IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC CIVIL APPEAL NO. 05 OF 2022

(Originating from Civil Case No. 01 of 2021, Tunduru District Court at Tunduru)

KANYINDA ABDALLAH MNUTA ..... APPELLANT

VERSUS

OBOCHA CREDIT (T) LTD ..... RESPONDENT

JUDGEMENT

Date of last Order: *16/12/2022*
Date of Judgement: *27/12/2022*

MLYAMBINA, J.

The instant appeal by the Appellant comprises eight (8) grounds of appeal, namely: *First,* the trial court erred in law and facts to decide against the Appellant while the Respondent had failed to prove his claim on the required standards by considering exhibit P1 which was relied upon contrary to the law. *Second,* the trial Magistrate erred both in law and facts to decide the matter in favour of the Respondent herein by disregarding a counter claim without considering that no issue was framed on counter claim which occasioned injustice to the Appellant. *Third,* the trial court erred both in law and facts by deciding against the Appellant's counter claim without considering Respondent's evidence, neither touched nor disputed any facts raised in the Appellant counter

claim. *Forth*, the trial Magistrate erred both in law and facts by deciding against the Appellant as a financial institution had not proved to have any business licence from the Bank of Tanzania or any relevant to carry out lending activities as it alleged. *Fifth*, the trial Magistrate erred both in law and facts by deciding against the Appellant without considering that the Respondent's evidence fall short on the legal requirements when issuing the said loan as a financial entity, if at all what he alleges are true. *Sixth*, that the trial Magistrate erred both in law and facts by deciding against the Appellant by ordering the Appellant to pay interest at 25% *per annum* on TZs 33,000,000/= from the date of default by the Appellant to the date of judgement thereafter on the decretal amount till full payment without stating the reasons and the law for the same. *Seventh*, the trial Magistrate erred both in law and facts by deciding against the Appellant by ordering him to pay interest at 3% *per annum* on TZs 33,000,0000/= as a default penalty without stating the reasons and the law for the same. *Eighty*, that, the trial court erred in law and fact in entertaining and deciding the matter contrary to the law.

The fourth and fifth grounds of appeal re-raises an issue; *whether a contract entered by the Bank without Licence is enforceable under the provisions of Section 3 (1) (a)- (b) of the Business Licensing Act, 1972*

(Revised Edition 2019), section 6 (1) of the Banking and Financial Institution Act No. 5 of 2006 and section 17 (1) of the Microfinance Act No. 10 of 2018. This court had an opportunity to analyse almost a similar issue in the case of **Richard Kalumuna Msemakweli v. African Banking Corporation Tanzania Limited and Christian Stanley Mshemakweli**, Civil Case No. 61 of 2017, High Court of Tanzania, Dar es Salaam District Registry (unreported). The same principles will be restated in this case at a later stage of the analysis.

The essential facts of the matter as can be gathered from the record of the trial court indicates that; the Appellant herein successfully applied for a credit loan facility from the Respondent's Company on 3rd day of February, 2018. On the same day, the Respondent granted and extended the said credit loan facility to the Appellant in the aggregate sum of TZs 28,000,000/= (Twenty-Eight Million Tanzania Shillings Only) on agreement that in February, 2019 the Appellant would repay TZs 33,000,000/= (Thirty-Three Million Tanzania shillings Only). The Appellant defaulted to repay the said loan. Despite of the repeated verbal reminders and a written demand letters by the Respondent, the Appellant indicated his motive to elude from honouring the loan

agreement. At the time when the Respondent lodged the case at the trial court, the period to pay the loan had expired.

After full trial the judgement was delivered in favour of the Respondent herein. The Appellant was ordered to repay back the loan at a tune of 33,000,000/= within three months, interest of 25% per annum based on TZs 33,000,000/= from the date of default to the date of judgement and thereafter on the decretal amount at court rate till payment in full, penalty of 3% per annum based on 33,000,000/= attracting 2,000,000/= as a general damage and costs of the suit. The Appellant was not satisfied with the decision of the trial court, hence this appeal.

At the date scheduled for hearing, the parties agreed to argue the matter by way of written submission. The Appellant was unrepresented while the Respondent was enjoying the service of Ms. Neema Erasto Nyagawa, learned advocate.

This court being the first appellate court has a duty to re-evaluate the evidence of the trial court and come up with its own findings. The same principle was echoed in the cases of **Khalife Mohamed (as Administrator of Estate of the late Said Khalife) v. Azizi Khalife and Another**, Civil Appeal No. 97 of 2018, Court of Appeal of Tanzania

at Tanga, (unreported) and **Elias Mwangoka @ Kingloli v. The Republic,** Criminal Appeal No. 96 of 2019, Court of Appeal of Tanzania at Mbeya (unreported). In the case of **Khalife Mohamed** *(supra),* the court stated that:

> An appellate court has indeed jurisdiction to review the evidence in order to determine where the conclusion originally reach upon such evidence should stand.

