IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

DC. CIVIL APPEAL NO. 02 OF 2023

(Arising from Civil Appeal No. 02 of 2021 in the District Court of Kaliua, Originating from the decision of Uyowa Primary Court in Civil Case No. 01 of 2021)

FAIDA SOSPETER ..... APPELLANT

VERSUS

KIKUNDI CHA WAFANYA BIASHARA MNANGE..... RESPONDENT

Date of Last Order: 26.09.2023
Date of Judgment: 09.10.2023

JUDGMENT

KADILU, J.

This case originated from the decision of Uyowa Primary Court in Civil Case No. 01 of 2021 where the respondent sued the appellant claiming for the payment of Tshs. 6,317,633/= being the outstanding loan. Brief facts characterizing the background of this appeal can be narrated as hereunder. The respondent through its assistant secretary alleges that on 01/05/2021, it loaned the appellant Tshs. 6,007,633/= and on 14/05/2021, Tshs. 810,000/=, making a total of Tshs. 6,817,633/=. The appellant mortgaged a matrimonial house and a woodworking machine. It was a term of the loan agreement that should the appellant fail to repay the loan, his mortgaged house and machine would be taken by the respondent.

On 20/06/2021, the appellant repaid Tshs. 500,000/= so, the outstanding loan amount is Tshs. 6,317,633/=. It was agreed in addition

that the last date for the repayment of the loan was 14/07/2021. On his part, the appellant asserts that in November 2020, he borrowed from the respondent Tshs. 2,000,000/= on the agreement that he would repay Tshs. 2,400,000/= in December, 2020. He failed to fulfill his promise as he only managed to repay Tshs, 400,000/= for the reason that on 24/12/2020, his child passed away. According to him, in March 2021, he repaid Tshs. 1,500,000/=, but on 13/05/2021, the respondent's secretary, Aloyce Joseph called the appellant informing him that they had to meet. When they met, Aloyce showed a document to the appellant and directed him to sign it.

The respondent refused to sign after having found that the loan amount indicated thereon was huge compared with what he had borrowed. He was then detained to the hamlet's lock-up up to 14/05/2021 when he was released and informed that the loan had an interest of Tshs. 400,000/= (20%) per month which is why the figure had changed. Thereafter, he was forced to sign a document and was directed to submit his wife's photograph, the instructions which he followed. He added that on 20/06/2021 he paid Tshs. 500,000/=, but on 01/08/2021 his woodworking machine was taken by the respondent. In August 2021, the respondent filed a civil case in Uyowa primary court to enforce the repayment of the loan.

After a full trial, the case was decided in favour of the respondent whereby the court ordered the appellant to pay the claimed Tshs. 6,317,633/= within 21 days and in case of failure, his woodworking machine which he used as a security for the loan would be handed over to the

respondent. Dissatisfied with that decision, the appellant appealed to the District Court of Kaliua via Civil Appeal No. 02 of 2021. The appeal was dismissed. Still aggrieved, the appellant preferred this appeal based on the following grounds:

1. *That, the district court erred in law and facts by its failure to determine the grounds of appeal presented before it.*
2. *That, the first appellate court erred in law and facts by entertaining the case while the respondent has no capacity to sue.*
3. *That, the first appellate court erred in law and facts by improperly weighing the evidence in the balance of probability thereby ending up defeating the ends of justice.*

The respondent did not file a reply to the petition of appeal. When the appeal was called for hearing, the appellant was represented by the learned Advocate Stella Nyakyi, whereas the respondent never appeared to the court. The record shows that on 18/07/2023 and 20/07/2023, the Chairman and Secretary of the respondent were served with a summons, but they refused to sign. The court ordered the grounds of appeal to be argued by way of written submissions. The following dates were scheduled for filing written submissions:

i) The appellant was to file a submission in chief on 16/08/2023.

ii) Respondent was to file a reply on 30/08/2023.

iii) The appellant was to file a rejoinder (if any), on 05/09/2023.

iv) Judgment was set on 05/09/2023.

