he charged that the criminal proceedings were malicious.

The High Court framed six issues for trial: **one**, whether the plaintiff, now the respondent, loaned any money to the defendant, now the appellant; **two**, if the answer to the first issue is in the affirmative, then

whether the defendant repaid the money; **three**, whether the defendant was prosecuted in Criminal Case No. 623 of 2012 at the instance of the plaintiff; **four**, whether the criminal proceedings were determined in favour of the defendant; **five**, whether the prosecution was actuated by malice and was made without any reasonable and probable cause; and **finally**, to what reliefs was each party entitled.

On the first and second issues, the High Court held, based upon the evidence adduced by PW1, PW2 and PW3 as well as Exhibits P.2 and P.3, that the respondent loaned US$ 1,100,000.00 to the appellant, and that the said sum of money was never repaid. The court rejected the appellant's claim that he never borrowed that sum of money. Besides, the court disagreed with the appellant that, based upon the settlement agreement comprised in Exhibit D.1, he was not indebted to the respondent. Again, the court decided the third, fourth and fifth issues against the appellant. In consequence, the court entered judgment for the respondent as alluded to earlier.

The appellant now challenges the High Court's judgment and decree on ten grounds as follows:

"1. That the High Court Judge failed to evaluate the evidence adduced before the court and hence arriving at an erroneous decision.

2. That the Honourable trial Judge erred in law and in fact in ordering the appellant to pay the respondent the sum of US$ 1,100,000.00 which claim was not proved on a balance of probabilities.

3. That the High Court erred in glossing over and omitting to squarely deal with the second issue or at all.

4. That on account of Exhibit D.1 the High Court clearly erred in failing to hold that as of the 22nd day of July, 2010 the appellant was not indebted to the respondent in any way.

5. That the Honourable trial Judge erred in law and in fact in awarding interest at the rate of 15% which rate is not provided for by the law.

6. That the Honourable trial Judge erred in law and in fact in awarding interest at the rate of 15% which rate was neither pleaded nor proved or at all.

7. That the Honourable trial Judge erred in law and in fact in ordering the appellant to pay the respondent the sum of TZS. 100,000,000.00 as

general damages without any justification and or reasoning therefor.

8. That the Honourable trial Judge erred in law and in fact basing her decision on the contradictory and weak evidence given by the respondent and his witnesses during the trial.

9. That the Honourable trial Judge erred in law and in fact for the failure to consider the counter claim which was proved on the balance of probabilities by the appellant herein.

10. That the High Court erred in law for failure to comply with the mandatory requirement of admitting exhibits as dictated by Order XIII, Rule 4 of the Civil Procedure Code [CAP. 33 R.E. 2002]"

At the hearing of the appeal before us, Mr. Gwakisa Sambo, learned counsel, appeared for the appellant whereas the respondent had the joint services of Mr. David Shilatu, Prof. Ikumba Robert Msanga and Mr. Jaffari Ally, learned advocates.

Before we deal with the grounds of appeal as framed by the appellant, we wish to put on record two issues that will necessitate a refocus or reformulation of the grounds of appeal: at the forefront, it is to

be noted that in his written submissions in support of the appeal, the appellant abandoned the eighth ground. Secondly, in the course of their respective oral submissions, we probed the parties to address on the propriety of the ninth ground of appeal, faulting the High Court for failing to consider and allow the counter claim. We were concerned that following the pre-trial amendment of the plaint, the appellant lodged an amended written statement of defence that left out the counter claim that was at first raised in the original written statement of defence.

Mr. Sambo strongly contended that the counter claim, being an independent suit or a cross-suit on its own, was very much a part of the pleadings despite the amendment; that it did not have to be refiled or included in the amended written statement of defence. He supported the High Court for considering the counter claim when framing issues for trial; and that Issues 3, 4 and 5 so based on the counter claim were rightly drawn up with the agreement of the parties. Rather ominously, the respondent did not address us on this crucial question.

Admittedly, the appellant raised a counter claim in his written statement of defence lodged on 14th November, 2013 as reflected from pages 18 to 41 of the record of appeal. Subsequently, the plaint was

amended with leave of the court. In response, the appellant lodged his amended written statement of defence on 18th March, 2015 as shown from pages 51 to 93 of the record. This time, the defence contained no counter claim. But it seems the learned trial Judge and the parties believed that the appellant's counter claim remained a part of the pleadings. On that belief, the court, with the agreement of the parties, framed six issues for trial, three of which (Issues 3, 4 and 5) were based on the counter claim.