Therefore, the plain meaning of the quoted decision is that the role of re evaluating the evidence of the trial court is vested at the first appellate court. This court therefore is positioned above the trial court to review the impugned decision and to correct any errors that may have occurred and issue any appropriate order to cure the error. For that reason, this court will go through the entire records before rendering the appropriate verdict.

To start with the first ground of appeal, the Appellant contended that the trial court erred in law and fact to decide against him while the Respondent had failed to prove his claim on the required standards by considering exhibit P1 which was relied upon by the court contrary to the law. The Appellant told this court that; the trial court relied on exhibit P1 which was not cleared for admission and the same was not

read after being admitted as per requirement of the law. He cited the cases of **Robinson Mwanjisi and 3 Others v. Republic** [2003] TLR 2018 (sic), **Bulungu Nzungu v. Republic**, Criminal Appeal No. 39 of 2018 (unreported) and **Geophrey Isdory Nyasio v. Republic**, Criminal Appeal No. 270 of 2017 Court of Appeal of Tanzania at Dar es Salaam (unreported).

Further, the Appellant submitted that; the admission of exhibit P1 was contrary to the provision of *section 47 (1)* read together with *section 5 (a) (i) of the Stump Duty Act [Cap 189 of 2019],* which prohibit the admission of any instrument chargeable with stamp duty unless it is duly stamped. The contract for the sum of money is one among the chargeable instrument in which its admission was supposed to comply with section mentioned above. He buttressed his argument with the case of **Zakaria Barie Bura v. Theresia Maria John Muburi** (1995) TLR 211 Court of Appeal of Tanzania and prayed for the court to expunge the exhibit P1 from the record.

In reply, the Respondent contested the Appellant's submission on the admission of the document. It was the Respondent assertion that; stamp duty requirement is not mandatory when it comes on the evidence issue. The law which gives direction on what to be followed in

documentary evidence does not bar the document to be admitted before the court if it has no stamp duty. The Respondent revealed that; before the trial court, the Appellant did not object the admission of exhibit P1. The Respondent added that; the document was cleared before the admission and read after being admitted contrary to the Appellant's allegation.

In view of the foregoing, the court has gone through the trial court typed proceedings specifically at pages 19 to 21 that covers the Respondent's evidence. As rightly as it was alleged by the Appellant, the admission of the said document was unprocedural. The document was neither cleared before the admission nor read after being admitted. It is a cardinal principle that any document which is tendered for admission to the court as evidence has to be cleared. Upon admission, the document has to be read before the court so that the adverse party can be aware with the content(s) of the said evidence. This was insisted in plethora of decisions, to mention few, the cases of; **Mwinyi Jamal Kitalamba @ Igonzi and Others v. The Republic** [2020] TLR 508; **Robinso Mwanjisi and 3 Others** *(supra);* and **Bulungu Nzungu** *(supra),* where the court had this to say:

> It is now a well-established principle in the law of evidence as applicable in trial of cases, both civil and criminal, that generally once a document is admitted in evidence after being cleared by the person against whom it is tendered, it must be read over to that person.

From the trial court record, exhibit P1 was not cleared nor read after being admitted. Therefore, failure to follow the procedure on tendering the documentary evidence is fatal. That means, it is like no evidence was tendered. The same position was reached in the case of **Mwinyi Jamal Kitalamba** *(supra)*. In that case, the Court of Appeal expunged the accused cautioned statement simply because it was not read after being tendered during the hearing of the case.

Even if the procedures on tendering the evidence were followed, exhibit P1 is a loan agreement which is among the instrument required to be stamped under *section 47 of the Stamp Duty Act [Cap 189 Revised Edition 2019], (1)* which provides that:

> No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties' authority to receive the evidence or shall be acted upon registered in evidence authenticated by any such person or by any public officer, unless such instrument is duly stamped.

Exhibit P1 is one among the instrument listed at the schedule to the *Stamp Duty Act (supra).* The provision is coached in a mandatory form by the use of the word SHALL. In a simple meaning, any instrument listed in the schedule to the *Stamp Duty Act (supra)* cannot be admitted anywhere unless it is well stamped. This was the decision in the case of **Zakaria Barie Bura v. Theresia Maria John Mubiru** [1995] TLR 211, where the court insisted that:

> The fact that neither document containing the agreement bears any indication of payment of stamp duty according to *the Stamp Duty Act,* by law such omission render the sale agreement inadmissible as evidence in court, unless the party concerned pays the stamp duty before the document is admitted as evidence.

From the above positions of the law, it is mandatory for the document which are recognised as instrument *under the Stamp Duty Act (supra)* to be stumped according to the law. Failure to stump the instrument will render the said instrument inadmissible. The Appellant assertion that *the Stamp Duty Act (supra)* has nothing to do with the evidence is meaningless. *The Evidence Act [Cap 6 Revised Edition 2022]* can not be read in isolation. Other laws which were enacted specifically in relation to a certain circumstance have to be considered so that the

justice can be seen to be done accordingly. With such findings, exhibit P1 is hereby expunged from the record for not having evidential value.

Coming to the second and third grounds of appeal, it is the Appellant submission that; in our civil jurisprudence, counter claim is a separate suit of which rights and liabilities arises. The Appellant claimed to have raised a counter claim which was replied by the Respondent but the trial court did not flame the issue in relation to it. As a result, parties adduced their evidence without knowing the matter of controversy in counter claim. No piece of evidence was adduced by the Defendant on counter claim.

The Appellant was of view that; failure of the Respondent to defend the same amount to admission of the counter claim taking into consideration that the Respondent failed to cross examine the Appellant on his testimony in relation to the counter claim. Unfortunately, the trial court dismissed the counter claim without the basis of evidence.

The Appellant went further to claim that; failure to frame issues in relation to the counter claim occasioned injustice. He cited the provision of *Order XIV Rule 1 (1)(2) (3) and (5), (3) of the Civil Procedure Code [Cap 33 Revised Edition 2019].* The Appellant explained further that; parties cannot be blamed for the error caused by the Court. He prayed

the matter to be either nullified or remitted to trial court for retrial. He supported his argument with the case of **The Registered Trustees of Vignan Education Foundation, Bangarole India and Another v. National Development Corporation and 6 Others**, Civil Appeal No. 88 of 2020, Tanzania Court of Appeal at pp. 9-10.

In response, the Respondent contested the Appellant's allegation that the trial court did not consider the counter claim. The Respondent went on to make the following averments: *One*, the issues were framed before the trial court and their determination covers all claim in plaint and counter claim. *Two*, in trial proceedings each party blame the other for the breach of contract. *Three*, the trial court complied with the provision of *Order XIV Rule 1 (1) (2) (3) and (5) of the Civil Procedure Code (supra). Four*, the counter claim was discussed affirmatively. He supported his argument with the case of **The Registered Trustees of Congregation of Brothers of Charity of Tanzania v. Timoth Kayuni and Kafuria,** Civil Appeal No. 242 of 2019, High Court of Tanzania at Dar es Salaam (unreported) at pp. 12-13.

In his brief rejoinder, the Appellant insisted that; no issue was framed to cover a counter claim raised by the Appellant. Thus, even the decree does not reflect the decision on counter claim which makes the

decree to be a nullity. He prayed for the court to nullify the decree due to the failure to frame the issues on counter claim. The trial court dismissed the counter claim while there was neither issue framed nor Respondent's testimony on defending the same.

In view of the afore submissions from both parties, this court has gone through the trial court proceedings and found that the issue framed at page 15 of the trial court proceedings did not cover the matter raised on counter claim. Worse indeed, even the evidence adduced did not reflect on the counter claim filed by the Appellant. The Appellant did not submit and the Respondent was silent on whether he was opposing or supporting the counter claim. Counter claim is like a cross suit and has to be treated as a suit. *Order VIII Rule 9 (2) of the Civil Procedure Code (supra),* provides inter alia that:

> Where a counterclaim is set up in a written statement of defence, the counter claim shall be treated as a cross suit and the written statement shall have the same effect as a plaint in cross suit, and the provisions of Order VII shall apply mutatis mutandis to such written statement as if it were a plaint.

The very language of *Order VIII Rule 9 (2) of the Civil Procedure Code (supra),* shows that a counter-claim filed by the Defendant to the

main suit will have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgement in the same original claim and on the counter- claim. That means, a dismissal or stay or striking off of the main suit is not an automatic dismissal or stay or striking off the counter claim.

There can only be three condition precedent governing filling of a counter claim. *First*, the counter claim must have a cause of action and that cause of action can be independently enforced. That is why necessary court-fees must be paid on the relief sought for counter claim. *Two*, a counter-claim must be set up in the written statement of defence. *Three*, in promoting prompt resolution and rendering finality to disputes, amendment of written statement of defence in order to set a counter claim should not be allowed when issues has already been framed or at the stage when recording of the evidence on behalf of the Plaintiff has commenced.

