IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC.LAND APPEAL No. 79 OF 2021

(Arising from the decision of the District Land and Housing Tribunal for Temeke in Land Application No. 315 of 2018)

JACKSON ELIA ULIMWENGU.....APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE.....1st RESPONDENT

BANI INVESTMENT LTD.....2nd RESPONDENT

JUDGMENT

23/02/2022& 17/05/2022

Masoud, J.

The appellant, Jackson Elia Ulimwengu, being aggrieved by the decision of the District Land and Housing Tribunal for Temeke (**The trial Tribunal**) in Land Application No. 315 of 2018, delivered on the 23rd March, 2021 decided to appeal before this court on the following reasons:

1. That, the trial chairperson erred in law and facts, for not making proper analysis of both testimonial and documentary evidence leading to denial of rights of the Appellant.

2. That, the Trial chairperson erred in law and facts for not observing the rules of procedure on admissibility of documentary evidence leading to injustice on part of the appellant.

On account of the above reasons, the appellant herein prays to this court to allow the appeal, quash and set aside the judgment and decree of the trial Tribunal in Land Application No.315 of 2018, grant an order for costs of this Appeal in his favor and any other relief (s) the court deems fit and just to grant.

This appeal was conducted by way of filing written submissions. While the appellant and the 1st respondent adhered to the schedule for filing the submissions, the 2nd respondent did not file his submission. It is a trite law that failure of a party to file his submissions on a date scheduled, is as good as a party's failure to appear in court when a matter comes for hearing. Therefore, the matter proceeded ex parte against the 2nd respondent. While the appellant was represented by Mr. Nickson Ludovick, Advocate, the respondent was represented by Ms Josephine Safiel, Advocate.

Submitting in support of the 1st ground of appeal, Mr. Ludovick submitted that, the trial chairperson when making his decision, he failed to make proper analysis of both testimonial and documentary evidence. The trial

Chairperson at page 10 of the impugned judgment had it that the appellant is pursuant to Exhibit D.1 indebted to the tune of Tsh. 119,137,657/=. Mr. Ludovick submitted that the weaknesses of such finding is that there is no evidence as to how the said debt increased to a total sum of 119,137,657/= while the loan amount was 65,000,000/-. Mr. Ludovick added that there were no explanations given as to accrual of interests, and penalties on one hand and the outstanding sum, and the principal sum on the other. It was thus in his view wrong for the Chairperson to assume that the appellant is indebted to the 1st respondent to the tune of the total sum of Tsh. 119,137,657/= as the origin of the alleged amount was not proved to the required standards.

To support his argument in relation to the first ground of appeal, Mr Ludovick relied on **Sections 110 and 111 of the Tanzania Evidence Act** Cap.6 R.E of 2019 (The Evidence Act), and **Tatu Mohamed vs. Maua Mohamed**, Civil Appeal No.31 of 2000 (unreported). In so doing, he argued that while the law requires one who alleges to prove his allegations, the total sum of Tsh. 119,137,657/= was not proved against the appellant.

Submitting on the second ground of appeal, Mr. Ludovick referred the court to sections 18(1), 18(2)(a), (b), (c), (d) and 18 (3)(a),(b) and (c) of the Electronic Transaction Act, No. 6 of 2015 (herein after **ETA**) and the case of **Serengeti Breweries Limited vs Break Point Out Door Caterers Limited Commercial Case** No. 132 of 2014 in relation to admissibility of electronic evidence. He then argued that since the Bank Statement (Exhibt D.1) is electronic evidence, it should not have been admitted unless there was an affidavit or certificate of its authenticity issued and filed on the record in the trial Tribunal. As there was no affidavit or certificate of authenticity of the Bank Statement (Exhibit D.1) on the record, it was wrong for the Chairperson to admit the said statement in the absence of the requisite authenticity certificate/affidavit.

Mr Ludovick told the court that objection on admissibility of Exhibit D1 was raised against the admission of the statement by the appellant's counsel. He went further to impress the court that the learned Chairperson engaged the parties off record on the objection. The learned Chairperson however subsequently continued to admit the said statement contrary to the requirements of the law and notwithstanding the objection. The learned counsel insisted that while the appellant's objection might not be on the record, the requirements of the law is clear that the

Bank Statement, as electronic evidence, should not have been admitted unless it was supported by authenticity certificate /affidavit which was not the case in the present instance.