The above approach by the High Court was noticeably flawed. Upon the amendment of the written statement of defence by filing an amended written statement of defence, the previous written statement of defence, which carried the counter claim, ceased to have any legal effect as if it was never a part of the record. Should authority for this elementary rule of pleading be needed, we would simply pay homage to the decision in **Tanga Hardware & Autoparts Ltd. and Six Others v. CRDB Bank Ltd.,** Civil Application No. 144 of 2005 (unreported) where this Court cited with approval a passage from the case of **Warner v. Sampson & Another** [1959] 1 Q.B. 297 that:

"... once pleadings are amended, that which stood before amendment is no longer material before the court."

It is noteworthy that the above holding in **Tanga Hardware** (supra) was subsequently followed in the Court's decisions in **Morogoro Hunting Safaris Limited v. Halima Mohamed Mamuya**, Civil Appeal No. 117 of 2011 and **General Manager, African Barrick Gold Mine Ltd. v. Chacha Kiguha and Five Others**, Civil Appeal No. 50 of 2017 (both unreported).

In view of the foregoing, we hold without doubt that the court below slipped into error by framing the third, fourth and fifth issues based on the counter claim that was no longer a part of the pleadings. In the premises, we dismiss the ninth ground of appeal. In consequence, we will ignore the evidence on record and related questions raised on the back of the three wrongly framed issues.

Now that the eighth ground of appeal is abandoned and the ninth ground out of the way, we think that the remaining eight grounds of appeal can be conveniently reformulated and condensed into four points of complaint in the following sequence:

1. That the High Court erred in law and in fact for failing to comply with the mandatory requirement of admitting exhibits as dictated by Order XIII, rule 4 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC).
2. That the High Court failed to evaluate the evidence on record and as a result it arrived at erroneous findings.
3. That the High Court erred in law and in fact in awarding the respondent the sum of TZS. 100,000,000.00 as general damages.
4. That the High Court erred in law and in fact in awarding interest at the rate of 15% for the period from institution of the suit until full payment.

We begin with the first ground of complaint as reformulated above, it being a matter that has to be settled before we determine the merits or otherwise of the appeal. The exact question here is whether the court below complied with the provisions of Order XIII, rule 4 (1) of the CPC which require each document admitted in evidence to be endorsed by the trial judge or magistrate as follows:

> *"(1) Subject to the provisions of the sub-rule (2), there* ***shall be endorsed on every document***

which *has been admitted in evidence in the suit the following particulars, namely–*

(a) the number and ***title of the suit****;*

(b) ***the name of the person producing the document****;*

(c) the date on which it was produced; and

(d) a statement of its having been so admitted;

and ***the endorsement shall be signed or initialled by the judge or magistrate.****"* [Emphasis added]

The CPC provides further, in Order XIII, rule 7 that:

"(1) Every document which ***has been admitted in evidence****, or a copy thereof where a copy has been substituted for the original under rule 5,* ***shall form part of the record of the suit****.*

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them." [Emphasis added]

It is evident that a document so admitted forms part of the record in terms of Order XIII, rule 7 (1) above.

In the written submissions in support of the appeal, Mr. Sambo criticized the High Court for flouting the above provisions. Elaborating, he said that Exhibits P.1, P.2. and P.3 as well as Exhibit D.1 bear no endorsement of the name of the witness who tendered it; and that Exhibits D.3, D.4 and D.5 miss the name of the court, the case number, the name of the witness who produced it and the statement that they have been admitted. The effect of the irregularity, counsel argued, is to render the exhibits liable to be expunged from the record and that the affected portion of the trial proceedings ought to be revised and nullified as the Court did in **A.A.R. Insurance (T) Ltd. v. Beatus Kisusi**, Civil Appeal No. 67 of 2015 (unreported). In that case, the Court held that endorsement on an admitted document is mandatory, the rationale being to guard against tampering with admitted documentary exhibits. Accordingly, the Court expunged from the record all exhibits that were admitted without being endorsed. Mr. Sambo placed further reliance upon another decision of the Court in **Ally Omari Abdi v. Amina Khalil Ally Hildid (as the administratrix of the estate of the late Kalile Ally Hildid**, Civil Appeal No. 103 of 2016 (unreported). In this case, the Court

followed **A.A.R. Insurance (T) Ltd. v. Beatus Kisusi** (*supra*) and held that:

> *"Ordinarily, faced with the irregularity of the trial court using as evidence the documents which were not endorsed in compliance with Order XIII, rule 4 of the CPC, this Court would invoke its power of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 (AJA) to quash all the trial proceedings which followed the exhibition of unendorsed Exhibit P.1."*

The respondent made no reply to the appellant's submissions on the ground under consideration.

We have examined all the impugned exhibits and taken account of Mr. Sambo's submissions. We acknowledge the position taken by the Court in the two authorities he cited to us, which also mirrors the stance taken by the Court in **Ismail Rashid v. Mariam Msati**, Civil Appeal N0. 75 of 2015 (unreported). Nonetheless, we think that the instant case is clearly distinguishable. In the said cases, there was complete non-compliance with the endorsement requirement while here the exhibits, upon being admitted, were substantially endorsed in terms of Order XIII, rule 4 (1) of

the CPC except for the slight aberrations cited by Mr. Sambo. We are firm in our mind that these deviations are minor and have not caused any miscarriage of justice and so, they can be ignored as we did in **Standard Chartered Bank Tanzania Ltd. v. National Oil Tanzania Ltd. and Exim Bank Tanzania Ltd.**, Civil Appeal No. 98 of 2008 (unreported). In that case, even though the exhibits had not been endorsed, the Court took the firm view that:

> *"the documentary evidence in the instant case was annexed to the plaint and the written statement of defence; it was properly tendered by the relevant witnesses who spoke on the exhibits; it was duly admitted by the court; no party raised any objection or challenged the authenticity or genuineness of the material; each relied on the documents in examination-in-chief and cross-examination and no prejudice or injustice was suffered by any of the parties. Considering all the above and in exceptional circumstances of this case, we are of the respectful view that the High Court's omission to endorse the exhibits was inadvertent and does not efface them as evidence or render the record of the suit defective."*

The above apart, we would readily invoke Rule 115 of the Tanzania Court of Appeal Rules, 2009 (the Rules) to give effect to the principle of Overriding Objective and, accordingly, ignore the irregularity complained of because it does not affect the merits of the case nor does it shake the jurisdiction of the High Court. It is noteworthy that the said principle, enshrined in sections 3A and 3B of the Appellate Jurisdiction Act, Cap. 141 RE 2002 (AJA) as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 – Act No. 8 of 2018, enjoins the Court to deal with cases justly and to have due regard to substantive justice. In consequence, we dismiss the first ground of appeal as reformulated above.

Next, we deal with the main complaint in the appeal, which is the contention that the High Court failed to evaluate the evidence on record and as a result it arrived at erroneous findings. This ground raises two connected issues: first, whether the respondent loaned US$ 1,100,000.00 to the appellant; and secondly, if the answer to the first issue is in the affirmative, then whether the appellant repaid the said sum of money.

In dealing with the above two issues as the first appellate Court, we are enjoined by Rule 36 (1) (a) of the Rules to re-appraise the evidence on the record and draw our own inferences and findings of fact, certainly

subject to the deference to the trial court's advantage that it enjoyed of watching and assessing the witnesses as they gave evidence. See **D.R. Pandya v. R.** [1957] EA 336; and **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General**, Civil Appeal No. 110 of 2012 (unreported).

On the issue whether the respondent lent the appellant the sum of US$ 1,100,000.00, the respondent led evidence that on 1st June, 2008 and 1st November, 2008, he advanced to the appellant the sums of US$ 500,000.00 vide Exhibit P.2 and US$ 600,000.00 vide Exhibit P.3 respectively. These transactions were effected at the respondent's office at Boma Mbuzi and that they were processed by PW2 and PW3. On both occasions, PW3 issued the money to PW2 who then handed it over to the respondent who, in turn, gave it to the appellant. Conversely, the appellant denied to have received the aforesaid two sums of money but acknowledged that he borrowed from the respondent in 2008 building materials worth US$ 600,000.00 in two tranches for the construction works of the Kibo Tower. He added that the said sums were set off vide Exhibit D.1 and, as a result, he was discharged from indebtedness to the respondent as of 22nd July, 2010.