It is the further findings of this court that once a cross suit has been set in the written statement of defence, the court has a duty to frame issues covering both original suit and the cross suit and render a common judgement of the suit and a cross suit reflecting all the issues. A common judgment means "a decision arrived simultaneously in more

than one suit tried together." In the eyes of law, any order passed in the counter-claim is considered to be a decree against which an independent appeal can be filed. A trial of a suit with a cross suit without framing issues covering both original suit and a cross suit is fatal in law. Equally, a common judgement of a suit and cross suit without articulate orders addressing both original suit and cross suit is not a judgement at all, and the same applies to its decree.

In the case at hand, the trial Magistrate did not consider the counter claim filed by the Appellant when the issues were flamed. As a result, even the parties when adducing their evidence did not address on the counter claim. That makes the counter claim to remain unsettled. *Order VIII Rule 12 of the Civil Procedure Code (supra)* provides that:

> Where the defendant has set up the counter claim the court may, if it is of the opinion that the subject matter of the counterclaim ought for any reason to be disposed of by a separate suit, order the counter claim to be struck out or order it to be tried.

To the contrary, the trial court did not make any findings on the counter claim. In the light of the decision in the case of **Director Moshi Municipal Council v. John Ambros Mwase**, Civil Appeal No. 245 of 2017, Court of Appeal of Tanzania at Arusha (unreported), the trial court

was in error. The Appellant's allegation that through the issues flamed, the trial court determined both the suit and the counter claim affirmatively is not backed up with the evidence.

As regards the 4th and 5th grounds of appeal, the Appellant submitted jointly that; the Respondent being a financial institution undertaking banking business such as issuing loan facility was expected to prove to be in compliance with the policies and laws regulating financial institution by producing a valid business licence from the Bank of Tanzania or any other relevant authority. He cited the provision of *section 6 (1) of the Banking and Financial Institution Act No. 5 of 2006 and section 17 (1) of the Microfinance Act No. 10 of 2018*. The Appellant insisted that; the court should had dismissed the Respondent's claims for non-compliance with the public policy.

In his reply, the Respondent claimed that the Appellant arguments is baseless due to the fact that his company is duly registered and conducting business in compliance with the Tanzania Laws, *Banking and Financial Institution Act [Cap 342 Revised Edition 2019].* The Respondent claimed that; the provision cited by the Appellant is only for licence. The issue was not disputed before the trial court no any doubt was raised during the cross examination. The Respondent supported his

argument with the case of **Republic v. Frank Charle @ Fataki**, Criminal Session No. 26 of 2018, High Court of Tanzania (unreported), where my brethren Gwae, J. referred to the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported), in which the court held that:

> As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said.

The Respondent went further to add that; the Appellant on paragraph 1 noted to have no doubt on legality of business conducted by the Respondent. He reminded this court on the principle that parties are bound by their own pleadings. He supported his statement with the case of **Funke Ngwagilo v. Attorney General** (2004) TLR 161.

The Appellant reiterated his submission in chief and insisted that; there is no any proof for the Respondent conducting his business legally. It was the Appellant view that; it was the Respondent's duty to prove that his business complied with the law.

Having considered the afore parties' submissions, it is imperative to be note the following principles stated by this court in the case of

Richard Kalumuna Msemakweli *(supra). First*, it is trite of law that, in order to have a valid contract the contracting parties must ensure that the agreement qualifies as a contract when meets number of tests otherwise that contract is void from the beginning. *Second*, the main test to be looked upon is; *whether or not the agreement is enforceable by law of the land. Third,* not all agreements are enforceable by law and not all agreements are contract. In this aspect of law, a contract is a legally binding agreement between two or more parties which contains elements of a valid legal agreement which is enforceable by law.

Fourth, an agreement is said to be reached when, two parties with competency and capacity, an offer by the offeree has been accepted by the offeror as an acceptance. *Fifth*, the parties must have the capacity to be bound to the contract and the contract must not be insignificant, vague unfeasible, or against any law of the land. *Sixth*, an agreement unenforceable in law is not a contract at all. *Seventh,* to be enforceable by law an agreement must have the following ingredients which are embedded and enshrined in *Section 10 of the Law of Contract Act [Chapter 345* Revised Edition, 2019] which provides that:

> *All agreements ae contracts if they are made by the free consent of parties competent to contract, for a lawful*

consideration and with a lawful object, and are not hereby expressly declared to be void.

