IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 28 OF 2023

(Arising from the decision of the Resident Magistrates' Court of Dar es Salaam at Kivukoni – Kinondoni in Civil Case No. 01 of 2021)

MOHAMMED ENTERPRISES (TANZANIA) LIMITED..... APPELLANT

VERSUS

MWESIGA ZAIDI..... RESPONDENT

JUDGMENT ON APPEAL

S.M. MAGHIMBI, J:

At Kivukoni Resident Magistrate's Court @ Kinondoni IJC the the appellant herein unsuccessfully sued the respondent vide Civil Case No. 01 of 2021 ("the suit"), for a claim of Tshs, USD 85,837.00 being an outstanding sum for a loan advanced to the defendant, the appellant lodged this appeal raising seven (7) grounds of appeal as he. Aggrieved by the dismissal of the suit, the appellant has lodged this appeal raising seven grounds of appeal as hereunder:

1. *That the trial Principal Resident Magistrate erred in law and fact in holding that there existed no contract to lend money in the extent of USD 85,837.00 by the appellant to the respondent, merely because Exh. P1 and P2 tendered contained the names of Mohamed Enterprises (T) Ltd instead*

of the full names of the Appellant which are Mohammed Enterprises (Tanzania) Limited.

2. *Having erred as stated in (1) herein, the trial Principal Resident Magistrate erred in law and fact in holding that the appellant failed to establish existence of a loan agreement between the appellant and the respondent in the extent of USD 85,837.00.*
3. *The Trial Principal Resident Magistrate erred in law and fact in holding that Exh. P1 could not be relied in evidence for not complying with section 39(1) (2) (3) (4) and (5) of the Companies Act, Cap. 212 R. E. 2019 of the laws. Such provisions are inapplicable in the circumstances of the present case.*
4. *The trial Principal Resident Magistrate erroneously applied the holding in the case in* ***Neema Joseph Gesasi vs Koli Finance Limited Civil Appeal No. 248 of 2020 High Court of Tanzania Dar es Salaam (unreported)*** *heavily relied to dismiss the appellant's case.*
5. *The decision of the Trial Principal Magistrate is in error for his failure to properly evaluate the evidence tendered and as a result he failed to hold that the appellant had ably proved the case on the balance of preponderances.*
6. *The trial Principle Resident Magistrate erred in law and fact in failing to consider and uphold the appellants' prayer and invitation to the Court to call expert witness to tender forensic report on handwriting which the Court had veracity of Exh. P1 and P2. Had the said report been tendered as prayed, it*

proved on balance of preponderances that Exh. P1 and P2 were authored by the Respondent and no other.

7. *The trial Principal Resident Magistrate erred in law and fact in failing to hold that the respondent was legally bound to refund the loaned money under the principle of "money hand and received".*

It was the appellant's prayer that the appeal is allowed by:

1. Setting aside the Judgment and Decree of the Trial Court and hold that the Respondent is in breach of the loan agreement legally entered into by the appellant and the respondent.
2. Hold that the respondent is liable to pay back/refund to the appellant USD 85,837.00 or equivalent in Tanzanian Shillings.
3. Respondent be required to pau interest accrued.
4. Any and further reliefs the court shall deem just and fit to grant.

Before me, the appellant was represented by Ms. Irene Charles, learned Advocate while the respondent appeared in person and unrepresented. By an order of the Court dated 15th May, 2023, the appeal was disposed by way of written submissions. In her submissions to support the appeal, the appellant informed this Court that he will submit on the 1st and 2nd grounds of appeal followed by the 6th ground then 3rd and 4th and lastly on 5th and 7th grounds of appeal.

On the 1st and 2nd grounds of appeal, the appellant submitted that the only reason considered by the Trial Court to conclude that there was no valid agreement entered between the appellant and respondent was the name of the person alleged to have advanced the loan to the respondent. Ms. Charles referred to **EXP1** and **P2** which are documents

bearing the names of Mohamed Enterprises (T) Ltd and not Mohammed Enterprises Tanzania Limited as appearing in the pleadings in this case.

She then submitted that in his evidence, the respondent tendered **EXD1,** which is a report produced by BRELA, indicating that such name "Mohamed Enterprises (T) Ltd" is not registered with BRELA. However, she argued, during hearing, PW1 was clear that the names appearing on **EXP1** and the plaint are one and same and that the word (T) represents Tanzania and has been used all through and without any confusions. That the use of the words (T) in place of Tanzania is not fatal as the Trial Magistrate held. She supported her submissions by citing the case of **Christina Mrimi Vs. Coca Cola Kwanza Bottlers Limited, Civil Application No. 113 of 2011** (unreported) whereby the Court of Appeal of Tanzania was faced with a similar position; i.e. the company was at one point referred as **Coca Cola Kwanza Bottlers Ltd** instead of **Coca Cola Kwanza Ltd;** and held that the defect is a minor irregularity and therefore curable. Referring the situation with the current situation, she argued that in the instant case, the only omission is the word (Tanzania) and in its place (T) was put.

Sequel to the above, she went on submitting that the learned trial Magistrate also erred to hold that **EXP1** violated Section 4 (a) of the Companies Act [Cap. 212 RE 2002] (the Companies Act) because the last words are written as Ltd instead of limited. As submitted in respect of the first part hereof and pursuant to the testimony of PW1, Ltd is the short word of "limited" and has been used by the appellant consistently. The omission is curable as well and we shall refer this Court to the case of **Christina Mrimi** (supra). Moreover, she submitted, Section 4(c) of the Business Names Registration Act, [Cap. 213 R. E. 2019] was inadvertently

relied by the trial Court because the said legislation applies to registration of business names, other than companies. That the provision was thus misapplied and she prayed that the 1st and 2nd grounds of appeal to be upheld.

Submitting on the 6th ground of appeal, Ms. Charles pointed that on 30th April, 2021 the appellant requested procurement of expert evidence by a forensic investigation of **EXP1 and EXP2** and the records are clear that the prayer was granted with an order issued. However, on 17th May, 2020 the same trial Court ordered removal of the forensic report from court record. That on this date the report was already submitted to the Court in compliance to order dated 30th April, 2021. She faulted the Court's reasons for removal of the report on the ground that the report was received un-procedurally. She submitted further that even the subsequent prayer made by the appellant on 14th November, 2022 requesting the trial Court to call the expert witness to tender the forensic report was rejected by the Trial Court. She emphasized that the Trial Court erred in issuing the order dated 17th May, 2022 because on this date it was ***functus officio*** having issued the previous order dated 30th April, 2021. The case of **Mohamed Enterprises (T) Limited Vs. Masoud Mohamed Nasser,** Civil Application No. 33 of 2012 was cited to challenge the procedure adopted by the trial Court.

The appellant went on submitting that the subsequent order refusing the appellant's prayer to call ex-parte witness to submit and testify on the forensic report was also an error. Ms. Charles cited the decision of the Court of Appeal in the case of **Peter Bugumba@ Cherehani Vs. Republic, Criminal Appeal No. 251 of 2019.** She then submitted that although the decision cited above is a criminal matter, it is

relevant to the case at hand because in both cases the matter at issue is the production of expert evidence. In the latter case, she argued, as held by the CAT, the prayer to conduct DNA test was made by the appellant and issued by the Court however, it was not implemented notwithstanding that the issue in dispute revolved on whether the born child was the siren by the appellant or not. It was the holding of the Court that the trial Court was bound to comply with order earlier issued. She argued further that in the instant case, like in **Peter Bugumba @ Cherehani**, the trial Court issued an order for a forensic report to be prepared by the Forensic Identification Bureau (FIB), the order was compiled and the report was submitted to the Court. That since the order was made and complied, the trial Court was duty bound to call expert witness to testify on the matter. That the order refusing to call the expert witness dated 14th November, 2022 constituted an error sufficient to warrant the decision of the Trial Court to be set aside. She prayed that the 6th ground of appeal be upheld.

