IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., LEVIRA, J.A. And, MASHAKA, J.A.)

CIVIL APPEAL NO. 284 OF 2020

NURU FINANCE AND BUSINESS SERVICES CO. LTD ..... APPELLANT

VERSUS

BENJAMIN ADAMSON MASUBA ..... RESPONDENT
(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam District Registry)

(Mlyambina, J.)

dated the 19th day of November, 2019

in

Civil Case No. 197 of 2016

JUDGMENT OF THE COURT

14th June, 2023 & 8th March, 2024

MASHAKA, J.A.:

The appellant seeks to challenge the decision of the High Court of Tanzania at Dar es Salaam which partly granted the claims by the respondent in Civil Case No. 197 of 2016 as well as the appellant's counter claim.

The factual background to this first appeal goes back to 12th May, 2016, when the appellant and the respondent entered into a loan

agreement in which the respondent borrowed TZS. 20,000,000/= from the appellant to pay taxes for the clearance of his motor vehicle make Fuso Tipper which was at the port waiting to be cleared. It was agreed that the loan was to attract an interest of 15% per month and was to be repaid in four equal instalments of TZS. 8,000,000/= effective from 13th June, 2016. The security for the loan was a Certificate of Title of the respondent's house situate at Block M, Plot No. 56, Goba Matosa, Kinondoni District, Dar es Salaam Region according to the loan agreement which was tendered in evidence and admitted as exhibit P1. It is stated that the certificate was handed to the appellant. The respondent defaulted to pay the first instalment, an omission which prompted the appellant to seize the motor vehicle Fuso Tipper which by that time had been cleared with registration number T 984 DHD. The move did not amuse the respondent and thus, decided to institute Civil Case No. 197 of 2016 before the High Court of Tanzania against the appellant.

In his plaint before the trial court, the respondent's asserted that; **one,** the appellant charged 15% per month interest over the loan instead of 10% per month as stipulated in her Loan Policy; **two,** the appellant illegally seized his motor vehicle Fuso Tipper as the same was

not part of the collateral pledged against the loan, as a result the respondent failed to use the motor vehicle and suffered loss; and **three**, the appellant failed to serve the respondent the statutory notice if there was any default on his part.

The respondent prayed for judgment and decree and specific orders from the trial court that: one, payment of TZS. 160,000,000/=; two, payment of general damages as per the court's discretion; three, the appellant be compelled to hand over to the respondent the Certificate of Title of the house situate at Block No. M Plot No. 56 Goba Matosa, Kinondoni District with Dar es Salaam City and the motor vehicle Fuso Tipper; and four, interest at the court's rate; and lastly, costs of the suit.

The appellant disputed the respondent's claims in his amended written statement of defence. He further raised a counter claim that the trial court order the respondent to pay a total sum of TZS. 68,000,000/= being principal sum borrowed, accrued interest and penalties which remained outstanding. Therefore, the appellant prayed for the dismissal of the respondent's suit in its entirety and implored the court for judgment and decree to the counter claim, interest and costs of the suit.

Following the parties' failure to reach a consensus during mediation at the trial, three issues were framed; **one**, whether the plaintiff had a loan agreement with the defendant; **two**, whether the motor vehicle Fuso Tipper with registration no. T.984 DHD was among the collateral for the loan; and **three**, to what relief (s) are the parties entitled to.

After the hearing, the trial court granted part of the suit and part of the counter claim containing the following: one, the defendant was ordered to pay general damages of TZS. 8,000,000/= for illegally auctioning of the plaintiff's Fuso Tipper motor vehicle in year 2016; two, the defendant to hand over the Fuso Tipper motor vehicle to the plaintiff; three, the defendant to hand over the plaintiff's certificate of title pledged as security upon being paid the principal loan of TZS. 20,000,000/=. No costs were awarded to the parties.

Being dissatisfied, the appellant lodged the appeal. He raised four grounds and decided to abandon the fourth ground remaining with the following: -

1. *The High Court Judge erred in law and facts for failing to evaluate the material evidence that justify how the motor vehicle make Fuso Tipper with Registration No. T984 DHD became part of the collateral.*

2. *The High Court Judge erred in law and fact for improper evaluation of the evidence and to hold that the contract entered between the parties was void whilst the record suggests the same to be valid.*

3. *The High Court Judge erred in law and fact in awarding general damages of TZS. 8,000,000/= to the respondent for the illegal auctioning of the motor vehicle without considering the evidence that the sale was made following the consensus of the parties.*

During hearing, the appellant was represented by Mr. Lupia Abraham Augusto, learned counsel while the respondent appeared in person and unrepresented. Both parties filed their written submissions under rule 106 (1) of the Tanzania Court of Appeal Rules, 2019 (the Rules) and prayed to adopt to form part of their oral submissions in support of and against the appeal.

We commence to determine the first ground of appeal which the appellant faults the trial court for its failure to evaluate the material evidence justifying that the Fuso Tipper motor vehicle was part of the collateral to the loan. Elaborating, it was the appellant's contention that the trial court did not consider the testimony of the appellant's sole witness George Burono Gandye (DW1) that the motor vehicle was at the beginning the property intended by the parties to form the collateral for

the loan. According to her, it was the parties' consensus that the house be used to secure the loan and obtained consent of respondent's wife because at the time when the money was disbursed, the motor vehicle had not been released from the port. DW1 stated that it was a four-month loan with condition of repaying equal instalment every month and the total loan with 15% interest would be TZS. 32 million.

The appellant argued that the evidence of DW1 showed that both parties participated in the clearing process of the said vehicle. However, after realising that the said vehicle was not road worthy requiring costly maintenance, the respondent decided to hand it and its file over to the appellant for it to be sold instead of the house and discharge the loan. In his submissions, Mr. Augusto contended that the house which was initially placed as collateral was substituted by the motor vehicle. The appellant argued that the respondent's claim that the vehicle was seized and sold without his consent was not true. Mr. Augusto raised several questions in his submission that how could the trial court fail to consider the obvious that the appellant could not manage to seize the said motor vehicle without the consent of the respondent which was in the possession of the respondent together with its file. Further he argued that if the trial court had considered the material evidence that validates

the said vehicle to be part of the collateral, the outcome of the suit would be different and justice would be served.

Mr. Augusto contended further that the trial court improperly evaluated the evidence and the resultant decision that the loan contract entered between the parties was void. However, it was his contention that the loan agreement was properly entered by both parties showing a 15% interest per month and the respondent accepted all terms and conditions set in the contract. He claimed that the trial court failed to consider the evidence properly that the respondent was charged the rate which was within the policy.

Opposing the appeal, the respondent argued that the trial court was correct to find that the vehicle at issue was not part of the collateral. He contended that the evidence adduced during the trial revealed that the loan was secured by the certificate of title of his residential house and he tendered the uncontested loan agreement which was admitted in evidence as exhibit P1 to substantiate his claim. He submitted that the said loan was advanced as a payment for the release of the said vehicle from the port. It was his contention that on 13/06/2016, the appellant seized the said vehicle after expiration of one month when the first instalment was due without serving him the statutory notices contrary to

sections 127 (1) of the Land Act, (Cap 113 R.E. 2019) and 12 (2) of the Auctioneers Act, (Cap 227 R.E. 2002).

Further, the respondent contended that DW1 was clear in his testimony that the collateral for the loan was the respondent's residential house which was consented to by the wife of the respondent. Though DW1 testified that the said vehicle was part of the collateral, no proof was tendered before the trial court to prove. He added that the court was also not told the price fetched for the alleged sale of his vehicle.

The respondent argued further that the contention by the appellant that he handed over the said vehicle and its entire file to him to be sold to clear the loan was mere speculation for lack of proof and against the settled principle that he who alleges must prove. In bolstering his argument, he referred us to the case of **Berelia Karangirangi v. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 (unreported). In conclusion, he prayed to the Court to find the first ground without merit and dismiss it.

Our determination of the appeal shall be guided by the principle that, being the first appellate court, we are vested with the mandate to

re-appraise the evidence on record and draw our own inferences of fact as stipulated under rule 36 (1) (a) of the Rules.

> ***"36-(1) On any appeal from a decision of the High Court or Tribunal acting in the exercise of its original jurisdiction, the Court may-***
>
> ***(a) re-appraise the evidence and draw inferences of fact"***

The dictates of the said rule have been applied in several cases including, **Standard Chartered Bank of Tanzania Ltd v. National Oil Tanzania Ltd and Another,** Civil Appeal No. 98 of 2008 quoted in **The Registered Trustees of Joy in the Harvest v. Hamza K. Sungura,** Civil Appeal No. 149 of 2017 (both unreported), where the Court stated:

> *"The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand..."*

In our consideration of the entire record and rival arguments of the parties, regarding the first ground of appeal, we have to resolve if the motor vehicle Fuso Tipper registration no. T 984 DHD was part of the

collateral to secure the loan advanced by the appellant to the respondent.

It is not disputed that on 12th May, 2016, the respondent filled an application form and signed an agreement for a loan of TZS. 20,000,000/= from the appellant for the purpose of paying for the clearance of a Fuso Tipper at the port which was eventually cleared and released to the respondent with registration number T 984 DHD. The parties were in agreement that the respondent surrenders the certificate of title of his residential house situate at Block M, Plot No. 56, Goba Matosa, Kinondoni District, Dar es Salaam Region to the appellant as collateral for the said loan. Additionally, there is no dispute that the respondent defaulted to pay the first instalment as agreed. Also, there is no dispute that the appellant seized the Fuso Tipper. The rival argument is whether or not the Fuso Tipper was part of the collateral of the aforesaid loan. Since it is the appellant who alleged that the motor vehicle was the collateral, the burden of proof was on the appellant. The question is whether she successfully discharged her duty.

We have gone through the record of appeal and the exhibit P1 was not found. This enthused us to examine the trial court file to satisfy ourselves on exhibit P1 which was tendered by PW1 and admitted in

evidence without any objection from the appellant as gleaned at page 162 and 163 of the record of appeal. Our further scrutiny of the High Court case file revealed that an application and loan agreement was tendered by the respondent and admitted in evidence as exhibit P1. At paragraph 5 of exhibit P1 it showed that the collateral is *"nyumba/kiwanja na vitu vya ndani"* literal translation *"house/plot and household items"* as gleaned from the said case file. The document was signed by the respondent and Elia N. Kamnde officer of the appellant. From the record of appeal, the appellant had no objection to the tendering of exhibit P1 and firmly stated at page 162 of the record that she had in possession of the original application and loan agreement. We find that the trial court relied on the documentary evidence exhibit P1 to determine the issue raised supporting the respondent's contention.

It is a cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act [Cap 6 R.E. 2019] which among other things states:

> *"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.*

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side."

In that regard the Court is required to sustain such evidence which is more credible than the other on a particular fact to be proved. See: **Agatha Mshote v. Edson Emmanuel and 10 Others**, Civil Appeal No. 121 of 2019 (unreported) and **Stanslaus Rugaba Kasusura and Another v. Phares Kabuye** [1982] T.L.R. 338. We also noted that through her submissions, the appellant insists that the parties agreed the said vehicle become part of the collateral for the loan after its clearance from the port. There is no gainsaying that the respondent tendered exhibit P1 the certificate of title of his residential house as collateral to the loan. Further the house was pledged so because when the loan was disbursed to the respondent, the said vehicle had not been cleared from the port. We feel compelled to restate the principle that he who alleges must prove. Certainly, the appellant was bound to prove the existence of the alleged fact that the Fuso Tipper motor vehicle was part of the collateral, failure of which, her argument suffers the consequence of being unreliable for lack of proof on the balance of probabilities.

We are of the finding that the documentary exhibit P1 disclosed that the collateral for the aforesaid loan to the respondent was the aforementioned residential house and household items. The FUSO TIPPER motor vehicle was not part of the collateral as alleged by the appellant. As correctly held by the learned trial Judge, the appellant adduced no documentary evidence concerning the said motor vehicle being collateral to the loan.

On ground two of appeal the appellant contends that the trial court improperly evaluated the evidence to hold that the contract between the appellant and the respondent was void while the records submitted to the court shows they are valid. We find that the High Court Judge properly evaluated the evidence and at page 180 of the record of appeal said:

> *"DW1 on his side merely alleged that the motor vehicle make Fuso Tipper with reg. no. T 984 DHD was part of the collateral. There was no supporting evidence, be another witness testimony nor any document to prove such allegation. As such, the second issue is answered to the effect that the motor vehicle FUSO TIPPER – with registration No. T 984 DHD was not part of*

the collateral. Therefore, the defendant had no right to auction /sale it."

Regarding the issue that the loan contract was declared void, we noted that the trial court declared on the reliefs entitled to parties that since the appellant did not object that the financial policy did not allow her to charge interest rate of 15% as the ceiling was 10%, it held that the contract entered between parties as to the interest concerned was void as it was contrary to the financial policy of the appellant. The issue for our determination is on the interest rate which we find that the parties are bounded by the loan contract, exhibit P1.

In our consideration, we noted that the LOAN POLICY FOR NURU PESA was not tendered in evidence by any of the parties, hence the binding document upon parties in evidence is exhibit P1 as correctly conceded to by Mr. Augusto and the respondent in their written submissions. At clause 2 of *B. Mkataba wa Mkopo* (loan agreement) between the parties, the respondent agreed to the 15% interest rate per month on the loan and to repay it in four equal instalments of TZS. 8,000,000/= per month from 13/05/2016. As correctly argued by Mr. Augusto the evidence relied on is exhibit P1 hence, binding on parties. Any party who signs a contract or agreement should be conscious and

cautious of what he or she is committing to. Once it is shown as in this case that the contract was reduced into writing, then in terms of S. 101 of the Evidence Act, a party to such contract is not permitted to adduce oral evidence for the purpose of contradicting, varying, adding or subtracting from its terms. The section reads: -

> *"101. When the terms of a contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 100, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representative in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms."*

In view of the foregoing, the respondent is barred from adducing oral evidence for the purpose of varying the written contract. The respondent tendered exhibit P1 and it is binding upon him and the appellant. We find no false representation which prejudiced the respondent.

Going to ground three, the appellant seeks to fault the trial Judge for awarding general damages of 8,000,000/= to the respondent for the

illegal auctioning of the motor vehicle without considering the evidence that the sale was made following the consensus of the parties. As we earlier found, the motor vehicle was not part of the collateral to the loan and therefore, the appellant illegally seized and sold it. In this regard, like the trial court, we find relevance in what was stated by the Court in the case of **Tanzania Sanyi Corporation v. African Marble Company Ltd** [2004] TLR 155: -

> *"General damages are such as the law will presume to be the direct, natural or probable consequence of the act, complained of, the defendant's wrong doing must, therefore, have been cause, if not a sale or a particularly significant cause of damage."*

In the matter under our consideration, the complained wrong doing was the seizure and illegal auctioning of the motor vehicle which the respondent claimed that it negatively impacted his business. The respondent had prayed for general damages as per the court's discretion which he was granted TZS. 8,000,000/=. We have found no cause to fault the trial court in its award. Thus, ground three lacks merit.

In sum, as we have endeavoured to demonstrate, we fully associate ourselves with the findings of the trial court save for the declaration that exhibit P1 was void.

In the light of the above, we find merit in the second ground of appeal. We allow it to that extent with costs.

It is so ordered.

DATED at DAR ES SALAAM this 7th day of March, 2024.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

Judgment delivered this 8th day of March, 2024 in the presence of the Mr. Lupia Abraham Augusto, learned counsel for the Appellant and the Respondent in person, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL