IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

PC. CIVIL APPEAL NO. 11 OF 2022

(From the decision of the District Court of Mbeya in Civil Appeal No. 19 of 2021 and Original Civil Case No. 24 of 2021 of the Primary Court of Mwanjelwa)

JACKSON W. MAHALI.....APPELLANT

VERSUS

PETER WAGESI CHACHA.....RESPONDENT

JUDGMENT

Date of last order: 29/03/2023
Date of Judgment: 26/05/2023

NDUNGURU, J.

This is a second appeal. The appellant in this case one, Jackson W. Mahali is challenging the decision of the District Court of Mbeya in Civil Appeal No. 19 of 2021 in which the court came out with its own findings to the issue which was not dealt by the Primary Court of Mwanjelwa (the trial Court) in Civil Case No.24 of 2021 which favoured the respondent one, Peter Wagesi Chacha.

Briefly, the facts giving rise to this case can be summarized as follows: The appellant and the respondent had entered into the loan agreement of Tshs. 36, 000,000/= sometimes on 28th day of August 2018 whereupon the respondent was deposit his house and card of his motor vehicle as collaterals. The respondent promised to pay back on 27th day of September 2018. The contractual relations were strained following the respondent delay in paying the appellant the balance of Tshs. 26, 000,000/= so had been agreed between them. As result, the appellant filed the suit against the respondent at the Primary Court of Mwanjelwa vide Civil Case No. 24 of 2021 claimed for outstanding balance of Tshs. 26,000,000/=.

In the course of trial, it came to be known that the same matter contested by the parties was under investigation by PCCB. The trial Court found and held that, it was wise to wait for investigation to be completed and then the appellant could refile the suit before it. so the issue as to whether the respondent made good payment for the loan remained not adjudged or determined notwithstanding the fact that the parties had testified on that issue. In appeal, the District Court of Mbeya found that, the respondent managed to pay back the whole amount which he was

owed by the appellant. Such decision by the first appellate court scratched the appellant thus this appeal.

In the (amended) petition of appeal, the appellant has raised two (2) grounds of appeal as hereunder:

1. That the appellate Court erred in law and fact to determine matter as the Court of first instance instead of remitting back the file to the trial Court to proceed with composing judgment in merits.
2. That the appellate magistrate erred in law in evaluation of evidence hence arrived at wrong conclusion.

When the matter was called for hearing, the appellant appeared in person, unrepresented whereas the respondent enjoyed the services of Ms. Irene Mwakyusa, learned advocate. Upon request of the parties and for interest of justice the same was ordered to be disposed of by way of written submissions.

Arguing the first ground of appeal, the appellant stated that, the appellate court is precluded from dealing with the issue not decided by the trial court unless it is a point of law. He also argued that, it is only the trial court which had an opportunity to observe the credibility and demeanor of

witnesses. He cited the case of **Wilfred Maro v Sarah Lotti Mbise & 3 others**, Civil Appeal No. 64 of 2020, CAT at Dar es Salaam and **Tom Morio v Athumani Hassan (Suing as administrator of the estate of the late Hassan Mohamed Siara) & 2 others**, Civil Appeal No. 179 of 2019, CAT at Arusha (both unreported) to cement his submission. He went on to submit that, in this appeal the trial court did not make decision on whether the respondent was indebted to the appellant or not. Again, he contended that, the trial court only observed that the matter it was under investigation by the PCCB. He added that, at page 10 of the typed judgment the appellate court found that the trial Court did not determine the issue before it.

The appellant further submitted that, the trial court did not decide the matter before it and the same cannot be remedies by the appellate court through evaluation of evidence recorded by the trial court. He went on to submit that, the remedy for the trial court's failure to decide the issue before it is to remit the file back to the trial court for it to consider and determine the matter. He cited the case of **Joseph Ndyamukama (Administrator of the estate of the late Gratian Ndyamukama) v**

N.I.C Bank Tanzania Ltd & 2 others, Civil Appeal No. 239 of 2017, CAT at Mwanza (unreported) to bolster his argument.

On the second ground of appeal, it was submitted by the appellant that, in his testimony, he testified that, the respondent borrowed Tshs. 36,000,000/= and managed to pay Tshs. 10,000,000/= only. It was also submitted by the appellant that, the respondent in his part testified that on 2nd day of March 2019 paid Tshs. 12,000,000/= through bank, on 7th day of March 2019 paid Tshs. 15,000,000/= and on unmentioned date paid Tshs. 10,000,000/= through bank and paid Tshs. 500,000 through TRA. He added that, he agrees that the burden of proof lies on a person alleges in his favour, however, the rule is not absolute it keeps changing depending on evidence led. To support his submission, he referred this Court to the case of **Yusufu Selemani Kimaro v Administrator General & 2 others**, Civil Appeal No. 266 of 2020, CAT at Dar es Salaam (unreported).

He continued to contend that, the allegation that the respondent paid the remaining balance via bank was within the knowledge of the respondent and was duly bound to prove that he truly paid. Again, he argued that, according to the respondent he paid three installments that is

Tshs. 12,000,000/=, Tshs. 15,000,000/=, Tshs. 10,000,000/= and Tshs. 500,000/= the amount totals are Tshs. 37,000,000/= while he was indebted Tshs. 36,000,000/= and the respondent never claimed to have paid in excess which now water down the claim that he paid. Finally, he prayed that, the appeal be allowed with costs.