Ms. Stella Nyakyi filed a submission in chief on 16/08/2023 as scheduled. However, the respondent did not file a reply thereof. I, therefore,

had to compose this judgment based on the appellants' written submission and the records in the case file. Concerning this issue, I wish to state that it is a settled legal principle that failure to file a written submission as ordered by the court is a manifestation of failure to prosecute the case. It is as good as non-appearing on the date fixed for hearing and its effect needs not to be overemphasized. This was the holding of the Court of Appeal in the case of ***Godfrey Kimbe v Peter Ngonyani***, Civil Appeal No. 41 of 2014. Having stated so, I now resolve the grounds of appeal as presented in this court.

The first complaint by the appellant is that the district court erred in law and facts by its failure to determine the grounds of appeal presented before it. He submitted that being the first appellate court, the district court was bound to address and resolve all the grounds of appeal and failure to do so, denied the appellant's right to be heard. To support this contention, Ms. Stella referred to the case of ***Salumu Njwete@ Salum Scorpion v R.***, Criminal Appeal No. 182 of 2019, Court of Appeal of Tanzania at Dar es Salaam where it was held that:

> *"... though it is not the duty of the first appellate court to resolve the issues as framed by the trial court, it is expected and bound to address and resolve the complaints of the appellant in the grounds of appeal either separately or jointly depending on the circumstances of each appeal. Failure to consider appellant's grounds of appeal was a fatal irregularity rendering the first appeal court's judgment a nullity."*

Submitting on the second ground of appeal, Ms. Stella stated that in the case at hand, the respondent has no capacity to sue. She explained that in law, the capacity to sue is crucial in any proceedings as it was stated in the case of ***Lujuna Shubi Balozi v Registered Trustees of CCM***, [1996] TLR 203 that:

> *"... in this country, locus standi is governed by the common law. According to that law, in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the Court has the power to determine the issue but also, that he is entitled to bring the matter before the Court."*

The learned Advocate explained that the respondent herein is not registered and has not complied with Section 28 (1) of the Microfinance Act of 2008 which stipulates that, a person who intends to undertake microfinance business under Tier 4 should apply for registration to the Bank or Delegated Authority in the manner as may be prescribed in the regulations. She added that, the sole purpose of a group like the respondent herein, is to provide aid to the needy members and if it was to provide the loan as it was alleged in this case, the group was required to be registered to make it a body corporate capable of suing and to be sued in its name.

According to Ms. Stella, the respondent would have the power to sue if it was registered, but as it is now, it lacks capacity and creates confusion on its legal status. She submitted that in a contract between the appellant and the respondent, the latter was identified as "Mnange Group" whereas the present case was instituted in the name of "*Kikundi cha Wafanya*

Biashara Mnange." To her, it is hard to identify the name which matches the registered name of the group hence, the respondent has no capacity to sue or be sued as a corporate body that provided a loan to the appellant.

Concerning the second ground of appeal, Ms. Stella stated that the court must evaluate and re-evaluate the evidence and come up with a conclusion. She opined that the district court of Kaliua failed to evaluate the appellant's evidence. She cited the case of ***Joseph F. Mbwiliza v Kobwa Mohamed Lyeselo Msukuma (Legal Representative/Administratrix of the estate of the late Rashid Mohamed Lyeselo) & 2 Others***, Civil Appeal No. 227 of 2019, Court of Appeal of Tanzania at Tabora in which it was held that the first appellate court, must re-evaluate the evidence and come up with its conclusion.

The learned Advocate explained that the honourable Magistrate did not consider the evidence of the appellant completely. She added that the appellant had strong evidence regarding the dates in which the contract was made, the appellant denied to have signed a contract and that, the contractual document was not read out to the court after its admission. Ms. Stella concluded that if the first appellate court could evaluate evidence properly, it would have reached a different conclusion. She implored this court to allow the appeal with costs.