With regards to the 3rd and 4th grounds of appeal, Ms. Charles submitted that Section 39(1), (2), (3), (4) and (5) of the Companies Act does not apply under the circumstances of this case. That according the amended plaint filed in the Lower Court on 30th July, 2021; it is clearly stated that the parties (Appellant and Respondent) entered into an oral agreement where the former advanced to the latter USD 85,837.00. that during hearing PW1 told the trial Court that EXP1 and EXP2 were prepared by him only to authenticate the sums of money loaned to the respondent. That PW1 testified further that he witnessed the oral agreement and he is indeed the one who handed over the money to the respondent on the instructions of the Chairman of the Appellant Group of Companies one Gullam Dewji. She then pointed out that in the judgment, the trial

magistrate held that since EXP1 does not contain the requirements stipulated under S. 39(1) - (5) of the Companies Act i.e. Company's common seal, signature of the Director and Secretary and not expressed as having executed by the company, and since there was no board resolution passed which allowed the appellant to lend money then the appellant has failed to prove that USD 85,837.00 was indeed lent to the Respondent. The trial Court relied heavily on the decision of this Court in the case of **Neema Joseph Gesasi.**

Submitting on the 5th and 7th grounds of appeal, Ms. Charles submitted that PW1 also tendered EXP3 and EXP4. That EXP3 contains data documents and WhatsApp screenshot messages involving the Respondent and PW1 and in these documents, it is exhibited that the Respondent acknowledged to be indebted to the extent of Tshs. 3,000,000.00. That he in fact paid the same after an advice for bank details was supplied to him as requested. She referred to screen short massages dated 15th February, 2021, 20th March, 2021 and proof of payment to CRDB deposit slip on screen short massage dated 28th March, 2021. Further that EXP3 is the photograph of ID of the respondent issued by the Tanganyika Law Society also showing that respondent is a practicing advocate with Roll number 6239. Ms. Charles also averred that PW1 testified that the ID was supplied by the respondent and it is very unfortunate that the Trial Court never discussed these crucial pieces of evidence anywhere in the judgment.

On the above, she prayed that since this is first appellate Court, the evidence of the trial court be evaluated and hold that the same sufficiently prove that the respondent acknowledges to have received loan of Tshs.

3,000,000.00 which was made on similar process as in the second loan of USD 85,837.00.

On the 5th and 7th grounds, she submitted that **PW**1 testified at length that he works with the Appellant Company. He ("Pw-1") also testified to the Court that he is one who handed over the two loans (exhibits "P-1" and "P-2") to the respondent and he signed them on his presence. PW 1 was also very clear that he personally knows the respondent who used to visit the appellant's offices regularly. She argued that the testimony of PW 1 cumulatively proves the case for the appellant particularly because Exh. P-2 read together with Exh. P-3 proved that indeed the respondent was loaned the sums of Tshs. 3,000,000.00 and USD 85,837.00. Her prayer was that the appeal be allowed with costs.

In reply to the 1st and 2nd grounds, the respondent submitted that the use of the name Mohammed Enterprises (Tanzania) Limited and Mohammed Enterprises (T) Ltd interchangeably is fatal. He argued that the two are different entities and that even after the search at BRELA, the registered entity is Mohammed Enterprises (Tanzania) Limited and that Mohammed Enterprises (T) Ltd is not registered hence not recognized. The respondent also has cited section 15 (1) and (2) of the Companies Act No. 12 [Cap. 212 of 2002] whereby the law requires a company to exercise its functions using its true name as it is registered and if not such name cannot exercise any function of the company.

It was also the respondent's averments that a company is an artificial entity which cannot speak by word of mouth rather on documents through its representatives. That since the appellant alleges existence of an agreement, making such allegations on ground of oral agreement is fictious and impossible to be concluded between a Company and the

respondent. The respondent also challenged exhibit P1 and exhibit P2 which are petty cash vouchers since the same do not bare the name of the appellant. He argued as to how the appellant is inviting a written agreement or contract when it is stated that the loan was advanced through a petty cash voucher. That section 38 (a) and (b) of the Companies Act requires a common seal, and other legal features to appear on the contract hence the same not being on the voucher makes the voucher not to be a contract.

The respondent went on submitting that PW 1 claims to have been the one who issued the petty cash voucher of the loans advanced to him but looking at the said exhibits the same do not have his name. And since the appellant was a company there was no board resolution that blessed the loan that was issued to the respondent. It was also the submission of Mr. Mwesiga that there was no formal application made by the respondent to request the said loan. In the trial records, PW 1 failed to prove the existence of the oral agreement for the respondent to have been advanced with a loan of USD 85,837.00 by the appellant.

Replying to the 6th ground of appeal, the respondent submitted that the issue on board resolution was raised *suo motto* by the Court. However, it being statutory requirement, the Courts in Tanzania have been raising that issue *suo motto* to show how it is unavoidable and it cannot be ignored or compromised. He supported his argument by citing the case of Giant **Machine and Equipment limited Vs Gilbert R Mlaki and Capcon Limited, Civil case No.5 of 2019** where the Court raised the issue of the requirement of Board resolution authorizing any act done on behalf of the company or by the company. That since evidence of the plaintiff showed there was no board resolution for approval of such loan,

the defendant denied to have made any oral agreement with the plaintiff and no any proof of oral agreement was tendered by PW1. That it was very correct for the Court to have answered in the negative that there was no contract between the plaintiff and the defendant.

With regard to the submission that the Court did not uphold appellant's prayer to call forensic expert, the respondent submitted that on 30th April 2021, the appellant requested forensic investigation of signature in respect of Annexure P-1 on the plaint. That an item one on the additional list of documents to support his claim also the Court order is very clear the court ordered an investigation in respect of annexure P1 on the plaint and item one on the additional list of documents. However, he submitted, the appellant did not enter such report in the additional list of documents to comply with the requirements of law. He denied the allegation that on 17th may 2020 the Court ordered removal of forensic report as on that date and year there were no this case in Court. But on 17th May, 2022, after having conducted perusal the respondent made an application to the Court to remove the report. That the order of the Court to remove forensic from Court file did not preclude appellant to file that report in accordance with the laid legal procedure as additional list of documents to allow him to rely on it at the hearing.

The respondent went on submitting that it should not be confused by appellant that the Court ordered forensic investigation ***suo moto.*** That it was the appellant who requested the Court to be assisted to get that report and use it to support his claim and that the Court had never admitted such report. He argued that failure by appellant to use it in accordance with the law cannot be an error of the Court rather her Advocates. That there is nothing ***functus officio*** in that regard, the trial

Court had never issued different orders on the same prayer with regard to forensic report. That each order given was in respect of independent prayer from different parties of the case. He concluded that ground No.6 of the appeal be dismissed.

Arguing on the 3rd and 4th grounds of appeal the respondent submitted that the appellant is a company registered and operating in accordance with the requirement of the law, specifically The Companies Act (supra). That Appellant alleged to have orally contracted with respondent without mentioning the name of an officer who conducted such discussions on behalf of the appellant. That there is nowhere in the plaint including Exhibits P-1, P-2, P-3 and P-4 where it appears a name of any officer who acted on behalf of the appellant while the appellant alleged to issue loan to the respondent through petty cash voucher. That it was inevitable for the trial court to assess whether those documents belong to the company under S.39(1) of the Companies Act and that Exhibits P-1 and P-2 does not have any of the features. He then submitted that the trial Court was correct to rely on S.39 of the companies Act (supra) to disqualify those exhibits as belonging to the appellant. That PW1 testified that Mr. Gulam is the one who gave loan to Mwesigwa while the said Gulam had never appeared in trial Court to testify. That even PW1 who is said to handover the money to respondent did not sign anything with respondent to signify any proof of acceptance. That the trial Court did not commit any error of fact or law, it complied with the law therefore grounds No.3 & 4 of the appeal must fail.