From the provision of *Section 10 (supra),* the mandatory ingredients for enforceable agreement are:

i. Free consent
ii. Competency or capacity to contract
iii. Lawful consideration
iv. Lawful object

Eighth, a person without capacity cannot inter into valid contract otherwise a contract done shall be void from the beginning. *Nineth,* if the contracting party is a company, it cannot, however make whatever contract but must ensure that it obeys and subject itself to laws that govern and regulates the business of that particular company, contrary to that a contract entered is *void ab initio.* This is in accordance to *Section 11 of the Law of Contract Act (supra)* which states:

> *Every person who is of the age of majority according to the law to which he is subject is competent to contract, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.* (Emphasis added)

Tenth, if the contracting party is a Bank, it must acquire a valid business licence, issued by the *Ministry of Trade and Industries pursuant to Section 33 (1) (a) (b) of the Business Licensing Act, 1972* which provides that:

3-(1) No person shall carry on Tanzania, whether as a principal or agent, any business unless

a) He is the holder of a valid Business Licence issued to him in relation to such business, and

b) Such business is being carried on at the place specified in the Licence

2) No person shall carry on business at two or more places in less he is the holder of a separate Business Licence issued to him in relation to such business for each of such place. Provided that, in any such case, if a valid Business Licence exists in respect of any of the place of business (hereinafter referred to as the principal place of business") the holder shall be deemed not to have contravened the provisions of this subsection.

a) If such person holds relation to such business a subsidiary Licence in respect of the other place of business or if he carries on such business at two or more other places each of such other places;

Eleventh, pursuant to *Section 65 of the Law of Contract (supra)*, any person who have received an advantage under a void contact is bound to restore it or make compensation from a person whom he/she has received advantage. *Section 65 (supra)* provides:

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to

restore it, or to make compensation for it, to the person agreement from whom he received it.

> Provided that where a contract becomes void by reason of the *provisions of subsection (2) of Section 56,* and a party thereto incurred expenses before the time when the occurs in, or for the purposes of , the performance of the contract, the Court may, if it considers it just to do so in all the circumstances of the case, allow such party to retain the whole or any part of any such advantage as aforesaid received by him, or discharge him wholly or in part from making compensation therefore, or may make an order that such party recover the whole or any part of any payments or other advantage which would have been due to him under the contract had it not become void, being in any such case, an advantage or party thereof discharge or payment, not greater in value than the expenses so incurred. (Emphasis applied).

Equally, it is the requirement of the law that anybody who want to engross into a financial business must have a licence from the Bank of Tanzania. *Section 6 (1) of the Banking and Financing Institutions Act No. 5 of 2006* provides *inter alia* that:

> Any person may not engage in the banking business or otherwise accept deposits from the general public

unless that person has a licence issued by the Bank in accordance with the provision of this party.

Notwithstanding the findings of the first, second and third issue, this court after re-evaluation of both oral and documentary evidence is of the observation that, there is no dispute that the Appellant secured a loan from the Respondent's company known as Obocha Credit Company. Unfortunately, the Appellant failed to repay the loan on time. The question is; what amount of money the Appellant secured from the Respondent's company? The Appellant claimed to have rent a total of TZs 1,350,000/= from the Respondent. He further claimed to had deposited into the Respondent's account a total sum of TZs 9,000,000/= but produced no any tangible evidence to prove the same. The Appellant claimed to have reported the Respondent into various institution but he did not summon any of them to support his allegation.

On the other side the Respondent tendered exhibit P1 a loan contract which was admitted to court and the Appellant did not object its admission. Through exhibit P1, the amount which the Appellant secured from the Respondent was TZs 28,000,000/= with interest. Despite the fact that exhibit P1 has been expunged from the records on procedural error, the evidence of the Respondent (DW1) was corroborated by PW2, the counsel who witnessed the contract between

the Appellant and the Respondent. Therefore, the Respondent managed to prove before the court that the Appellant secured the loan at a tune of TZs 28,000,000/= with interest from his company as required by the provision of section *110, 111 and 112 of the Law of Evidence Act [Cap 6 Revised Edition 2022*].

To the contrary, the Appellant did not honour their agreement. It is the settled law that parties are bound by their agreement, this was the decision in the case of **Simon Kichele Chacha v. Aveline M. Kilawe**, Civil Appeal No, 160 of 2018, Court of Appeal of Tanzania at Mwanza (unreported). The Appellant was .required to respect the sanctity of their contract.

On the allegation that the Respondent has no licence from Bank of Tanzania to run the financial business, it was the Respondent (Plaintiff) duty to prove before the court that he had a licence in which it was allowed to run its business as per *sections 110, 111 and 112 of the Evidence Act (supra).* But the Respondent did not produce any evidence to prove the same. The Respondent while testifying before the trial court claimed to have a licence orally. As a matter of credence, and taking into consideration that the licence is a document which can be easily brought to court, it was the Respondent's duty to bring and tender the same.