Having set out the background of the case, submission by the Advocate for the appellant and perusal of the case file, the issue for consideration

before me is whether or not the appeal is meritorious. I will start with the first ground of appeal in which the appellant complains that the district court failed to determine the grounds of appeal presented before it. Indeed, it is trite law that the court is obliged to consider the grounds of appeal presented to it either generally or one after another. Failure to consider the grounds of appeal is fatal to the decision so reached. See the case of ***Salumu Njwete@ Salum Scorpion v R.***, (*supra*).

In the instant case, the appellant filed seven grounds of appeal that:

(i) That, the honourable Magistrate of Uyowa Primary Court erred in law and facts to decide the matter based on evidence of the respondent only.

(ii) That, the honourable Magistrate of the Primary Court erred in law and facts when he considered the contract presented by the contract while the said contract was incomplete for not being signed by the Village leader.

(iii) That, the honourable Primary Court Magistrate erred in law to consider the respondent as a legal party while it is not registered and its constitution does not explain its object.

(iv) That, the honourable Primary Court Magistrate erred in law and facts when it admitted the facts to confiscate the appellant's house and chain-saw machine as securities to secure the loan.

(v) That, the honourable Primary Court Magistrate erred in law and facts when he handed the appellant's chain-saw machine to the respondent in execution of the loan agreement.

(vi) Not readable

(vii) Not legible

I have examined the appellate court's judgment and found that the learned appellate court's Magistrate resolved the grounds of appeal on the last page of the judgment. Only a few grounds of appeal were indeed resolved by the appellate court. For example, the appellant's complaint about the respondent's locus standi remained unresolved by the appellate court. For this reason, I find the first ground of appeal meritorious and I allow it.

The other complaint by the appellant is that the first appellate court erred in law and facts by entertaining the case while the respondent could not sue or it had no lucus standi to sue the appellant. The basis of this contention by the appellant is that the respondent is not registered as a corporate body. In resolving this issues, I will first provide the meaning of *locus standi.* This is a Latin phrase whose literal meaning is, a place of standing. See the **Black's Law Dictionary, 9th Edn. (2004)** at page 1025. In the legal context, *locus standi* means the right to bring an action or to be heard in a given legal platform or forum.

Simply defined, *locus standi* is the right or legal capacity to bring an action or to appear before a court of law. See **Samatta, J.**, (as he then was)

in the case of ***Lujuna Shubi Ballonzi v Registered Trustees of Chama Cha Mapinduzi*** [1996] TLR 203. Throughout the proceedings in the district court, the appellant maintained that the respondent was not registered. However, in the respondent's written submission to the district court, the respondent's assistant secretary stated that it is a registered society under the Societies Act. This piece of evidence was not sufficiently contradicted by the appellant.

Nevertheless, the appellant never raised the registration issue in the trial court so that evidence would be presented to prove it or otherwise. In addition, the relationship between the parties in this case was contractual. This is to say, the enforceability of the contract between the appellant and the respondent was not dependent on the legal status of the parties. Even if the respondent was a natural person, the contract would still be enforceable as long as it fulfilled the legal requirements. Since the appellant does not deny that he borrowed money from the respondent, then he is legally bound to repay the loan in compliance with the agreement regardless of whether or not the respondent was registered. By the way, it is incomprehensible how the question of registration became relevant only after the appellant was granted the loan and not before. In the case of ***Private Agricultural Sector Support Trust & Another v Kilimanjaro Cooperative Bank Ltd***, Civil Appeal No. 171 & 172 of 2019, the Court of Appeal held that:

> *"The parameters of a loan are pretty straightforward. If you borrow money, you must ultimately pay it back, in most cases with interest. There is no shortcut."*