In his submissions, Mr. Sambo faulted the High Court for acting solely on Exhibits P.2 and P.3 which were false and had suspect probative value. He wondered why huge sums of money were allegedly given out on documents that were not countersigned by the respondent as the lender or either of PW2 and PW3 who allegedly processed the payments. Moreover, Mr. Sambo contended that Exhibit D.1 clearly and solidly indicates in Clause 4 that upon execution and performance of the agreement none of the parties would owe the other any sum of money as all outstanding debts between them would be set off or cleared. Indeed, the relevant part of Clause 4 reads thus:

> *"At the completion of this Agreement, the Buyer [the respondent] and Seller [the appellant], together with their respective wives, shall sign a written agreement* ***to declare that none owes the other anything and no one of them has any claims against the other*** *or against Advocate Eric S. Ng'maryo ..."* [Emphasis added]

Noting that under the agreement dated 22nd July, 2010 represented by Exhibit D.1, the respondent had to pay US$ 1,000,000.00 in cash or through set off so as to buy out the appellant, Mr. Sambo queried if the

respondent would have readily agreed to pay the appellant the said sum if a previous sum of US$ 1,100,000.00 advanced in 2008 would remain unsettled. The respondent would have sought to set off that sum of money instead of parting with a further sum of US$ 1,000,000.

In riposte, Prof. Msanga supported the learned trial Judge's evaluation of the evidence and finding that the sums of money under consideration were loaned to the appellant. In particular, he contended that the learned trial Judge was rightly surprised that the appellant took no action if, indeed, his signature on Exhibits P.2 and P.3 was forged. Mr. Ally, for the respondent, added that the High Court took Exhibit D.1 into account that it represents the winding up of Ash-Rav Company Ltd. and that the sums of money received by the appellant vide Exhibits P.2 and P.3 were not part of the winding up transaction. He wondered why the appellant did not produce Mr. Ng'maryo as a witness to support his position as regards Exhibit D.1. On this aspect, counsel cited the case of **Hemed Issa v. Mohamed Mbilu** [1984] TLR 113 for the proposition that a court of law is entitled to draw an adverse inference against a party that fails to call a material witness or produce a relevant documentary material.

On our part, we have scrutinized Exhibits P.2, P.3 and D.1 in the light of the competing learned submissions. We have also looked at the trial proceedings and the impugned judgment so far as they relate to the question at hand. For a start, we agree with the learned trial Judge that Exhibits P.2 and P.3 were not seriously impeached by the appellant to render them implausible even though they were not countersigned by the respondent or any of his officers (PW2 and PW3). In this regard, we wish, at first, to note that the appellant's response in examination in chief at page 51 on the signature on Exhibit P.2 was apparently ambivalent and indecisive; he initially acknowledged that it was his but then he changed tack. The relevant response goes as follows:

> *"**The signature is mine (but changed) and denied the signature is his**. As a CEO and MD of the company, **I sign on many documents so the signature is everywhere**. I did not sign the two documents."* [Emphasis added]

Moreover, in cross-examination, at page 150 of the record, on the signature on both Exhibits P.2 and P.3, he adduced rather acquiescently that:

"Yes, this is my signature which is appearing on the agreement. This is my signature as well on Exhibit P.2. Yes, this is my signature on Exhibit P.3."

Thereafter, he, once again, changed tack and said, as shown at the same page, that:

***"It is not correct that I signed Exhibits P.2 and P.3 after taking money from Ravji**. Yes, I was paid USD 1,000,000.00 and the payment was final for the Kibo Tower transaction."* [Emphasis added]

In view of the shifty and indecisive responses alluded to above, we are of the firm mind that the learned trial Judge was entitled to disbelieve the appellant's claim that the two exhibits were a product of forgery. Indeed, the learned trial Judge went further and found, rightly so in our view, that the appellant's reaction upon becoming aware of the existence of the two documents belied his claim that the signature on the documents was not his because he took no action such as reporting the matter to the police. The relevant part of the judgment reads thus:

"For one to find his signature has been forged on a document establishing liability and not taking any

action does not, one, show seriousness especially he being the CEO and MD of a company and two, there might be some truth on what is on the document. His laxity to the signatures appearing on the two documents raises doubt as to the sincerity of his claim that the signature was forged."

We would, in addition, state that the learned trial Judge's finding in favour of the respondent was rightly fortified by the fact that she believed the evidence given by PW2 and PW3 that they witnessed the appellant collecting the loaned money from the respondent. She noted that no reasons were advanced to impeach the said witnesses.