Therefore, there is no any evidence to prove if the Respondent financial business is legal and permitted by the Bank of Tanzania. In the case of **David Charles v. Seni Manumbu,** Civil Appel No. 31 of 2006 the Court held that:

> Charging interest on a loan by any description, a business transaction must comply with the provision of *section 3 of Business Licensing Act Cap 208 (Revised Edition 2002)...*

Needless, it is the firm view of the Court that, even if the Respondent had no valid Business Licence from BOT, it cannot exonerate or be a scapegoat of the Appellant from his liability to repay the borrowed amount. The Appellant can avoid interest thereof only.

On the 6th and 7th grounds, the Appellant submitted that; the trial Magistrate erred in law by ordering the Appellant to pay 25% per annum on decretal amount from the date of default by the Appellant to the date of judgement contrary to *Order XX Rule 21 (1) (2) (b, c) of the Civil Procedure Code (supra).* The Respondent believed that the rate of interest was supposed to be 7% or another rate not exceeding 12%. It was the Appellant view that; 25% ordered by the trial court was unjust, unreasonable and it was not preceded with any reason(s). The Appellant cemented his argument with the case of **Robert Scheltens v. Sudesh Kumari Varma (as administrator of the estate of the Baldev**

Norataram Valma) and 2 Others, Civil Appeal No. 203 of 2019, Tanzania Court of Appeal, pp. 30 to 33.

The Appellant went on to claim that; the order of the trial court for the Appellant to pay 3% per annum on TZs 33,000,000/= as a default penalty was unjust and unreasonable preceded with no any reason. The Appellant regarded it to be a double punishment. No any reason was provided to justify the amount to default penalt and did not reflect the law. The Appellant insisted the court to declare the judgement and its decree as void and does not reflect the law and practice.

In reply, the Respondent reminded this court that the issue of interest is guided under *Order XX Rule 21 of the Civil Procedure Code (supra).* He conceded with the Appellant argument that the rate of interest has to be between 7% and 12% per annum, and it shall cover from the date when the judgement was delivered to the date of final settlement of the judgement and sometimes referred as court rate. The 25% awarded by the trial Magistrate is covered under *Order XX Rule 21 (2) of the Civil Procedure Code (supra)* whose rate has to be determined upon court discretion and not within 7% to 12% as submitted by the Appellant. He cited the case of **Rev. Christopher Mtikila v. Attorney General** [2004] TLR 173. The Respondent added that; the Appellant

was entitled to the interest at commercial rate from a day of filling the suit to the date of the judgement delivery. It has to be a commercial rate of 31% per annum. Therefore, it was the Respondent's view that the court was correct to award the 25% interest at commercial rate.

In his brief rejoinder, the Appellant reiterated his submission in chief and averred that the law provides the interest not to exceed 12%.

In consideration of the parties' arguments, *Order XX Rule 21 (1) and (2)* provides that:

> 21.-(1) The rate of interest on every judgement debt from the date of delivery of the judgement until satisfaction shall be seven per annum or such other rate, not exceeding twelve per cent per annum, as the parties may expressly agree in writing before or after the delivery of the judgement or as may be adjudicated by consent.
>
> Provided that in the case of judgement debt subsisting on the first day of July, 1964 the provision of this rule shall apply thereto as if there were substituted for the words "delivery of judgement" the word "on the first day of July, 1964"
>
> (2) for the purpose of this rule –
>
> "Judgement" in suit relating to mortgages of immovable property means the final decree; and

"Judgement debt" means-

(a) The principle sum;

(b) Any interest adjudged on such principal sum for any period prior to the institution of the suit and

(c) Any interest adjudged on such principal sum for the period between the institution of the suit and the delivery of the judgement.

After going through the trial court Judgement at p. 12 and the decree, the court is of the observation that; the trial Magistrate awarded two kinds of interest. *First*, the interest at 25% per annum from the date of default to the date of judgement as provided under the provision of *Order XX Rule 21 (2) of the Civil Procedure Act (supra)*. *Second*, the interest at court rate from the judgement till payment in full according to the provision of *Order XX Rule 21 (1)* of the same Act. Therefore, the order of interest issued by the trial Magistrate was according to the law.

On the last ground of appeal, the Appellant submission was based into four limbs: *First*, the trial court received and acted on exhibit P1 without warning itself as the said document does not have the Respondent's name. Also, there was no any procedure such as filling loan application, approval from the Board of Directors, and no any documentation. The Appellant referred this court to the provisions of

section 6 (1) of the Banking and Financing Act (supra), read together with *section 17 (1) of the Microfinance Act No. 10 of 2018*.