For the sake of clarity, I take the liberty to reproduce Section 10 of the Law of Contract Act, [Cap. 345 R.E. 2019] which was heavily relied on by the parties in this case:

> *"All agreements are 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."*

In the present appeal, the agreement was made on 01/05/2021 and it was duly signed by both sides. During the trial in the primary court, the contractual document was admitted as exhibit A-1 after the court had asked the appellant if he had any objection and he replied that he did not have. In his defence, the appellant contended that on 13/05/2021, he was forced to sign the loan agreement so, he did not consent to the loan contract freely. However, on 20/06/2021, he managed to pay back Tshs. 500,000/= as part of the loan amount. These facts in my view are inconsistent with human experience because one cannot figure out how the appellant could be forced to sign the contractual document 38 days after it was made, yet he alleges the existence of coercion.

Under Section 15 (1) of the Law of Contract Act, coercion is defined as the committing, or threatening to commit, any act forbidden by the Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, **with the intention of causing any person to enter into an agreement**. According to the appellant, he was

locked up between 13/05/2021 and 14/05/2021 in connection to the loan facility. It is undisputed that unlawful detention of the appellant was an act forbidden by the Penal Code. Nonetheless, the appellant never reported anywhere about this wrong before, during, or after the detention.

In addition, as shown above, Section 15 of the Act requires that for the unlawful act to constitute coercion, it should have been done to the party to cause him to enter into an agreement. The alleged coercion in this case was done long after the contract was signed. As if that was not enough, the appellant repaid part of the loan amount, but when he failed to discharge his loan obligation to the completion, he raised the defence of lack of consent. Like the first appellate court, I find the defence of coercion as an afterthought or else, the kicks of the dying horse.

The facts of this case indicate that none of the parties was forced to enter into a loan agreement. Further, the capacity of the parties to enter into the said contract was not challenged anywhere. There is also no doubt about the lawfulness of the consideration herein and, no illegality was raised concerning the parties' agreement. In this regard, each party was bound by the terms of the contract. Section 37 (1) of the Law of Contract Act provides that:

> *"The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or any other law."*

Since the contractual document was admitted during the trial without any objection from the appellant, it must speak itself in exclusion of oral account as to its contents. This is per Section 100 (1) of the Evidence Act, [Cap. 6 R.E. 2022] and the case of ***MS. Msolopa v Paul Warema & Others***, Land Case No. 23 of 2017. From that understanding, it follows that, if one is to examine the validity, legality and enforceability of exhibit A-1, the document to examine in the first place is, exhibit A-1 itself. With that in mind and given the fact that exhibit A-1 is unambiguous, I have no hesitation in concluding that there was a valid and enforceable contract between the appellant and the respondent.

For that reason, the appellant's non-payment of the loaned money as per the agreement constituted a breach of the said contract. The **Black's Law Dictionary, 8th Edition** of 2004 page 200 defines the term "breach of contract" as a violation of contractual obligation by failing to perform one's promise by repudiating it or by interfering with another party's performance. Further, Section 74 (1) of the Law of Contract Act, Cap. 345 provides:

> *"Where a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated."*

Based on the quoted provision, a breach of contract occurs where its terms have not been performed as agreed and the injured party becomes entitled to the payment of the amount named therein. In the present case, one of the terms of the loan agreement was that, the appellant had to repay the loan in full not later than 01/06/2021. During cross-examination of the appellant, it came out very clearly that he did not repay the loan as required. In his own words as shown on page 15 of the primary court's proceedings, the loan has not been repaid to the fullest. In the case of ***Philipo Joseph Lukonde v Faraji Ally Saidi***, Civil Appeal No. 74 of 2019, the Court of Appeal stated that:

> *"Where the parties have freely entered into binding agreements, neither courts nor parties to the agreement should interpolate anything or interfere with the terms and conditions therein, even where binding agreements were made by lay people."*

In the light of the foregoing, this court finds that, the second ground of appeal is devoid of the legal base and I dismiss it accordingly.

Lastly, the appellant complains that the first appellate court erred in law and facts by improperly weighing the evidence in the balance of probability thereby ending up defeating the ends of justice. This ground of appeal shall not detain me much. I will be guided by the principles outlined in civil litigations. Section 110 of the Evidence Act places the burden of proof on the party wishing the court to believe his testimony and pronounce judgment in his favour. It provides:

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

Similarly, in the case of ***Hemedi Said v Mohamedi Mbilu*** [1984] TLR 113, it was held that *"... he who alleges must prove the allegations."* The Court of Appeal in the case of ***Anthony Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna),*** Civil Appeal No. 118 of 2014, emphasized this principle by stating that; *"...generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour."*

In the case at hand, the respondent called three witnesses and tendered one exhibit to prove that there was a contract between the appellant and the respondent. On the other hand, the appellant did not produce any evidence to establish that he borrowed Tshs. 2,000,000/= and he was supposed to pay Tshs. 2,400,000/= as contended. Therefore, in the absence of a tangible evidence, the court cannot rely on mere words that the loan amount claimed by the respondent was incorrect.

With regard to the last ground of appeal, I have failed to grasp the basis of the appellant's complaint as he kept on repeating that the trial court erred by accepting proof of the respondent's case on the balance of probabilities without further elaborations. Section 143 of the Evidence Act stipulates clearly that, there is no particular number of witnesses that is required in any case to prove any fact. Therefore, whether or not the case

was proved against the appellant on the balance of probabilities, depends on the probative value of evidence presented before the trial court.

As to whether the evidence adduced by the respondent was sufficient to prove the allegation against the appellant on the balance of probabilities, a decision in the case of **Paulina *Samsoni Ndawanya v Theresia Thomas Madaha***, Civil Appeal No. 45 of 2017 is relevant in which the Court of Appeal stated that:

> *"It is equally elementary that since the dispute was in a civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."*

Guided by the above legal authorities and by weighing the weightier evidence, I am persuaded that, the respondent managed to prove on the balance of probabilities that the appellant breached a loan contract. *See* also the case of ***Geita Gold Mining Ltd v Ignas Athanas***, Civil Appeal No. 227 of 2017. In these cases, the defendants' evidence appeared weightier than that of the plaintiffs. The Court of Appeal in ***Paulina Samson Ndawavya v Theresia Thomas Madaha*** (*supra*), observed as follows on how to discharge the burden of proof in civil cases:

> *"... the degree is well settled. It must carry a reasonable degree of probability, but not so high as required in criminal cases. If the evidence is such that the tribunal can say- we think it is more probable than not, the burden of proof is discharged."*

Subjecting the above legal authorities to the present appeal, it is my humble opinion that, given the enumerated set of events and the records in the case file, it is more probable than not that the respondent in this case, discharged the burden of proof to the required standard. For this reason, the third ground of appeal is also devoid of merits and I dismiss it accordingly. Given the weight of the grounds of appeal which I have dismissed herein above, I dismiss the appeal for lack of merits. The right of appeal is open to any party aggrieved with the decision.

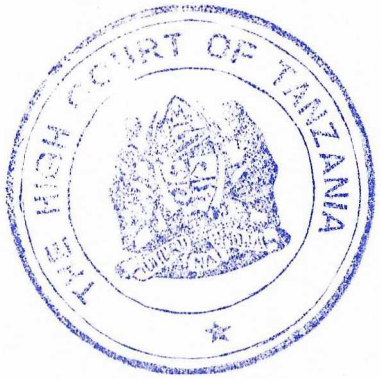
It is so ordered.

KADILU, M.J.

JUDGE

09/10/2023.

Judgment delivered in chamber on the 09th Day of October, 2023 in the presence of Ms. Stella Nyakyi, Advocate for the appellant.



KADILU, M.J.,

JUDGE

09/10/2023.