Replying to the appellant's submission, Ms. Mwakyusa submitted that, in an appeal, the Court is mainly corned with the grounds of appeal in connection with evidence on record. She cited section 21 (1) of the Magistrates Court Act (Cap 11 R.E. 2019) to the effect that the District Court has appellate jurisdiction over the Primary Courts to direct the Primary Court to take additional evidence and certify to the District Court or to hear additional evidence itself. Again, she contended that, the first appellate Court has power to look at evidence on record and proceed to analyze and re-evaluate it and finally come up with its own finding. She cited section 21 (1) of the Act (supra) to support her submission.

She further submitted that, the case of **Wilfred Maro v Sarah Lotti Mbise & 3 others** (supra) has no any relevance with circumstances of evidence and come up with other findings as the first appellate Court is

allowable at law. It was also submitted by the counsel for the respondent that, the first appellate Court expunged the documents which were wrongly admitted before the trial Court. She referred this Court to the case of **Anthony Masanga v Penina (Mama Mgesi) & another**, Civil Appeal No. 118 of 2014 CAT and **Tanzania Insurance Co. Ltd v Farid Amour Khalfan & 2 others**, Civil Appeal No. 20 of 2019, HC at Mwanza (both unreported) to support her submission.

She continued to argue that, the appeal before the first appellate Court was not allowed rather the Court expunged the documents which were wrongly admitted and that was the only remedy of that ground of appeal. She also relied on the Article 107B of the Constitution of the United Republic of Tanzania, to the effect that the Court of law is enjoined to decide cases according to the law and Constitution. She further cited the case of **John Magendo v N.E. Govan** (1973) LRT 60 and **Tryphone Elias @ Ryphone Elias & another v Majaliwa Daudi Mayaya**, Civil Appeal No.186 of 2017 to bolster her contention.

As to the second ground of appeal, Ms. Mwakyusa argued that, the failure to contradict the evidence during the trial, such person admits what

is told by the witness, and such fact cannot be in turn be argued. To bolster her submission cited the case of **Kwiga Masa v Samweli Mubatwa** (1989) TLR 103 to the effect that a failure to cross examine is merely a consideration to be weighted with all other factors in the case in deciding the issue of trustfulness or otherwise of the unchallenged evidence. In conclusion, Ms. Mwakyusa submitted that, the first appellate Court was proper to hold in favour of the respondent and invited this Court to subscribe the same with costs.

In his rejoinder, the appellant reiterated his submission in chief. He went on submit that, the trial Court never evaluated or considered evidence by the parties for which now the appellate Court could re-evaluate, reconsider and re-analyze and reach to its own conclusion. Finally, he reiterated his earlier prayer.

I have gone through the records of both Courts below, grounds of appeal and written submissions by both parties. The issue calling for determination is whether or not this appeal has merit.

To begin with the first ground of appeal, the appellant faults the judgment of the first appellate Court on the reason that, it dealt with the

issue not decided by the trial Court while was not a point of law. After passing through the record of the Courts below, I concur with the appellant that, the issue whether or not the respondent managed to pay back the whole amount which he was owed by the appellant, the trial Court did not determine it. Indeed, the trial Court escaped its duty to determine the main issue before it. On that regards, it is my view that, the District Court being the first appellate had jurisdiction only to determine whether the Primary Court was barred from entertaining the matter or not.

Again, I am of the view that, the act of the District Court being the first appellate Court to evaluate and consider the evidence adduced before the trial Court is like to assume original jurisdiction of the trial Court which does not have. I hold so because the first appellate Court cannot step into the shoes of the trial Court and determine the issue that was not determined by the trial Court. In this regards, I subscribe the position stated in the case of **Wilfred Maro v Sarah Lotti Mbise & 3 others** (supra) which was cited by the appellant. Also, see the case of **Hotel Travertine Limited & 2 others v National Bank of Commerce Limited** (2006) TLR 133.

Furthermore, I disagree with the counsel for the respondent that, the section 21 (1) of the Act (supra) allow the District Court at appeal stage to step into the shoes of the trial Court and determine the issue that was not determined by the trial Court. The mentioned section only gives power to the District court to direct the trial Primary court to take additional evidence or hear additional evidence. On that regards, I find that the District Court of Mbeya has assumed the role of the trial court by evaluating and analyzing the evidence which was not evaluated and analyzed by the trial court which is a strange and not a proper procedure.

Given the circumstances, it is my considered view that, the decision of the District Court of Mbeya is a nullity for it assuming the original jurisdiction of the trial Court. This appeal is allowed. I hereby quash the same. Further, I order that the matter be remitted back to the trial Court so as to determine the main issue before it and a proper judgment be re-composed by the same trial magistrate who heard the parties during the trial

In the upshot, I find needless to belaboring to the 2nd ground of appeal since its determination solely depended on the positive answer to the

foregone ground of appeal. I further order that each party should bear its costs.

It is so ordered.

D. B. NDUNGURU

JUDGE

26/05/2023

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