

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

CIVIL APPEAL NO. 37 OF 2020

(Arising from the District Court of Muleba at Muleba in Civil Appeal No. 65 of 2019 and original Civil Case No. 80 of 2019 at Mubunda Primary Court)

ALEXANDER AVER EXAVERY.....APPELLANT

VERSUS

ALISTIDIA GODFREY

**(Administrator of the estate of the late Godfrey
Pancras).....RESPONDENT**

JUDGMENT

Date of Judgment: 13.12.2021

Mwenda J,

Mr. Alexander Aver Exavery (The Appellant) being dissatisfied with the judgment of Muleba District Court at Muleba in Civil Appeal No. 65 of 2019, has preferred this appeal with a total of three (3) grounds.

When this appeal came up for hearing on 22nd September 2021 parties appeared in person and the appellant prayed before this court to argue this appeal by the way of written submission. The respondent did not protest the said prayer and this court granted the same and the scheduling order was then fixed where the parties complied accordingly.

To begin with, the appellant consolidated ground no.2 and ground no.3. where he made reference to section 111 and 112 of the Evidence Act [Cap 6 R.E 2019]

regarding on whom the burden of proof lies and the burden of proof of particular facts.

The Appellant submitted that in the present appeal the respondent alleged to have entered into a written contract with him but the said contract was never tendered in court instead the respondent orally testified on the existence of the same. He further submitted that, the respondent blames him for unlawfully grabbing of the said contract and hence he filed a criminal case against him. He said the alleged fact that there was a contract was not proved by the respondent as the said written loan agreement was not tendered in court hence it creates doubt as to whether there was loan agreement or not. To him the respondent did not prove the case on the balance of probabilities. To cement his argument, he cited the case of ***Agatha Mshote vs Edson Emmanuel & 10 Others Civil Appeal No. 121 of 2019*** Court of Appeal of Tanzania at Dar es salaam.

He further submitted that the respondent filed criminal case against him that is Criminal Case No. 76 of 2019 for grabbing the loan agreement but the court found him not guilty as accused. He said he tendered the said judgment before the trial court and it was admitted as exhibit D1, he was of the view that, the trial court ought to have taken judicial notice of the said judgment.

He therefore concluded by submitting that he prays for this appeal to be allowed with costs.

In reply to the applicant's written submission, the respondent submitted that, it is a trite law that he who alleges must prove and the proof in the civil suit is on balance of probabilities. She further submitted that her husband exercised his duty on proving the case before the court that there was existence of a loan agreement between him and the appellant.

The respondent submitted that, both lower courts acted wisely by taking into consideration of the laws governing civil cases and the evidence of key witnesses who witnessed the transaction as well as the act of grabbing the loan agreement. To her this sufficed to prove existence of lending money. She made reference to section 62(1) (a) of the Law of Evidence Act [Cap 6 R.E 2019] and the case of **John Mwalinzi and Sheyo Shungu v R Criminal Appeal No. 4 of 2000** CAT at Mbeya and **Edward Petro v R (1967) HCD NO. 296**.

She submitted further that the case of **Agatha Mshote v Edson Emmanuel (supra)** is distinguishable from the case at hand as in the case of Agatha Mshote the document tendered in court was different from the testimony that the Appellant and her witnesses testified before the court.

In regard to exhibit D1 the respondent submitted that, it has been laid down in clear term that a criminal judgment is not a bar to a civil suit and cited the case of **Godfrey Maleko v T. Mwaikaja [1980] TLR NO. 112**

She therefore concluded by submitting that, both lower courts reached a justifiable decision after being satisfied that there was breach of contract committed by the appellant who is still using tactics to justify his illegal actions.

Having gone through the submissions by both parties this court came up with only one issue for determination which is whether there was a loan agreement between the parties (i.e the appellant and the respondent husband).

It is a trite law that he who alleges must prove and this position was propounded in the case of **Barelia Karangirangi vs Asteria Nyalwambwa Civil Appeal No. 237 of 2017 CAT** (unreported). In this case the Court said the rule finds a backing on section 110 and 111 of the evidence Act [Cap 6 R.E 2019] which among other thing state;

"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."

Again, in the case of **Barelia Karangirangi v Asteria Nyalwambwa (supra)** the court stated that and I quote;

"It is similarly that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities. In addressing a

similar scenario on who bears the evidential burden in civil cases, the court in **Anthony M. Masanga v Penina (Mama Ngesi) and Another, Civil Appeal No. 118 of 2014** (unreported), cited with approval the case of **In Re B [2008] UKHL 35**, where lord Hoffman in defining the term balance of probabilities states that:-

"If a legal rule requires a fact to be prove (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only value is 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it a value of 1 is returned to and the fact is treated as having happened".

Having revisited the summary of the parties' submissions as well as court's records it is crystal clear that the appellant and the respondent's late husband entered into a written contract of lending the appellant Tshs 600,000/=. The primary court's proceedings show the respondent testified to the effect that on 2/1/2019 the appellant approached him and sought a loan to a tune Tsh

600000/=. It was also agreed that the appellant would repay the loan by 23/2/2019 which he didn't. He said, the said agreement was reduced into writing. He testified further that on the 19/7/2019 the appellant lured the respondent to visit him at his residence so as to get paid. Upon arrival the appellant took the written contract and remained with it without honoring his promise. The respondent complained before the police and a criminal case was filed against the appellant for robbery with violence in Criminal case No. 76 of 2019 in which the appellant was acquitted. According to the evidence at the trial court, the respondent during visit at the appellant's house was in companion of a bodaboda rider one Octavian Christian who supported the respondent story by testifying as SM3. In further support to his case, the respondent summoned SM 2, his wife who witnessed the transaction between the duo. In his defense the appellant levelled a general denial.

Following a thoroughly perusal of the evidence of the trial court's record, this court is satisfied that, on balance of probabilities the respondent proved his case against the appellant as his evidence was heavier than that of the appellant. In his submissions the appellant seems to rely on the argument that lack of written contract relieve him from liability. It is however important to note that although the respondent did not produce any written agreement to that effect, the evidence adduced before the trial court prove that the written loan agreement was in fact prepared but was deceitfully taken and destroyed by the appellant. The appellant submitted that he was acquitted in the criminal case filed against

him by the respondent for taking the written contract by force. It is also important to note that even if he was acquitted in the said criminal case, the standard of proof between the criminal and civil case is different in that in criminal case the standard of proof is beyond reasonable doubt while in civil cases is on balance of probabilities. Even if the said agreement was never prepared, with the evidence adduced in court the law is clear that oral agreement qualifies to be a contract just like any other.

In the case ***of Banny Maijo t/a Banny Technical and General Supply V. Medical Officer Incharge Geita Referral Hospital and Two others, Civil Case No. 12 of 2020*** (unreported) this Court held inter alia that;

"Oral agreement qualifies to be a contract just like any other.....

What is critical is whether the defendants are culpable parties against whom the cause of action may be inferred or established."

That being the case, basing on the evidence on record this court is satisfied that the respondent proved his claim of 600,000/= Tshs on the standard required i.e balance of probabilities before the trial court and hence he was entitled to be paid the same accordingly.

Following the above analysis, this court find out that this appeal lacks merits and it is hereby dismissed with costs. This court otherwise uphold the decision of Muleba District Court in Civil Appeal No. 65 of 2019.

It is so ordered.

Right of appeal fully explained.





A.Y. Mwenda

Judge

13.12.2021

Judgment delivered in chamber under the seal of this court in the presence of the appellant Mr. Alexander Aver Exavery and in the presence of the respondent Ms. Alistidia Godfrey the administrator of the estate of the late Godfrey Pancras.




A.Y. Mwenda

Judge

13.12.2021