IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL N0. 06 OF 2023

(Arising from the decision of Kinondoni District Court in Civil Appeal No. 7 of 2022, Civil Appeal No. 138 of 2022 Before Hon. Kisanya Original from Kinondoni Primary Court in Civil Case No. 250 of 2020)

THOMAS TABU MASSAWE..... APPELLANT

VERSUS

GROTH COLLINS.....RESPONDENT

JUDGMENT

15th April & 16th June 2023

MKWIZU, J.

This is an appeal stemming from a breach of a secured loan agreement between the parties. The facts gathered from the records are that the parties had on 1/11/2016 entered into a loan agreement in which the appellant was to be granted a total amount of 19,500,000 to be secured by immovable property. In compliance thereto, the Appellant pledged as security, his registered property on Plot No 618 Block No 5 with a title certificate No 150161, Land office No 528635 Kibamba area Dar es Salaam. He however defaulted in repaying the loan as agreed. The Respondent instituted Civil Case No. 250 of 2022 at Kinondoni Primary Court against the Respondent. The primary court ruled in favour respondent. It ordered the appellant to pay the respondent a total sum of 15,800,000/= within 30 days period. The appellant was not happy, he appealed to the District Court with eight (8) grounds of appeal.

The district court affirmed the trial court's decision. Still aggrieved, the appellant has preferred the instant appeal, raising seven grounds of appeal which are reproduced as follows:

1. The district court erred in law and fact due to failure to consider that the Kinondoni Primary court had no jurisdiction to entertain the matter which related to the mortgage (land) contract with interest.
2. The district court erred in law and fact due to failure to consider the difference of names of the respondent and take it as a minor issue.
3. The district court erred in law and fact due to failure to consider that the disputed contract is the mortgage with interest.
4. That the district court erred in law and fact due to total failure to consider 4h ground of appeal that the disputed contract is the illegal third part mortgage.
5. The district court erred in law and fact due to failure to consider the mistakes made by the primary court in the evaluation of the evidence adduced during the trial.
6. The district court erred in law and fact due to failure to consider the 6th and 8th grounds of appeal hence making the admissions of the respondent during the trial and preliminary objections raised by the appellant during the trial to be meritless.
7. The district court erred in law and fact due to failure to consider the illegal order or directions of the judgment of the primary court magistrate over the mortgaged land to be disposed against the contract which requires the mortgaged land to be repossessed by the respondent who cannot and had never possessed it before.

The appeal was disposed of by way of written submissions whose filing was ordered on 15th March 2023. Both parties who are in person complied with the filing schedule.

The appellant's contention in-ground one is that the appeal in the 1st appellate court failed to consider that the trial primary court entertained a matter which it had no jurisdiction to determine. He contends that the dispute stems from a breach of a mortgage deed on which the respondent was entitled to repossess the mortgaged property in case of failure by the appellant to repay the loan. To him, this is a land-related matter that ought to have been filed in the district land and housing tribunal or High court (Land division) and not the trial primary court. He queried the District Court's magistrate for not considering the matter, asserting that the issue of jurisdiction is a fundament that every court should ask itself before acting on any matter placed before it for determination. He relied on the decision of **Said Mohmed Said Vs. Muhusin Amiri and Muharami Juma** Civil Appeal No. 110 of 2020 (unreported), section 167 (1) of The Land Act Cap. 113 RE 2019 and Sections 3 and 4 (1) of the Court (Land disputes Settlements) Act No. 2 of 2002 RE 2019 stressing that the trial court had no power to even admit the matter for which it had no jurisdiction to determine.

In ground two the appellant faulted the district court for considering the different names used by the respondent as a minor issue. He said, the mortgage deed under contention was entered into between Groth Collis and the appellant and therefore it was only Groth Collis who had a right to sue over the said mortgage deed and not any other individual. He denied knowing the person by the name of Groth Collins who signed the

contract saying that Groth Collins cannot sue on the contract and that he was never a party.

The third ground of appeal is a query against the district court's findings for its failure to note that the debated contract is the mortgage contract with interests, the loan amount of 15,000,000 loans, and 4500,000 interests. The district court failed to consider that to run a money lending business with interests one has to be licensed by the BOT and that the respondent had no such a license rendering the entire Loan agreement a nullity. He banked on the provisions of sections 16(1) & 17(1) of the Microfinance Act No. 10 of 2018 and its regulations.

Arguing grounds 4 and 6 together, the appellant faulted the district court for not considering grounds 4th, 6th, and 8th. He implored this court not to remit back the file to the district court for the determination of the undecided grounds but resolve the appeal to its finality.

The appellant's fifth ground was a complaint over improper evaluation of evidence by the 1st appellate court. He said, both the proceedings and judgment of the trial court are marred by serious, contradictions, confusion, and lies that need proper analysis to sort out the real issues that would lead to a proper conclusion.

His last ground is a condemnation of the 1st appellate court for not rectifying the unlawful directives by the trial court that had ordered the respondent to possess the mortgaged property contrary to section 116 (1) of the Land Act, Cap 113 R: E 2019. He lastly invited the court to allow the appeal with costs.

In responding to the 1st ground of appeal, the respondent submitted that the trial court was in Civil Case no 250 of 2022 asked to determine the rights of the parties over the loan contract of TZS 19,000,000/= which the trial court has powers to determine. He on this point referred the court to section under S.18 (1)(iii) of the Magistrate Court Act [CAP 11 R: E 2019], and the case of **Mussa Makweta Vs Faraja Credit Finance**, Civil Appeal No.08 of 2021 High Court of Kigoma.

Submitting on the variance of the respondent's name brought for determination in ground two, the respondent said, the difference in spelling is just a typographical error on page one of the undisputed loan agreement and further that since the respondent signed the contract with a correct name, then the error is minor and has occasioned no injustice to the appellant. He urged the court to consider the appellant as a defaulter who is just looking for ways to diverge from complying with the terms of the agreement which if uphold will lead to a miscarriage of justice.

Urging the court to disregard ground three of the appeal, the respondent said, the appellant misguided himself in interpreting the evidence. He said the issue of interest in the loan agreement brought before the court is being raised as a new issue hence unmerited. He contended that parties to the contract are bound by what the parties drew and signify as their rights and obligations in the contacts and that a written contract cannot be disputed by words as decided in **Muungano Saccos Ltd and 2 others Vs Lameck Daudi Libeli**, Land Appeal No. 22 of 2020 (unreported).

He also prayed for the dismissal of ground 4 of the appeal for it raises a new issue relating to a third-party mortgage which was not raised in the trial court. And ground 6 for not being elaborative enough for it to be understood.

On the last ground, the respondent was of the view that the trial court decision had directed the appellant to pay the outstanding balance of TZS 15,800,000, and therefore the ground is without merit. He lastly prayed for the dismissal of the appeal with costs.

The appellant's rejoinder submissions are essentially a reiteration of his submissions in chief with an emphasis on the point of the jurisdiction of the trial court over the matter; a prayer to the court to disregard the attachment in the written submissions by the respondent; that the issue of a third-party mortgage is not new. He insisted that Peter Tabu Massawe confessed before the trial court to have obtained the loan from the respondent expressing his willingness to pay and that it is the respondent who testified on the interest segment of the loan amount indicated in the loan agreement and therefore cannot come at this late hour to dispute his own evidence.

I have curiously considered the grounds of appeal, the party's submissions, and the two lower courts' records. The disturbing issue is whether the appeal has merit or not. I will be guided by the canon of civil justice which suggest that *"he who alleges must prove the allegation*", and the second one is that *"the person whose evidence is heavier than that of the other is the one who must win*" as per **Hemed Sais Vs Mohamed Mbilu** (1984) TLR 113

The first grounds tend to question the jurisdiction of the trial court over the matter related to the mortgage of the landed property. As rightly submitted by the appellant, the question of jurisdiction of any Court is basic as it goes to the very root of the authority of the court to adjudicate upon cases. As a matter of practice, courts must be certain and assured of their jurisdiction at the commencement of their trial. This position was stated by the court in **Fanuel Mantiri Ng'unda Vs. Herman M. Ng'unda,** Civil Appeal No. 8 of 1995 (CAT-unreported).

In this case, the appellant is faulting the trial court for determining a land matter for which it had no jurisdiction. His contention is that the dispute is rooted in a mortgage of the landed property which falls squally on a land dispute determinable by the land courts. The respondent opposed the appellant's claims and insisted that the cause of action resulted from the breach of contract hence the trial court has powers under section 18 (1)(iii) of the Magistrate Act [CAP 11 R: E 2019].

I have revisited the complaint form filed to initiate the claim in the trial court. The plaintiff before the trial court sued the appellant for a total sum of Tshs 15,800,000/- being the unpaid loan amount resulting from the secured loan agreement between the parties. There is nothing in the complaint form relating to the secured land, repossession, or sale as claimed by the appellant. The fact that the loan was secured by a landed property does not by itself turn the dispute into a land matter. In the case of **Exim Bank (T) Limited V. Agro Impex (T) LTD & Others**, Land Case No. 29 of 2008 where the court held that,

> *" Two matters have to be looked upon before deciding whether the court is clothed with jurisdiction. One, you look at the*

pleaded facts that may constitute a cause of action. Two, you look at the reliefs claimed and see whether the court has the power to grant them and whether they correlate with the cause of action".

In striking out the case, the court said:-

"on looking at the prayers you will find that non is related to land. ***The mere fact that the second and third defendants have put some security for a loan does not turn the suit to be a land dispute****. Additionally, in my view, suing on an overdraft facility per ser does not turn the suit into a land dispute and give this court the necessary jurisdiction... this suit is squarely based on a contractual relationship between a banker and consumer whereby the customer has overdrawn and failed to pay. " (emphasis added)*

In another case of **Britania Biscuit Limited V. National Bank of Commerce Limited & 3 Othe**r, Land case No. 4 of 2011 (unreported), High Court cited with approval the **Exim Bank Limited's** case (supra) and had this to say on page 14 of the said decision:

*" **The mere facts that landed properties were mortgaged will not turn the matter into a land dispute.** The matter is purely commercial in nature, and it is an outcome of an unperformed commercial transaction which is far away from the jurisdiction of the Land Division of the High Court." (emphasis added)*

I associate myself with the decisions of the court in the cited cases above. The party's dispute is purely a breach of contract dispute and not a land dispute as claimed. The first grounds lack merit it is thus dismissed.

It is asserted in the second ground that the respondent has no locus to sue for she is not a party to the contract. This assertion comes due to the variation of the respondent's name in the loan agreement. I have revisited the records, the top front page of the loan agreement describes the respondent as Growth Collis without an 'n' before letter s, and Growth Collins on the second page of the same loan agreement with letter n. The 1st appellate court found this omission as a minor error not occasioning any miscarriage of justice. The trial court was of the view that had the respondent has been a stranger to the appellant, the appellant could have raised the issues at the trial court. His silence meant that he was familiar with the respondent.

I have a similar view. Apart from the fact that it is Growth Collins who signed the contract as admitted by the appellant, his participation in the entire transaction is well interpreted by the parties' evidence and submissions. In his defence evidence on pages 15 to 19 of the trial court proceedings, the appellant recognizes the respondent as the mortgagee and the lender of the money subject of the dispute at hand. It is a well-established principle in the law of contract that when a contract is in a written form the parties only intend to contract with the parties named in the contract. Therefore, if the contract turns out to be with anyone other than the individuals named in the contract, it will be void for mistake. See **Cundy v Lindsay** (1877) App Cas 45. In his evidence, the appellant seemed to have been aware not only of the person he was contracting

within the written contract, but they were all together on 1/11/2016 when he signed the contract, he had been meeting the respondent on several occasions, at the police Osterbay, PCCCB offices, and at the Bank. He also claimed to have handled the respondent's cash on hand. I am thus of the firm view that the appellant knew the person he was transacting with, and he intended to contract with the SM1, Groth Collins, the signatory of the contract, and not any other person. This ground is thus devoid of merit.

Regarding the nature of the business by the respondent and whether she was a licensed entrepreneur should not detain the court. The 1st appellate court had exhaustively dealt with the issue, and I find no reason to differ from the findings arrived at. The appellant admits to having signed a loan agreement with the respondent on 1/11/2016. Clause 1 of the said agreement states:

> *"The lender promises to loan TZS 19,500,000 to the Borrower and the Borrower promises to repay the principal amount to the lender without interest payable to it".*

There is no evidence brought exhibiting variation of the above terms by the parties in this agreement until to date in line with the decision of the Court in **Edwin Simoni Mamuya v. Adam Jonas Mbala** (1983) TLR 410 which was also quoted by the 1st appellate court that;

> *"Where the contract is in writing its terms can only be varied in writing"*

In **Unilever Tanzania Ltd v. Benedict Mkasa trading as BEMA Enterprises**, Civil Appeal No. 41 of 2009 (Unreported), page 16 the court had this to say: -

"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which the parties have agreed between themselves..."

Similarly in **Simon Kichele Chacha vs. Aveline M.Kilawe**, Civil Appeal No. 160 of 2018 (unreported), The Court observed:

" Parties are bound by the agreements they freely entered into, and this is the cardinal principle of the law of contract. That is there should be the sanctity of the contract as lucidly stated in ***Abually Allibhai Azizi v. Bhatia Brothers Ltd*** *[2000] T.L.R 288 on page 289 thus: -* ***'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance*** *where there is* ***no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of a public policy prohibiting enforcement."(*** *Emphasis added)*

The appellant signed the above contract without coercion, force, or misrepresentation, meaning that he was aware of the terms, and he was ready to perform his party as a borrower. The statement that the loan amount was 15,000,000 with an element of interest amounting to 4,500,000 is as decided by the 1st appellate court an assertion without proof.

The above analysis also resolves the appellant's grievance in the 4th ground of appeal. As expressed in that ground, the appellant is asserting a third-party mortgage. There is no doubt from the contract adduced that

the appellant Thomas Tabu Masawe is the person who signed the loan agreement as a borrower. He also pledged his own landed property as security. This evidence was left unshaken by the SU1's evidence that the appellant is relying upon.

The appellant argues that this issue together with grounds 6 and 8 presented at the 1st appellate court was left undecided. I am conscious of the legal position that the courts are obligated to determine every ground of appeal raised on appeal. In **Hatari Masharubu @ Babu Ayubu v. Republic**, CAT-Criminal Appeal No. 590 of 2017 (Unreported), The court Held:

> *"…. However, we wish to remind first appellate courts to always ensure that unless the grounds of appeal are compressed thereof and the reason given, each ground must be considered and determined to finality."*

There is however an exception to that rule. The courts are allowed to drop some of the grounds where a few of the grounds of appeal are sufficient to dispose of the appeal. This position was expressed in the case of **Mwajuma Bakari (Administratrix of the Estate of the late Bakari Mohamed) v. Julita Simgeni & Another**, 15 CAT-Civil Appeal No. 71 of 2022 (unreported), Where the Court of Appeal observed:

> "The appellate court is bound to consider the grounds of appeal presented before it and in so doing, **need not discuss all of them where only a few will be sufficient to dispose of the appeal** but **it is bound to address and resolve the complaints of the appellant either separately or jointly depending on the circumstance of each appea**l."

The 4th ground of appeal was sufficiently resolved by the 1st appellate court. The impugned decision made it clear that the grounds repetition of the 2nd and 3rd grounds of appeal.

Grounds 6 and 8 at the 1st appellate court were all querying the issue of evidence. The grounds read:

> 6. *The trial court erred in law and fact after deciding in favor of the respondent while the respondent agreed with all evidence tendered by the witnesses of the appellant except the testimony of the Barclays bank transaction of Tshs 1,500,000/-.*
> 8 *The trial court erred in law and fact due to failure to consider the tendered evidence and objections of the appellant in the judgment and proceedings of the court raised during the trial.*

The two grounds above were calling for the re-evaluation of evidence. Though not specifically stated in the judgment, I am convinced that the determination of these grounds was done together with the fifth ground of appeal. The issues raised in the two grounds above are similar and linked with the fifth ground which is broader than the two grounds above. On that ground, the 1st appellate court delved into a re-evaluation of the trial court's records. There is no doubt that its conclusion left nothing for determination on the two complained grounds of appeal. Ground six is also baseless.

The fifth grounds fault the 1st appellate court for failure to consider the mistakes committed by the trial court in evaluating the evidence. I have reviewed both the trial courts and the 1st appellate court's decisions. The

fifth ground in the appellant's 1st appeal was querying the evaluation of evidence by the trial court. That ground was coached thus:

> *5. The trial erred in law and fact due to failure to evaluate and analyze the evidence adduced by parties during the trial.*

The 1st appellate court's decision on this point was that:

> *"Going by the records at hand, the judgment did openly lay out the reason for the decision. The appellant failed to supply sufficient evidence to prove to the court that the amount alleged was paid to the respondent, the court can then not be moved by mere words. hence receipts or bank statements were proper backups of those assertions. The appellant's argument as to why should the court did take on record, some of the amounts admitted by the respondent. The answer to this is simple. That recognition of amount received by the respondent amounted to admission…"*

As revealed above, the 1st appellate court re-evaluated the trial court's evidence but could not affirm the appellant's version of evidence. It is the Appellant's submission that the judgments and proceedings are tainted with contradictions and confusion that need to be analyzed. He referred the court to page 6, paragraph 3 of the judgment and clause 1 of the loan agreement, claiming that there is a contradiction in the amount at issue. I have read the refereed paragraphs: I will let the records speak for themselves.

Page 6 par 3 of the 1st appellate court's decision

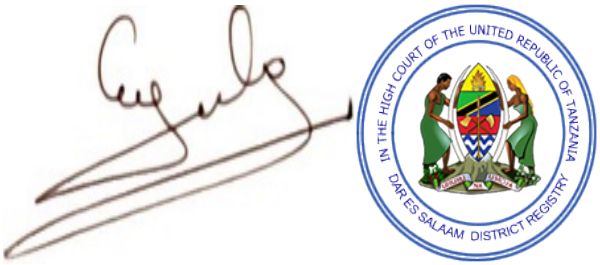
> *"It is the appellant's view that the respondents gave 15,000,000/= as a loan and 4,500,000/= being an interest on the loan, therefore because of the said interest, the contract became unlawful as interest would not be legally imposed in the loan if the said respondent was not licensed to do so."*

I have failed to find any contradiction. As stated earlier, clause one of the loan agreements speaks of 19,500,000/= as the loan amount without interest. On page 6, paragraph 3 of the 1st appellate court's decision, the appellate magistrate was referring to the appellant's assertion before he later on page 7 second paragraph expressed his dissatisfaction with the appellant's evidence that the 4500,000 was charged as interest. The same was done to other elements of the dispute. At the end of its analysis, the 1st appellate court was satisfied that the trial court's decision was justified after the failure of the appellant to prove payment of the amount he alleged to have deposited to the respondent. This grounds as well lacks merit.

Lastly is a complaint on an illegal order for the disposition of the mortgaged property contrary to the terms of the agreement. I think this ground was sufficiently determined by the 1st appellate court. The trial court's decision had ordered the appellant to pay the respondent Tshs 15,800,000/= as an outstanding loan amount. No disposition order or repossession order was given in that decision. The appellant's contention on this ground is inaudible and penurious. I dismiss it.

Subsequently, the appellant's appeal is dismissed in its entirety for lacking merit.

DATED at **DAR ES SALAAM** this **16th** day of **June** 2023.



E. Y Mkwizu
Judge
16/6/2023

COURT: Right of appeal explained

E. Y Mkwizu
Judge
16/6/2023