In reply, Ms. Josephine submitted that, the first respondent disputes the arguments raised by the appellant's advocate. She was of the view that the respondent proved her case in accordance with to sections 110 and 111 of the Evidence Act (supra). She argued that the appellant is default of the loan amount as per the issues raised. It was therefore the appellant who in her view failed to prove that the bank owes him Tsh. 40,000,000/= only. Ms Josephine submitted further that the appellant also admitted that the loan amount must increase due to interest and penalties. Ms Josephine added that the appellant testified before the trial Tribunal that the interest of the loan amount he obtained from the 1st Respondent was 25 to 26% of the amount borrowed. And that his bank account was blocked due to the debt that he owes the 1st respondent.

Ms Josephine submitted further that it is true that, the burden of proving a particular act lies on the person who wishes the court to believe in its existence, unless it is provided by the law that the proof of the fact shall lie on any other person. Ms Josephine referred me to the case of

Affricariers Limited v Millenium Logistic Limited, Civil Appeal No.185 of 2018, CAT at Dar es Salaam (unreported) whereby the court cited with approval the case of **Anthony M. Massanga vs Penina (Mama Mgesi) & Lucia (Mama Anna),** Civil Appeal No.118 of 2014, where court held that;

> *" The plaintiff though claiming that she is entitled to unpaid purchase price for Eicher trucks there is no proof that there was any unpaid purchase price for the four trucks. There is shred of evidence to prove various claims made by the plaintiff. All her claims must fail."*

Ms Josephine disputed the allegation raised by the appellant's counsel that the total sum of Tsh. 119,137,657/= was not proved against the appellant (applicant in the trial Tribunal) as the appellant's counsel submitted that the amount claimed was not proved as to how it originated. Ms. Josephine maintained that the increase of the loan amount was due to penalty and interests which accrued from the outstanding loan amount. She insisted that the first respondent proved her case by tendering in evidence exhibit D-1. On the contrary, there was no evidence from the appellant, Ms Josephine argued, to prove otherwise.

As regard to the 2nd ground, Ms Josephine referred to section 79 of the Evidence Act (supra) which provides that;

> *79.-(1) A copy of any entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.*

She also referred to the provision of section 79 (2) of the Evidence Act, which reads thus:

> *(2) The proof under subsection (1) shall be given by person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner for oaths or a person authorized to take affidavits.*

The learned counsel for the appellant argued further that the provision of Section 79 (2) cited above answers in negation the claim by the appellant's advocate that, the act of the trial Chairperson to admit in evidence the bank statement as exhibit D-1 did not comply with the rules of admissibility which requires the filing of the affidavit before tendering the copy of an entry in a banker's book. In her view sub section (2) of Section 79 provides that the proof under Section 79 (1) may be given orally or by an affidavit, and that in the case at hand, the accuracy of the evidence tendered was verified orally by DW-1 Justine Patrick Butongwa, thus, its admission left no doubt.

When rejoining Mr. Ludovick reiterated what he submitted in his submission in chief and added that, it is not true that the appellant admitted to owe the 1st respondent the total sum of 40,000,000/= nor did he admit the interest of 25 to 26%. He added that the appellant never accepted the debt of 119,137,657/= nor the interest of 25 to 26% as per the proceedings and judgment which forms part of courts record and they sanctity records that are unimpeachable. To support his argument, he cited the case of **Alex Ndendya vs Republic** Criminal Appeal No.207 of 2018, where Mwambegela J.A, at p.12 last paragraph, held that;

> *"There is always a presumption that a court record accurately represents what happened."*

That the 1st respondent at page 2 of her submission stated that appellant admitted to be told by the bank (1st respondent) that he (the appellant) owed the 1st respondent Tsh.40,000,000/=, that this proposition shows clearly that the 1st respondent claims the total sum of Tsh. 40,000,000/= against the appellant and not the total sum of Tsh. 119,137,657/=

Having gone through the rival submissions, the main issue for determination is whether the appeal before the court is meritorious regard

being had to the two grounds of appeal which as a whole relate to the documentary evidence.

Going by the record, I am clear that sometimes in 2013 the appellant entered into a loan agreement with the 1st respondent. The loan collateral was the Appellant's house located at Kongowe within Temeke District in Dar es Salaam, with the CT No.122138, Plot No.6 Block D. The record reveals that the appellant borrowed the total sum of Tsh. 65,000,000/= which was charged at the interest rate of 25 to 26%. The appellant was supposed to repay the said loan in installments, for the period not exceeding 12 months. The appellant defaulted in repaying the loan within the prescribed time, as he only managed to pay some installments, henceforth, his bank account was blocked. And the respondents commenced the processes for selling up the mortgaged property.

The record reveals further that, the appellant did not dispute the fact that he is indebted to the 1st respondent but he disputed the amount of Tsh.119,137,657/= claimed by the 1st respondent, saying that the amount is too high and that there is no clear explanation or evidence as to how it increased to Tsh. 119,137,657/=. My perusal further left me in no doubt

that when the appellant was responding to the questions asked by the assessors, he admitted that the overdraft loan was charged at the interest rate of 25% to 26%. The exhibit D-1 (the Bank Statement) which was tendered by DW.1 is evident on how the overdue debt rose to Tsh.119,137,657/=by the time the suit was opened at the trial tribunal as a result of accrual of penalties and interests for the whole period of default.

I must also say that there was no record of evidence from the plaintiff as to how he repaid the loan. As such, the claim by the appellant is at best unsupported and misplaced. On the contrary, the first respondent managed to attach the bank statement, which was later during the trial proceedings tendered and admitted in evidence without objection as exhibit D-1. Indeed, exhibit D-1 explains the origin of the debt which the respondent claim. It is my findings that the appellant herein, who was the applicant before the trial Tribunal, failed to prove his case on the required standards of the law.

With regards to the 2nd ground, Mr. Ludovick submitted that, the bank statement was not supposed to be admitted in evidence as an exhibit

without first the person tendering it, filing in court the authenticity certificate/ affidavit. It was as earlier shown also argued that the appellant raised an objection against the admission of the exhibit, but the chairperson asked the parties to discuss the issue off records and later she admitted the said statement, despite the fact that the law does not allow such admission. And that, while the appellant's objection might not be on the record, the law would prevail that such statement should not have been admitted unless there was authenticity certificate/ affidavit filed on the record in respect of the statement. In reply, Ms Josephine said that the accuracy of the evidence tendered, that is the Bank Statement (i.e exhibit D-1), was verified orally by DW-1 Justine Patrick Butongwa. Therefore, there was no need to file the certificate or affidavit of authenticity of the said bank statement.

I am in agreement with Ms Josephine that the admission of the bank statement was supported by oral verification of DW-1 which certified its authenticity. The above position reinforced by the fact that the admission of the said statement was not objected in any way by the appellant. If I may add there was no cross-examination conducted in respect of the exhibit and outstanding amount. The submission in this appeal that there was off record conversation on the issue which saw the learned

Chairperson admitting the bank statement in contravention of the requisite rules is not supported by the record and hence an afterthought.

I am thus of the view that Mr. Ludovick's argument, regarding the requirement under Section 18 of TEA is, not relevant in the circumstances. The provision would apply if the appellant had issues with reliability and integrity of the document tendered (Bank Statement), which was not the case before the trial Tribunal. As already indicated, there was no cross-examination conducted in respect of the Bank Statement and the accrual of interests as is apparent in the very Bank Statement (Exhibit D.1). Although it is not indicated in the trial Tribunal's findings as to how DW1 assured the trial Tribunal on the authenticity of the Bank Statement (exhibit D-1), it is clear on the record that the appellant had a chance to object the admissibility of the exhibits D-1 but he opted not to do so.

As already pointed out, the appellant's allegation that he raised the objection against the admission of the statement and the Chairperson asked the parties to address the tribunal off record was not supported by the record of the proceedings. The question is whether the submission reflects what truly happened at the trial tribunal. On this question, it

needs to be understood that a court record is a serious document, which should not be lightly impeached. See **Alex Ndendya vs Republic** (supra). In so far as there is nothing on the record to substantiate the assertion that the Bank statement was objected as was argued in the submission, the appellant's submission through his learned counsel is in the circumstances a mere afterthought. Since there was no objection as to admission of the said statement, I think the trial tribunal was right in admitting the same.

In the upshot, the appeal is without merit. There is accordingly no basis of faulting the judgment and decree of the trial Tribunal. The appeal is as a result dismissed with costs. It is so ordered.

Dated at Dar es salaam this 17th day of May 2022.

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B. S. Masoud

Judge

THE HIGH COURT OF TANZANIA
LAND DIVISION