Second, the Appellant claimed that there were inconsistences of evidence adduced by PW1 and PW2 especially on the place where the agreement was signed. PW1 said it was in his office and PW2 testified that it was in his office. Also, PW2 testified that; the Appellant was given the money to count before them but nowhere in PW1's testimony shows how he issued the money to the Appellant.

Third, despite of the above inconsistence, PW2 was the one who drafted the Respondent's pleadings. Also, he appeared personally on behalf of the Respondent and sometimes through Mr. Agrey Ajetu prior the withdraw. For that case, the Appellant claimed that; PW2 had interest in the matter that's why he was willing to testify in whatever manner in favour of the Respondent.

Fourth, the Appellant faulted the Respondent for referring the company money as his money while the company is a legal person with power to claim what belongs to it. He insisted that; the Respondent's Director should warn himself if the money purported to be issued belongs to the company or was personal money.

The Appellant reminded this court its role of evaluating the trial court evidence for its own and independent decision. He prayed for the court to allow the appeal with costs.

In response to the first limb, the Respondent informed this court that; the procedure for issuing the loan which are used in Banks are different comparing to the one exercised by mini microfinance. On the second limb, the Respondent submitted that; the standard of proof in civil cases is on balance of probabilities as provided under the provision of *section 3 (2) of the Evidence Act [Cap 6 Revised Edition 2022].* It was his view that; the doubt raised by the Appellant did not go to the root of the case. He supported his assertion with the case of **Delafa Misungwi v. Milika James,** Land Appeal No. 32 of 2021, High Court of Tanzania at Mwanza where my brethren Ismail, J. referred the case of **Luziro Sichone v. The Republic**, Criminal Appeal No. 231 of 2010 (both unreported), in which the court stated *inter alia* that:

> We shall remain alive to the fact that no every discrepancy on detail or due to lapse of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count.

The Respondent claimed that the third limb has less weight because it is evident from the proceedings that Mr. Kaukuya was holding a brief for Mr. Agrey Ajetu. Also, the law did not bar a person who prepared the pleading to appear in the case. The interest cannot be revealed in drafting but rather in representing. He went further to submit that; one Ajetu is not even a partner to NIASA & Co. Advocate. He cited the case of **Nadds Burea De Change Limited & Nelson Daniel Swai v. Y2K Burea De Change Ltd,** Commercial Application No. 8 of 2021, High Court of Tanzania at Dar es Salaam (unreported), where my brethren Nangela, J. has this to say:

> A witness may be called interested only when he or she derives some benefit from the result of litigation; in the decree in civil case or in seeing the accused person punished. A witness who is a natural one ... in the circumstances of a case cannot be said to be interested.

The Respondent submitted further that; the Appellant did not clinch materials or any demonstrably convincing evidence that PW2 was harbouring any interest in the case, other than telling the truth of what he witnessed. He referred this court to the provision of *section 7 of the Notaries Public and Commissioner for Oaths Act [Cap 12 Revised Edition 2019]* where the law provides limits for an advocate to act as

Commissioner for Oaths if he represents a client or had interest. It was the Respondent's view that neither of the two were infringed by PW2.

On the fourth limb, the Respondent replied; it was settled that the money issued was owned by Obocha Credit (T) Limited, which is operated through Directors. The one who issued the money was a Director of the Company as depicted in exhibit P1. He prayed this appeal to be dismissed with costs.

While re-joining, the Appellant reiterated his submission in chief and revealed that PW2 is an Advocate and Managing Partner of NIASA & Co. Advocate, the firm which drew the Respondent's pleadings and represented him through its partner one Agrey Ajetu. For that reason, the Appellant insisted that; PW2 had an interest to serve that's why he testified in favour of the Respondent. The inconsistence shows that there was ill motive between the two in detriment of the Appellant and, in his view, that is what lead for the matter not be proved on the required standard. He insisted that; exhibit P1 bears no name of the Respondent. Thus, if he was representing the company, the names of the company would have been indicated. Worse, there is no any reasons to show as to why there was no name of the Respondent.

Having carefully evaluated the evidences of PW1 and PW2, the court is of the findings that; the Appellant assertion that there was a contradiction between PW1 and PW2 evidence specifically on the place where the transaction took place is not true. It is in the record that the Respondent told the trial court that the Appellant went to his office to secure a loan. The Appellant signed the contract in presence of his advocate one Kaukuya. The Respondent did not reveal a specific place where the transaction was conducted. PW2 (Mr. Kaukuya) while testifying, mentioned directly that the Appellant and the Respondent went to his office for the fulfilment of the loan facility transaction. That means, the transaction was done in the office of PW2 one Mr. Kaukuya.

There is a claim that Mr. Kaukuya had interest in this case because he was the one who drafted the Respondent pleadings and represented the Respondent before the trial court. The Appellant, however, claimed that Mr. Ajetu is a partner with PW2 in the same firm, that's why, he claimed that PW2 had interest in the matter. The record proves otherwise. The Advocate for the Respondent was Mr. Ajetu and on few occasion Mr. Yusuph Kaukuya (PW2) held brief on behalf of Mr. Ajetu as revealed at page 6 and 7 of the typed proceedings. It is a cardinal rule that the record of the court transpires what happened in court. This was

the decision in the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527. Therefore, the Appellant assertion is an afterthought.

The Appellant did not bring any evidence to support his allegation that the Respondent advocate and PW2 are working in the same firm. *Section 110, 111 and 112 of the Evidence Act* requires whoever assert a certain fact has to prove if the said fact exist. In the cases of the **Attorney General v. Eligi Edward Massawe**, Civil Appeal No. 86 of 2002, Court of Appeal of Tanzania at Dar es Salaam; and **Barelia Karangirangi v. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017, Court of Appeal of Tanzania at Mwanza, the court insisted that:

> ... It is pertinent to state the principle governing prove of case in civil suit. The general rule is that, he who alleges must prove... it is similarly in Civil Proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities ...

More so, a claim on conflict of interest must be established to the standard required in order to bar a witness with such interest from giving testimony from the court. This Court in the case of **Magweiga Munanka Samo and 2 Others v. Aloyce Kisenga Kimbori and**

Another Land Case No. 80 of 2017 High Court of Tanzania Dar es Salaam Registry (unreported) held;

> *the plaint being drawn, filed and endorsed by an advocate and firm who have confidential information against the former client, has been improperly brought before the Court. To that effect, the plaint is hereby struck out of the record.*

In a similar matter of conflict of interest, the Court in the case of **General Trading Co. Ltd v. Skjevesland** (2002) EWCA Civil 1567 which was cited with approval by this Court in **Magweiga's case,** had these to observe;

> *the Court had the power, under its inherent powers to prevent abuse of its procedure to restrain an advocate from representing a party if it were satisfied that there was a real risk that his continued participation would lead to a situation where the order made at a trial would have to be set aside on appeal. In exceptional circumstances, that power could be exercised even if the advocate did not have confidential information.*

In the case at hand, the Appellant did not submit any evidence to prove his allegation that the Respondent and PW2 are partners working in the same firm. Worse enough, the Appellant averred that PW2 is the administrative partner, to mean the Respondent counsel is working under his supervision. The allegation therefore has no leg to stand.

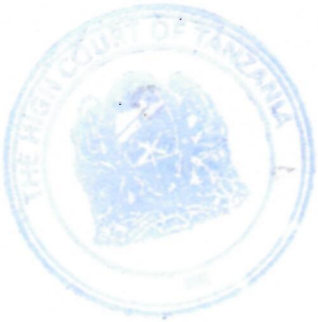
Also, the Appellant alleged that throughout PW1 testimony, he referred the money purported to be issued as his own money while the company is a legal person with power to claim what belongs to it. The Appellant secured the money from Obocha Credit (T) Limited, as a Company which has legal personality capable to sue or being sued. This was the decision in the case of **Joseph Magombi v. Tanzania National Parks (TANAPA)**, Civil Appeal No. 114 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported).

Moreso, Obocha Credit can also be referred as financial institution in terms of *section 3 of the Banking and Financial Institution Act No. 5 of 2006*. The company or institution operates through its Board of Directors. It is evident from the record that one Juma Chacha, a Director of Obocha was the one who entered into the contract with the Appellant on behalf of the company. The same Director appeared on behalf of the company in this case. Therefore, the Appellant rent the money from Obocha Financial Institution while Mr. Chacha was just a Director who supervised the business on behalf of the company.

In the end result, the proceedings, judgement and the orders of the trial court are hereby nullified for failure to frame issues and decide in respect of the counter claim. The matter be tried *de-novo* before

another competent Magistrate from the stage of framing issues (Final PTC). Costs be shared.

Order accordingly.



Y. J. MLYAMBINA

JUDGE

27/12/2022

Judgement pronounced and dated 27th day of December, 2022 in the presence of the Appellant in person and learned counsel Optatus Japhet for the Respondent. Right of Appeal fully explained.

Y. J. MLYAMBINA

JUDGE

27/12/2022