On the 5th and 7th grounds of appeal, the respondent submitted that Exhibit P-1 is disputed by respondent in the WSD and testimony at the hearing. He argued that under S.69 of the Evidence Act Cap 6 R.E 2022,

if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his hand writing. His argument was that there was no any proof of the alleged signature by the appellant and that even PW1 who testified that he prepared those exhibits did not request for the Court to order investigation of the handwriting found on Exhibit P-1 and P-2. That it was only requested to investigate the signature on exhibits P1 and P2 leaving other handwriting found on those exhibits. Therefore, there is no even proof of PW1 handwriting despite to testify that he prepared those Exhibits.

Moreover, the respondent submitted, there is on record exhibit P-4 which is a demand letter which does not prove anything and the same is disputed by respondent together with contents therein. Further that exhibit P-3 are WhatsApp screenshot messages were disputed by respondent as they don't display respondent's phone number and PW1 phone number, a fact which lowers it's authenticity. With regard to a copy of ID, he argued that it does not prove anything or to invite conclusions of the existence of oral contract as alleged by appellant. The testimony of PW1 that the respondent signed exhibits P-1 and P-2 on his presence lacks credibility on these grounds **first**, he did not tender any proof to be an employee of the appellant, **second** nowhere in those exhibits PW1 signed, wrote or printed his name, **third** there is no any proof for him to be instructed to handover the money to appellant, **Fourth** no proof for him to have handle over money to the respondent, indeed he is the one who testified that there was no resolution authorizing the said loan.

It was also submitted by the respondent that, looking at the records of the trial Court, no any evidence of the said meeting by PW1 was tendered in Court and no resolution to call the said meeting was tendered and no minutes of the said meeting was tendered. He argued that it makes a clear conclusion that no any meeting to ask a loan was conducted between appellants company Chairman, respondent and PW1 and that if no meeting was conducted, any discussion was made, then there was no oral agreement. He further argued that in law, a company cannot make oral agreement hence no loan was taken and indeed respondent have never taken any loan from appellant or any of its officer. Finalizing the submissions, the respondent averred that with all the above discrepancies in Exhibits P-1, P-2, P-3, P-4 and the testimony of PW1 grounds No.5&7 must fail and be dismissed and this Court uphold the decision of the trial Court.

I have gone through the rival submissions of both parties and the records in respect of the suit before me, in my view, the grounds of appeal can be clustered into three issues for my determination:

1. Whether there was a loan agreement between the plaintiff and the defendant.
2. Whether the names of Mohamed Enterprises (T) Ltd as seen in the Exh. P1 and P2 tendered instead of the full names of the Appellant which are Mohammed Enterprises (Tanzania) Limited rendered the two exhibits invalid.
3. Whether the trial magistrate failing to consider and uphold the appellants' prayer and invitation to the Court to call expert witness to tender forensic report on handwriting which the Court had veracity of Exh. P1 and P2 prejudiced the appellant's case.

The first issue is founded on the 1st and 2nd grounds of appeal where the appellant is dissatisfied by the decision of the trial Court that there was no proof of a loan agreement to the respondent on bases of exhibit P1 and P2. The evidence is such that PW 1 claims to witness the appellant's Chairperson entering into an oral agreement to loan the respondent USD 85,837.00 which was issued through petty cash voucher that PW 1 issued and that he was the one that handed the said money to the respondent.

The respondent on the other hand disputes to have entered into such an agreement as claimed by PW 1. It was the respondent's argument that even the petty cash vouchers tendered in Court as evidence to prove the said loan do not legally belong to the appellant herein. His argument was that the appellant herein is Monmmed Enterprises (Tanzania) Limited while the Petty Cash Vouchers are of Mohammed Enterprises (T) Ltd which he claimed to be two different entities and that having made search with BRELA the latter does not exist since it is not registered.

I have considered the appellant's evidence adduced by PW1 who claims that the respondent has been making various visits to one Mr. Gulam who is the Chairperson of the appellant herein, and that the respondent was seeking for a personal loan from Mr. Gulam. It was after several visits that the respondent entered to an oral agreement with Mr. Gulam for a loan of USD 85,837.00.

At this point, I have reconsidered the evidence and the most important thing at this point, regardless of whether the two names belong to one company, the loan is said to have been given by the appellant as a legal person to the respondent. However, what it sounds to me is that the whole transaction was between the respondent and a Director of the company which sounds like a personal loan between the two. The

transaction of a company is communicated through duly signed board resolutions or other written form showing authority of the company as a legal person. In this case, all the witness (PW1) testified was being directed, not by the board, but Mr. Gulam Dewji to lend money to the respondent. Unfortunately, even the said Mr. Gulam Dewji did not come and testify in court. My attention was taken to the fact that the amount of money at stake is USD 85,837/- which is not a small amount. You wonder how could a company (appellant) lend such a huge amount of money to the respondent without proper company documentation rather than a *"give this amount to so and so...."*.

I also find it important to emphasize also at this point that it is the agreement referred herein is an oral agreement. Although prudence calls for all agreements to be in writing, the law has never expressly extinguished oral agreements in a case like the current one from being enforceable. In such cases, the provisions of Section 110 and 111 of the Evidence Act [Cap. 6 R. E. 2022] ("the Evidence Act") apply squarely. Under the provisions, the burden to prove existence of the contract lies with the person who so alleges the existence and in this case, it is the plaintiff who had the burden to prove the contract/agreement.

An oral contract is enforceable in law if it complies with the requirements of a valid contract. In our jurisdiction, Section 10 of the Law of Contract Act, [Cap. 345 R.E 2019] provides for the essential elements of a valid contract. The section so provides:

> *"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."*

Reading the provisions of section 10 above, my understanding is that an oral contract is enforceable if it is made by parties out of their free consent for a lawful object and consideration. In that case, the task to so prove is principled under the of balance of probabilities as it is the case in any civil case (See the case of **Anthony M. Masanga vs. Penina (Mama Ngesi) and Others, Civil Appeal No. 118 of 2014** (Unreported).

With the above in mind, proving an oral contract may be unnerving task, for that matter parties may consider calling witnesses for proof of the existence and future testimonial purposes. It is also advisable to create or preserve any physical evidence associated with the oral contract, such as letters, receipts, etc. Oral contracts may be easily proved if there is a noticeable output when its terms are implemented.

All the above three aspects may be established by the court by looking at the proven and accepted history that has transpired between two parties, which allegedly made a verbal contract. In the present case, the evidence and exhibits before the Court by PW1 seek to establish that there has been an oral agreement for the appellant to lend money to the respondent. Important is to bear in mind that the appellant is a legal personality. The Appellant's witness testified to have been present during the oral agreement between the respondent and the Chairman of the appellant company. It is on the face of records that the amount of money loaned is remarkable sum and not just petty cash therefore the evidence to prove the existence of the agreement was of great essence. However, to begin with, the appellant neither in her pleadings nor through PW1 ever explained before the Court why the alleged chairman of the appellant who is the main party to the alleged agreement from whom the loan was

advanced to the respondent did not come to testify on the existence of the agreement.

As we have seen above, an oral agreement is not easy to prove as opposed to the case where the terms of the agreement have been reduced in writing. It is also stated above that an agreement will be valid if it contains the requisites of a competent agreement recognized by law. In the circumstance of this case, the trial Court found that the appellant had failed to prove the existence of an agreement between the parties named. It is my firm stand that from the records, I am in agreement with the trial magistrate that PW1 failed to prove the existence of such oral agreement. For instance, considering the petty cash voucher claimed to be evidence of the loan advanced, the same has been challenged on ground that the name that appears for Mohammed Enterprises (T) Ltd while the appellant who was the Plaintiff in the trial court is Mohammed Enterprises (Tanzania) Limited.

It is in records that Mohammed Enterprises (t) Ltd is not registered with the Government Agency responsible for registration of companies (EXD.....) therefore a non-existing Entity. This vitiates the legality of the payment voucher tendered in Court to prove that the money was actually advanced to the respondent as the two appear to be two distinct persons.

The appellant, being the one with the duty to prove what he claims to the standard required in civil cases which is on a balance of probabilities, had to prove the existence of the oral agreement which would then establish the loan of USD 85,837.00. I find the evidence in record not sufficient enough to warrant the trial court to make conclusion that there actually was such a loan 1st and 2nd grounds of appeal merits. Hence the 1st and 2nd grounds of appeal fail.

In determination of the 6th ground of appeal, the appellant finds the Court to have errored on not complying to the Forensic Order that was already granted to the appellant by the Court. The respondent on the other side is of the view that the Court did not error since it was revealed by the respondent that the report from the forensic used different documents for examination unlike what was prayed to be examined and the same was filed in the Court file had not complied with the legal requirements of filing the same in the Court file.

In ordering a forensic examination, the expert is called upon to analyse some tabled materials to determine details such as whose handwriting or signature is on a disputed document or whether some elements of a document were added later than other, as well as whether a particular machine was used to produce a certain document. The expert's duty is to compare **a source document (a document that is relevant to the investigation)** with other documents said to have been written or signed by the same person and he will then provide an opinion on whether they were written by the same person. The keyword in this case is the source document, which is a document which is relevant to the investigation.

As per the records, it is not disputed that an order for a forensic examination was prayed for and the Court granted the same on the 30th April 2021 in respect of annexture P1 in the Plaint as well as item 1 in the list of documents filed on the 30th April, 2021. On 10th February, 2022 it was revealed that the respondent had done a file perusal to the Courts file and discovered that there was a report from the forensic department in compliance with the order for examination. It was however, seen that the report contained reporting on documents that were not centre for

examination. The records reflect what the respondent has submitted and since the key word is the source document and the same was not tabled for examination before an expert, it is conclusive that since the order of the Court was not complied with, it makes the whole process a nullity.

The trial court records are such that after this anomaly was addressed, the Court then ordered that the report be removed from the Court records leaving the fact that the same was entered in the Court file unprocedural and the fact that the same was contrary to the Courts order as to which documents were to be examined. Since the documents to have been examined were not the documents examined I find that the trial Court made the right decision in removing the said report from the Courts file. From that finding, I find the 6th ground of appeal meritless.

On the 3rd and 4th grounds of appeal as consolidated, the appellant faults the trial court in holding that Exhibit P1 could not be relied upon for not complying with section 39 (1), (2), (3), (4) and (5) of the companies Act. The appellant also argues that the trial court erroneously applied the holding in the case of **Neema Gesasi Vs. Koli Finance Limited Civil Appeal No. 248 of 2020.** The appellant is of the view that the provision of law above does not apply in circumstances like this one since the agreement entered into was an oral agreement and that exhibits P1 and P2 were tendered by PW1 to authenticate the sum of money loaned. On the other hand, the respondent states the issue of requirement of a board resolution was not raised by Court suo motto.

Having considered the arguments of both sides, I am in agreement with the respondent that in proving decision made by a company, a board resolution is required to show that any act was authorised and done on behalf of the company. In absence of the board resolution, any written

instructions by the Chairperson of the company would have suffice along with a documentary proof that in the Memorandum and Articles of Association, such an amount could be lent to an external person with a need for authorisation through board resolution. Since none of that was proved, the trial Court cannot be faulted in reaching its decision.

On the grounds of the relevancy of the requirement of sections 39 (1), (2), (3), (4) and (5) of the companies Act, that it could have been relied upon in the circumstances; I do join hands with the appellant's argument. However, the evidence on records shows that the loan was advanced by the Chairman of the Company to the respondent and it was PW1 that witnessed the same. Therefore, if the loan was a personal loan as stated by the PW1, authorised by the Chairperson, it is a personal loan between him and the respondent meaning that the company was not a part of it. However, from the nature of the case, it appears that it is the Company that claims to have borrowed the money to the respondent hence a board resolution in this circumstance cannot be avoided.

Moreover, what has been tendered in Court to show that there was a loan advanced to the respondent is exhibit P1 which is a petty cash voucher. The provisions of section 39 (1), (2), (3), (4) and (5) provides for execution of documents and under the Companies Act, a document has been defined to include summons, notice, order, and other legal process, and registers. Reverting to the circumstance at hand, what the Court has in record is a petty cash voucher of which I find that from the definition above, the same does not fall within the definition of document as referred to by the provision of Section 39. Hence the trial Court having ruled that exhibit P1 could not have been relied upon for t did not comply with the provisions of section 39, I find that the Court had mislead itself

since a petty cash voucher does not fall in the context of the definition of a document in the Companies Act.

As for the case of **Neema Joseph Gesasi vs Koli Finance Limited (supra),** the Court discussed the essence of a board resolution where a person was to act for the Company. This part will not detain me since it has already been addressed above that the appellant herein failed to prove the existence of the Contract between the appellant and the respondent. The evidence of PW1 in record reveals that the loan was a personal loan from Mr. Gulam who is the chairperson of the appellant to the respondent. Therefore, if he was acting in his personal capacity then the appellant has no claims against the respondent. If Mr. Gulam was acting for the Company, evidence to show that he was so acting was crucial. In conclusion therefore, the two grounds are also without merits.

Lastly is the 5th and 7th ground of appeal whereby the appellant finds the court to have failed to properly evaluate the evidence of the appellant and hold that the latter proved the case on balance of probabilities. Again, the Court failed in holding that the respondent was legally bound to pay the loan under the principle of money had and received. In this case the appellant claims against the respondent an amount of USD 85, 837.00 which is claimed to have been loaned to him by one Mr. Gulam the Chairman to the appellant. The respondent denies to have entered into such an agreement with Mr. Gulam to the sum of USD 85,837.00.

It was stated in evidence that the respondent had been visiting one Mr. Gulam seeking for a persona loan. Further that at some point an oral agreement was entered between the appellant and the respondent for a loan of USD 85, 837.000. All this was made through a petty cash voucher written by PW 1, a petty cash voucher in respect of the amount stated

above was tendered. However, as observed by the trial court, the petty cash voucher appears belongs to Mohamed Enterprises (T) Ltd which clearly shows that it is Mohammed Enterprises (T) Ltd that had loaned the money to the respondent. The respondent first disputed that the entity Mohammed Enterprises (T) Ltd does not exist and that he had no agreement with the said entity. The suit a subject of this appeal was initiated by a company named Mohammed Enterprises (Tanzania) Limited. In simple terms, there are three people in the testimony of the PW1 and the records, Mr. Gulamhussein, Mohammed Enterprises (T) Ltd and Mohammed Enterprises (Tanzania) Limited. It is unclear as to exactly who borrowed the money to the respondent. Since the onus of proof lies on the appellant, it cannot be said that he successfully discharged that duty. Failure of the appellant's witness to prove all these leaft the trial court with no choice other than making a finding that the appellant's witness failed to prove the case on the balance of probabilities. I find these two grounds to be also meritless.

Based on the above deliberation and findings, I find the appeal to be lacking in merits and it is therefore dismissed in its entirety. The respondent shall have his costs.

Dated at Dar es Salaam this 06th day of November, 2023.

THE HIGH COURT OF TANZANIA

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M. MAGHIMBI

JUDGE