As regards Exhibit D.1, we do not think that it constitutes any basis for refutation that the money was loaned out by the respondent to the appellant. As rightly submitted by Mr. Ally, the said document bearing the heading "An Agreement on the Modalities of Payment and Transfer of Shares in Ash-Rav Investments Limited and in Land on Plot No. 7 Block 'B' Section I, Moshi Municipality Under C.T. 12419", concerned the winding up of Ash-Rav Company Ltd and settlement of liabilities arising therefrom. None of its terms reflects any arrangement for set off or settlement of the two sums of money loaned out vide Exhibits P.2 and P.3. It is significant

that the parties did not execute any agreement in line with Clause 4 to clarify that none of them owed the other any sum of money under Exhibit D.1 or from past dealings.

To conclude on the first limb of the second reformulated ground of appeal, we confirm the High Court's finding that on the evidence on record, it was established on a preponderance of probabilities that the respondent lent the appellant a total sum of US$ 1,100,000.00.

As indicated earlier, the other limb of the aforesaid ground queries whether the said sum of money was repaid. In her decision, the learned trial Judge posed the issue and answered it somewhat swiftly as shown at page 204 of the record as follows:

> *"The second issue is whether the defendant has paid back the loaned money. The answer to this is no; the defendant has not repaid the money despite constant reminders. The second issue again is answered in affirmative that the defendant has not paid back the money loaned to him."*

For the appellant, Mr. Sambo assailed the above finding that it was unsupported by the evidence on record. He added that if the learned trial

Judge had considered Exhibit D.1 she would have come to the conclusion that none of the parties owed the other any sum of money. On the other hand, Mr. Shilatu argued that even though the impugned finding of the High Court at page 204 of the record appears rather short, it was preceded by sufficient analysis of the evidence (at page 197 of the record) and that the High Court took the view that Exhibit D.1 was a share transfer agreement without any indication that the monies advanced under Exhibits P.2 and P.3 were fully repaid or settled.

Admittedly, the High Court's finding on the second issue framed for trial was, in essence, a conclusion not backed up by any analysis of the evidence. What appears at page 197 of the record was a general exposition of the evidence on record as opposed to an evaluation of the evidence so far as it related to the second issue.

All the same, having scrutinized the evidence on record, we are of the view that the loaned funds under consideration were not repaid. For a start, the appellant, having denied to have borrowed any money in cash from the respondent, led no evidence that he repaid the monies. Secondly, we reject the claim that Exhibit D.1 was proof that the parties owed each other no money. As we said earlier, that agreement states expressly that it

is concerned with the winding up of Ash-Rav Company Ltd and settlement of liabilities arising from the buyout. None of its terms suggests that the parties agreed to a set off or settlement of the two sums of money loaned out vide Exhibits P.2 and P.3. Guided by the parole evidence rule, we cannot accept the appellant's claim that all indebtedness between the parties beyond the liabilities arising from the Ash-Rav buyout was settled under Exhibit D.1. Doing so would amount to using extrinsic evidence to alter or vary or add to the terms of Exhibit D.1. Again, we find it weighty that the parties did not execute any agreement in line with Clause 4 to confirm that none of them owed the other any sum of the money either under Exhibit D.1 or from past dealings.

To sum up on the second limb of Ground 2, we confirm the High Court's finding that the loaned monies were not repaid. Having found against the appellant on both limbs, we dismiss the second ground of appeal.

We move on to the third ground that the High Court erred in law and in fact in awarding the respondent the sum of TZS. 100,000,000.00 as general damages.

It is evident from page 210 of the record of appeal that the High Court awarded the general damages on the following reasoning:

> *"The Court has also considered general damages in the light of loss of economic income since such a huge amount of money was tied down, the depreciation factor on the value of the purchase price, psychological torture, severing the relationship between the plaintiff and the defendant and of course unwarranted disturbances, such as hiring a debt collector. The Court considers the amount requested is deserved.* ***See: Tanganyika Standard (N) Ltd & Another v. Rugarabamu A. Mwombeki*** *[1981] TLR 40."*

Mr. Sambo attacked the above award on the ground that it was not backed up by any evidence and that its quantum was unjustified. He relied upon **Anthony Ngoo and Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported) where the Court held that:

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence able to justify the award. The judge has discretion in the award of*

general damages. However, the judge must assign a reason, which was not done in this case."

Mr. Shilatu countered that the High Court took into account relevant factors; that the debt was long overdue, the money depreciation factor, disturbances and psychological torture suffered by the respondent and debt collection costs incurred. Accordingly, he supported the award.

We think Mr. Sambo's complaint against the award of damages is fully justified. In his entire testimony from page 124 through page 134 of the record, the respondent proffered no factual basis to justify his prayer for general damages. For example, he did not adduce any evidence on the so-called psychological torture or unwarranted disturbances. He may have hired a debt collector but he did not reveal the expense that was incurred. It would appear to us, therefore, that the learned trial Judge awarded the damages as a matter of course. The award was based on her own assumptions but not necessarily on the hard facts of the case. Her approach was also mistaken because she did not take into account that interest imposed on the loaned principal sum would mostly offset whatever economic loss and inflation the respondent was exposed to. In the

premises, we find merit in the third ground of complaint, which we allow. In consequence, we vacate the entire award for general damages.

Finally, we deal with the complaint that the High Court erred in law and in fact in awarding interest at the rate of 15% for the period from the institution of the suit to full payment.

It is evident that in his plaint, the respondent's prayer for interest on the principal sum had two limbs: first, he prayed for interest on the principal amount at the bank's rate from the date of instituting the suit **until the date of full payment**; and secondly, he asked for interest on the principal amount at the court's rate from the date of the judgment until the date of full payment. In its judgment, the High Court ordered the appellant to pay interest on the principal amount at 15% considered to be the bank's rate from the date of instituting the suit **until the date of full payment**. Moreover, the High Court imposed on the appellant the obligation to pay interest on the principal amount at the rate of 7% being the court's rate from the date of the judgment until the date of full payment.

Submitting, Mr. Sambo argued that interest awarded was contrary to section 29 and Order XX, rule 21 of the CPC. He added that the rate of 15% interest was neither pleaded nor proven in evidence. Again, he relied on the case of **Anthony Ngoo** (*supra*).

On the other hand, Prof. Msanga conceded that the High Court's award of interest on the principal amount at 15% from the date of instituting the suit **until the date of full payment** was erroneous because it ought to have covered the period up to the date of the judgment, not full payment.

The question of interest has been dealt by the Court on several occasions particularly by interpreting the provisions of section 29 and Order XX, rule 21 of the CPC – see **Said Kibwana and General Tyre E.A Ltd. v. Rose Jumbe** [1993] TLR 174; **Njoro Furniture v. TANESCO** [1995] TLR 205; and **Rev. Christopher Mtikila v. Attorney General** [2004] TLR 172. It is settled that the rate of interest to be awarded for the period up to the delivery of the judgment is entirely at the discretion of the court whereas interest for the period from the delivery of the judgment until final satisfaction is also awardable at the discretion of the court but within the prescribed limits of 7% and 12% per annum.

As rightly conceded by Prof. Msanga, in the instant case the High Court erred by fixing the 15% interest rate for the period from the date of instituting the suit **until the date of full payment**. That rate ought to have covered the **period up to the date of the judgment.** Moreover, we think that the prescribed commercial rate of 15% for a sum of money in US Dollars is evidently on the high side. To meet the justice of the case, we would reduce it to 10% per annum. In view of that, we find merit in the final ground of complaint, which we allow to the extent shown.

To recap, we have found no reason to disturb the High Court's judgment for payment in favour of the respondent for the sum of US$ 1,100,000.00 as well as interest on the principal sum at the rate of 7% from the date of judgment to full satisfaction. However, based on the foregoing analysis, we set aside the award of TZS. 100,000,000.00 as general damages along with the grant of 15% interest per annum for the period from the date of instituting the suit **until the date of full payment**. In lieu of the latter award, we order the appellant to pay interest at the commercial rate of 10% per annum for the period from the date of instituting the suit to the date of judgment. Needless to say, the

High Court's award of interest at the rate 7% from the date of judgment to payment in full remains in force as it was not the subject of this appeal.

That said and done, the appeal is partly dismissed and partly allowed to the extent shown above. Each party to bear its own costs.

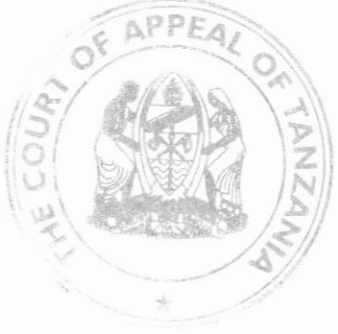
DATED at **ARUSHA** this 9th day of April, 2019.

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

I certify that is a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL