IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MUGASHA J.A., MWANGESI J.A., And WAMBALI J.A.)

CIVIL APPEAL NO. 185 OF 2019

DANIEL APAEL URIO ---------- APPELLANT

VERSUS

EXIM (T) BANK ---------- RESPONDENT

[Appeal from the judgment and decree of the High Court of Tanzania (Commercial Division) at Arusha.]

(Mwandambo, J.)

dated the 10th day of October, 2018

in

Commercial Case No. 8 of 2016

JUDGMENT OF THE COURT

18th & 26th March, 2020

MWANGESI J.A.:

The appellant in this appeal was the plaintiff at the trial court. According to his plaint, he executed an agreement with the defendant on the 28th November, 2012 wherein, he deposited an amount of Tanzanian shillings (TZS) Five Hundred Million (500,000,000/=), on a fixed deposit account for a period of one year, which would mature on the 28th November, 2013 as per the fixed deposit reference TDR No. EB/97/011148. It was their agreement that upon maturity, he would be paid an interest

rate of 13%, which would translate into TZS Five Hundred and Sixty- Five Million (565,000,000/=). He argued that upon maturity of the fixed deposit account, the respondent failed to honour the terms of their agreement. As a result, he lodged the suit in the trial commercial court, praying to be paid his amount due and the interest thereto, plus consequential costs.

On the other hand, the respondent strenuously resisted the claim by the appellant in its written statement of defence. While it conceded to the fact that the appellant, was its customer operating two saving accounts namely, No. 0031023511 for local currency (TZS), and No. 0031023512 for United States Dollars (USD), it denied to have ever entered into a fixed deposit account agreement with the appellant of which, he failed to name even its number. It was thus prayed by the respondent, that the suit by the appellant be dismissed with costs.

To establish his case, the appellant summoned two witnesses that is, himself who testified as PW1, and one G. 4043 Detective Constable Ibrahim Bipa, who testified as PW2. The attempt by the appellant to tender as exhibit, a certified copy of the Term Deposit Receipt, of which its original copy was said to be in possession of the Regional Crimes Officer (RCO) for Arusha Region, was rejected by the trial Judge. On its part in

defence, the respondent paraded one witness only named Fredrick Robert Umiro, who testified as DW1. In the judgment that was handed down by the trial Judge on the 10th October, 2018, the appellant was held to have failed to establish his claim on balance of probabilities, and hence the instant appeal.

The memorandum of appeal by the appellant to challenge the finding of the trial court, is comprised of five grounds which read:

1. *That, the honourable trial Judge, grossly erred in law and fact in not admitting into evidence the certified copy of the Term Deposit Receipt dated the 28th November, 2012; for interests of justice.*
2. *That, the honourable trial Judge, grossly erred in law and fact in not holding and finding that the oral testimony of PW1 of the contents of the Term Deposit Receipt dated the 28th November, 2012, weighed and considered together with the expert evidence of PW2, irresistibly proved on balance of probabilities that the appellant executed a fixed deposit agreement with the respondent bank.*
3. *That, the honourable trial Judge, grossly erred in law and fact in not drawing an adverse inference against the respondent bank for*

its unexplained and deliberate failure to call its pertinent employees: Bimal, Livingstone and Hassan Said to testify.

4. *That, the honourable trial Judge, grossly erred in law and fact in making a suo motu prejudicial finding against the appellant without hearing the parties, that the Term Deposit Receipt annexure did not contain any conditions overleaf.*
5. *That, on the totality of the evidence on record; the honourable trial Judge, grossly erred in law and fact in not finding and holding that the appellant had proved his case against the respondent bank on balance of probabilities standard.*

In compliance with the provisions of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (**the Rules),** the appellant on the 29th day of July, 2019 lodged written submissions in support of the appeal. The same was replied to by the respondent through its written submission in reply, which was lodged on the 30th August, 2019 in terms of rule 106 (8) of **the Rules**.

When the appeal was called on for hearing, Mr. Eliufoo Loomu Ojare, learned counsel, entered appearance to represent the appellant, whereas the respondent had the services of Mr. Denis Maringo, also learned

counsel. On taking the floor to expound the grounds of appeal, Mr. Ojare, adopted the written submissions which was lodged by the appellant in support of the appeal. He submitted in respect of the first ground of appeal that the learned trial Judge, erred in rejecting to admit in evidence under section 68 (g) of the Evidence Act, Cap. 6 R.E. 2002 **(the TEA)**, the copy of the Term Deposit Receipt dated the 28th November, 2012 which had been certified for the interest of justice.

While the learned counsel was in agreement with the holding of the trial Judge, that there was failure to serve the Regional Crimes Officer for Arusha Region, who was in possession of the original copy of the Term Deposit Receipt and within the court's reach, with either a notice to produce the original document, or to appear and testify before the court, he argued that the circumstances of the case, necessitated admission of the certified copy under section 68 (g) of **the TEA,** for the reason that the appellant had taken active steps to procure the original copy of the document from the RCO vide his advocate's letter dated the 19th April, 2017 (exhibit P2) and the response thereto, dated the 04th Mach, 2017 (exhibit P3). In the view of Mr. Ojare, the trial Judge, adopted a too legalistic approach in rejecting admission of the certified copy of Term

Deposit Receipt, to the detriment of the appellant. He implored us to allow the first ground of appeal by reversing the position taken by the trial Judge.

As regards the second ground of appeal, the trial Judge has been faulted for not finding that the oral testimony of PW1 in regard to the contents of the Term Deposit Receipt, as supplemented by the testimony of PW2, a police officer who was a handwriting expert, irresistibly proved on balance of probabilities, that the appellant executed a fixed deposit agreement with the respondent. This being the first appellate Court, the learned counsel invited us under rule 36 (1) (a) of **the Rules**, to re-appraise the entire evidence on record, and come out with our own findings. In so arguing, he also referred us to the decision of **Charles Thys Vs Hermanus P. Steyn,** Civil Appeal No. 45 of 2007 (unreported).

Also, relying on the holding in **Barella Karangiragi Vs Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 (unreported), wherein the principle governing proof of case in civil suits was stated, it was Mr. Ojare's submission, that even with the absence of the evidence from the contents of the Term Deposit Receipt, of which its admission in evidence was rejected, still had the learned trial Judge, objectively evaluated the other

evidence placed before him by PW1 and PW2 against that which was led by the sole witness from the respondent, he would have come out with a different conclusion from the one he reached upon.

The learned counsel, further referred us to the provisions of section 36 (1) of the Banking and Financial Institutions Act, Cap. 342 R.E. 2002 hereinafter referred to as **the Banking Act**, which imposes a mandatory duty of fidelity and secrecy on the respondent bank towards the appellant, who was its customer. Since it was sufficiently established through PW1 and PW2 that, the appellant was a customer of the respondent bank, the appellant ought to have been believed that he executed a fixed deposit account transaction with the respondent bank. We were therefore, urged by the learned counsel for the appellant, to uphold the second ground of appeal.

The complaint by the appellant against the trial Judge in the third ground, is pegged on his failure to draw an adverse inference against the respondent, for its failure to call its pertinent employees that is, Bimal, Livingstone and Hassan Said to testify in court. Mr. Ojare, argued that the three employees of the respondent, were named by the appellant to be closely connected to the fixed deposit transaction, which he executed with

the respondent. Nonetheless, in its defence to the suit lodged against it by the appellant, the respondent called one Fredrick Robert Umiro, who knew nothing about the said transaction and thereby, ending up in giving evasive testimony. In moving us to draw an adverse inference against the respondent, reference was made to the decisions in **Lazaro Kalonga Vs Republic,** Criminal Appeal No. 348 of 2008 (unreported) and **Azizi Abdallah Vs Republic** [1991] TLR 71.

In regard to the fourth ground, the learned trial Judge, was faulted for making a *suo motu* prejudicial finding against the appellant without hearing the parties at page 297 of the record of appeal, that the Term Deposit Receipt annexure, did not contain any conditions overleaf. Since the law is settled that annexures are not evidence to be acted upon, and the fact that in the instant appeal, the parties were never accorded opportunity to address the court on the said annexure, then there was no way in which the trial Judge, could have made a finding basing on such an annexure. Placing reliance on the holding in **Abbas Sherally and Another Vs Abdul Sultan Haji Mohamed Fazalboy,** Civil Appeal No. 33 of 2002 (unreported), Mr. Ojare, urged us to find merit in the fourth ground of appeal.

The totality of what has been canvassed above according to the learned counsel for the appellant, sufficiently established that the appellant had entered into a fixed deposit agreement with the respondent. He thus argued that the trial Judge, was at gross error to conclude in his judgment at page 305 of the record of appeal, that after the evidence from the term Deposit Receipt had been discounted, then the entire claim of the appellant against the respondent crumbled. This was the gist of the fifth ground of appeal, which he prayed to be upheld on the grounds that the trial Judge, misdirected himself on the legal evidential burden of proof applicable in civil cases.

Further on the burden of proof in civil cases, which he had discussed in detail in the second ground, the learned counsel visited the provisions of sections 62 and 65 of **the TEA** which regulate oral evidence, and argued in regard to situations where the contents of a document can be established orally, basing his argument on the holding in **Thabitha Muhondwa Vs Mwango Ramadhani and Another**, Civil Appeal No. 28 of 2012 (unreported). Mr. Ojare, concluded his submission by strongly urging us to allow the appeal with costs.

In response to the submission of his learned friend, Mr. Maringo also prayed to adopt the contents of the written submission which was lodged by the respondent in reply. Responding to the first ground of appeal, the learned counsel submitted that the trial Judge, was justified to reject admission of a copy of the Term Deposit Receipt, because no plausible reasons were advanced as to why the original copy which could have given the court, an opportunity to assess its genuineness was not produced in court.

With regard to the contention by his learned friend, that the learned trial Judge, would have used his discretion under section 67 (g) of **the TEA** to admit the copy of the document, Mr. Maringo's view was that, such provision is usually applied for general situations where there is no specific provision catering for admission of a document. The fact that in the instant matter there was specific paragraph for application that is, paragraph (f) of section 67, there was no way in which the Judge would have gone to the suggested paragraph (g) of the said provision. After all, the authenticity of the said document was doubted from the beginning, he argued. In support of his contention, the learned counsel referred us to the decisions in **Damson Ndaweka Vs Ally Said Mtera,** Civil Appeal No. 5 of 1999 and

Onaukiro Anandumi Ulomi Vs Standard Oil Company Limited and Three Others, Civil Appeal No. 140 of 2016 (both unreported).

The learned counsel for the respondent, countered the second ground of appeal by submitting that in terms of section 61 of **the TEA,** all facts may be proved by oral evidence except the contents of documents, meaning that the contents of a document have to be proved by the document itself. Under the circumstances, the trial Judge, was correct in holding that in the absence of the document to establish that an agreement was entered between the two disputants, the appellant failed to establish his claim against the respondent on balance of probabilities.

On the contention by the appellant that the learned trial Judge, ought to have drawn an adverse inference against the respondent for its failure to summon as witnesses, its pertinent employees, which constitutes the third ground, the response from the learned counsel for the respondent was that, the respondent categorically denied existence of the alleged fixed deposit agreement. As such, the need to call the named witnesses did not arise. If the appellant on his part was of the view that the alleged employees, would be useful in expounding his suit, he ought to have called

them to testify on his side, instead of shifting the burden of proving his suit to the respondent.

In reply to the fourth and fifth grounds of appeal, the learned counsel for the respondent, argued that the fourth ground has no any bearing on the decision of the court, while the fifth ground has been a mere repetition of what was submitted in the second ground. To that end, it was his conclusion that the trial Judge, was correct in holding that the appellant failed to discharge his burden of proving his case on the balance of probabilities. He therefore urged the Court to dismiss the appeal with costs.

From the grounds of appeal which have been preferred by the appellant in this appeal, there are basically two issues which stand for deliberation and determination by the Court, that is: -

1. *Whether the trial Judge, correctly rejected to admit in evidence the certified copy of the Deposit Term Receipt. This issue arises from the first ground of appeal.*

2. *Whether the appellant managed to prove his claim against the respondent on balance of probabilities. This issue arises from the remaining four grounds of appeal.*

Starting with the first issue, it was the argument of Mr. Ojare, that the trial Judge, applied a too legalistic approach in rejecting to admit in evidence, the copy of the Term Deposit Receipt, which had been certified. We wish in the first place, to state the obvious that, a copy of a document intended to be relied in evidence, whether certified or not falls in the same category of secondary evidence as envisaged under section 65 of **the TEA** of which, before being tendered in evidence, the requirement stipulated under the provisions of section 67 of **the TEA,** have to be complied with. For ease of reference we hereby reproduce the two provisions:

"S. 65. ***Secondary evidence includes–***

(a) certified copies in accordance with the provisions of this Act;

(b) copies made from the original by mechanical process which in themselves ensure the accuracy of the copy and copies compared with such copies;

(c) copies made from or compared with the original;

(d) counterparts of documents as against the parties who did not execute them;

(e) oral accounts of the contents of a document given by some person who has himself seen it.

"S. 67. ***Proof of documents by secondary evidence***

(1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases–

(a) when the original is shown or appears to be in the possession or power of–

(i) the person against whom the document is sought to be proved;

(ii) ***a person out of reach of, or not subject to, the process of the court;*** *or*

(iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it;

[Emphasis supplied]

According to the evidence on record in this appeal, the original copy of the document intended to be tendered in evidence by the appellant, was in the possession of the RCO for Arusha Region, who was within the court's reach. In terms of section 68 of **the TEA**, before the appellant could rely on the copy of the document there were two options open for him that is, **one**, serving the party in possession of the document with a notice to produce the document in court, or **two**, by requesting the court to issue summons to the party in possession of the document to appear in court and testify. Nonetheless, for reasons best known to the appellant himself, he resolved to opt to neither of the two.

Since it was the appellant himself who failed to comply with the requirement of law, we fail to find any justifying basis for the appellant, to shift the blames to the trial Judge, who in refusing to admit the copy of the document, was just performing what he was required to do by the law.

The further argument of Mr. Ojare on this point was that, despite the requirement of law as stipulated in the cited provisions of law, still the trial Judge, could have used the discretion bestowed on him under section 67 (g) of **the TEA,** to admit the copy of the document for the interest of justice. We have had the advantage of going through the copy of the

document which was intended to be tendered in evidence but rejected by the trial Judge, as aforesaid. Apart from being a copy, it was also problematic. While it was said to be a receipt evidencing deposit of TZS 500 Million in the bank by the appellant on the 28th November, 2012, in the rejected copy of the Term Deposit Receipt, it is indicated at its top left corner that on the said date, the bank received from the appellant an amount of TZS 565 Million. In the same document at its right bottom corner, it is indicated that the appellant would be paid TZS 565 Million.

When we asked for clarification from the learned counsel for the appellant, on the confusing figures contained in the document, he was unable to clear the mess on us. Under the circumstance, even if the document was to be admitted, still it would have remained to be of little assistance if any. We therefore uphold the stance which was taken by the trial Judge. That said, we answer the first issue in the affirmative that, admission of the copy of the Term Deposit Receipt, was correctly rejected by the trial Judge, which leads to dismissal of the first ground of appeal.

The second issue is whether the appellant in this appeal, managed to establish his suit against the respondent on the balance of probabilities. In dealing with this issue, we commence by first acceding to the prayer which

was presented to us by Mr. Ojare under rule 36 (1) (a) of **the Rules,** and the holding in **Charles Thys Vs Hermanus P. Steyn** (supra), that we step into the shoes of the trial court and re-appraise the evidence which was received during trial and come out with our own finding. This is so for the reason that we are the first appellate Court.

To begin with, we wish to state the standard of proof in civil cases that, it is on balance of probabilities. This position has been stated by the Court in a number of decisions. In **Mathias Erasto Manga Vs Ms. Simon Group (T) Limited,** Civil Appeal No. 43 of 2013 (unreported) for instance, while reversing the finding of the trial High Court, the Court held that:

> *"The yardstick of proof in civil cases 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 court did is going beyond the standard of proof in civil cases."*

We note from the pleadings of the suit under scrutiny that, the appellant's claim against the respondent, hinged on a fixed deposit agreement alleged to have been entered between them on the 28th November, 2012 which was breached by the respondent. The respondent

on the other hand, strongly resisted existence of the alleged agreement between them. Paragraphs 3, 4 and 5 of the witness statement of the appellant, as reflected on page 188 of the record of appeal, which in our view are the relevant ones in so far as the dispute at hand was concerned, bear the following wording: -

3. *That, I operate a bank account No. 0031023511 for TZS and USD account No. 0031023512 at the Defendant's Arusha Branch.*
4. *That, on 28th November, 2012 I executed an agreement with the defendant to deposit a sum of TZS 500,000,000/= as a fixed deposit a term of one year and the same will mature on 28th day of November, 2013. (a copy of pertinent receipt is exhibited in the plaint and marked as Urio – 1)*
5. *That, I agreed with the defendant that upon maturity, she will pay me an interest of 13% making a total payment of TZS 565,000,000/=.*

The witness statement of the PW2 who was said to be a police officer who examined documents associated with the dispute between the disputants as reflected on page 197 of the record of appeal bears these words in paragraphs 3, 4 and 5.

3. That on 6th day of September, 2016 I received a sealed packet from D. 7310 Detective Sergeant Mustafa which was sent to him by the office of the RCO Arusha which contain (sic) a number of documents under the cover of letter Ref. ARR/CID/B.1/7A/VOL.80/126 dated 5th day of September, 2016.

4. That, the said documents which was (sic) mentioned under paragraphs 2 of the witness statement was given to me in order to examine the disputed handwriting and signature of exhibit A- one Exim bank (T) Limited Term Deposit Receipt of TZS 565,000,000/= dated 28th day of November, 2012 and exhibit GI – GII of ten sheets of paper and one letter dated 20th May, 2010 bearing specimen handwriting and signatures purporting to be signed by Livingstone Julius, who was an employee of the defendant. A copy of the pertinent documents examination report is exhibited and marked as Ibrahim 2.

5. That, in my opinion I hereby state that the disputed and specimen signatures are similar and was signed by one and the same person.

On the other side of the coin, paragraphs 3, 4 and 5 of the witness statement of the defendant made by one Fredrick Robert Umiro, found on page 218 of the record of appeal, read as follows: -

3. I state that the plaintiff herein on 23rd day of April, 2012 opened a TZS saving account No. 0031023511 and USD account No. 0031023512 respectively. Copies of the account opening mandate are annexed on the defendant's written statement of defence as exhibit EB1.

4. I state further that the defendant herein (sic) has never maintained any fixed deposit account with the respondent as alleged; I state that there are no any documents from either the plaintiff or the bank evidencing opening, existence or maintenance of the alleged fixed deposit account by the defendant herein (sic).

5. I state further that the alleged receipt evidencing the deposit attached in the plaint as annex Urio 1 is not a document of the bank, and the alleged reference No. marked on the document does not exist in the defendant's FDR register or any other books or records of the defendant.

The question which we had to ask ourselves, is whether on the basis of the witness statements of the appellant and his witness as quoted in the paragraphs above, it could be said that the appellant discharged his burden of establishing existence of an agreement between him and the respondent on balance of probabilities. Since the agreement between the two was documented, undoubtedly its proof ought to be by way of the best evidence rule that is, through primary (original) document, which would in turn be in harmony with the stipulation under the provisions of section 61 of **the TEA**, which provides that:

"All facts except the contents of documents, may be proved by oral evidence."

Our interpretation of the wording in the above provision of law, which is in agreement with what was submitted by the learned counsel for the respondent, is that oral evidence cannot be used to prove the contents of a document. In that regard, we would have expected *prima facie,* to find some documentary evidence to establish that, there was indeed an agreement entered between the two. The necessity arises from the fact that the alleged agreement was strenuously resisted by the respondent in the written statement, who went on producing exhibit D2 that is, the forms

which were filled by the appellant while opening the other accounts, which he operates in the respondent bank.

The situation in the instant appeal is distinguishable from the one which was discussed by the Court in **Mathias Erasto Manga Vs Simon Group (T) Limited** (supra), where the appellant had tendered in evidence a dis-honoured cheque. The Court held that the appellant had established his case on balance of probabilities because the dis-honoured cheque, was not objected by the respondent. In the instant appeal, following the rejection to admit the copy of the Term Deposit Receipt, there was completely nothing else to establish any relationship between the appellant and the respondent in regard to the alleged agreement for a fixed deposit account. With such situation, we uphold the position taken by the trial Judge, that the appellant failed to prove on balance of probabilities, that he had entered into a fixed deposit account agreement with the respondent.

And the fact that the existence of an agreement for a fixed deposit account between the appellant and the respondent bank was the foundation of everything, once it is held that there was no proof of existence of such an agreement, discussion on the other grounds of appeal

which were raised in the memorandum of appeal, become of no use. Consequently, we dismiss the appeal in its entirety with costs.

Order accordingly.

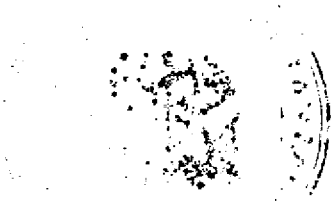
DATED at **ARUSHA** this 25th day of March, 2020.

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

This Ruling delivered on 26th day of March, 2020 in the presence Ms. Winnie Evarist holding brief of Mr. Eliufoo Loomu Ojare, learned counsel for the appellant and Mr. Lecktony Ngeseyan holding brief of Mr. Emmanuel Nasoon, learned counsel for the Respondent, is hereby certified as a true copy of the original.



B.A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL