IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC CIVIL APPEAL No. 17 OF 2020

(Arising from Nyamagana District Court Civil Appeal No. 35 of 2019, originating from Mwanza Urban Primary Court in Civil Case No.228 of 2019)

BROWN MALIMA.....APPELLANT

VERSUS

PUNUNTA'S COMPANY LTD.....RESPONDENT

JUDGMENT

26th August, & 09th October, 2020.

J.C. TIGANGA, J.

Mr. Brown Malima, the appellant herein, having been dissatisfied with the decision of the District Court in Civil Appeal Case No. 35 of 2019 before Hon. Ryoba, RM dated 13th December, 2019, do hereby appeal to this Court advancing the following grounds of appeal as follows;

1) That the appellate District Court like the Primary Court erred both in law and in fact in awarding the respondent Tshs 13,750,000/= as interest charged daily at a rate of 15% contrary to not only the respondent's lending policy and procedure manual which requires interest to be charged on monthly basis at a rate of 4%, but also

against the Banking and Financial Institutions (Microfinance Activities) Regulations, 2004.

2) That the appellate District Court erred in law and fact in holding that the appellant consented to the document titled "Masharti na Utaratibu" while the said document in itself did not form part of the loan agreement and never known to the appellant and does not bear the signature of the appellant.
3) That the appellate District Court like the Trial Court erred both in law and in fact in relying upon the document titled "Masharti na Utaratibu" which was attested but the attesting officer was never called in to testify on it before the court.
4) That the appellate District Court abdicated its duty by failing to nullify the decision of the Trial Court after observing that the appellant was never issued with a sufficient written notice while it is a prerequisite condition in debts collection and recovery as per the Microfinance Act, 2018.
5) That as a whole the decision is against the evidence on record and the law applicable.

The appellant prays that this appeal be allowed, the decision of the District Court be set aside and costs be provided for.

Throughout this appeal, parties were represented by learned counsel, the Appellant, by Mr. Ally Zaid and the Respondent, by Mr. Baraka Dishon. It was ordered by this Court that the appeal be argued by way of written submissions and counsel filed their respective submissions timely and according to the schedule.

Submitting in support of the appeal, counsel for the appellant stated with regard to the first ground of appeal that, it was wrong for the appellate Court to award the claimed amount of tshs 13,750,000/= which sum was arrived at contrary to both the lending policy and procedure manual for the respondent and Regulation 66 of the Banking and Financial Institutions (Microfinance Activities) Regulations, 2014 [GN No. 298 of 2014]. The said regulation provides that, "the contract between an institution engaged in microfinance activities and the borrower shall state interest rate, commissions and fees, either on annual or monthly basis." Whereas the policy at page 8 item 4.3 states that "the interest rate for all loans is 4% per month"

It was further stated that even the appellate Magistrate in his judgment stated that "the court agreed with the appellant's counsel that 15% interest of the respondent is against his lending policy and procedure manual in which the respondent ought to have charged only 4% of interest" he stated therefore that the respondent's entitlement per month was 4% equivalent to 10,000/= and not 15% daily which is prohibited by the law.

Regarding ground two, counsel argued that the appellant never consented to the document titled "masharti na utaratibu" because the said document neither formed part of the loan agreement and it was never known to the appellant nor did it contain his signature. He submitted further that in the said document the respondent modified the interest rate contrary to the provisions of section 50(4) of the Microfinance Act, 2018 which states that, "any term or condition stipulated in a contract or any other relevant document purporting to grant a Microfinance service provider authority to unilaterally introduce

or modify interest rate or any other loan condition shall be null and void".

As for the third ground, the counsel argued that, it was also wrong for the appellate court to rely on the document titled "masharti na taratibu" because the said document he stated was attested but the attesting officer was not called to testify before the court. He contended that this is contrary to the provisions of section 70 of the Evidence Act requires an attested document to be proved by the attesting officer before it is used as evidence. He cited the case of **Asia Rashidi Mohamed versus Mgeni Seif,** civil appeal no. 128 0tf 2011, CAT (unreported). Also the fact that the attesting witness also approved the loan makes the document unreliable.

On the fourth ground of appeal, the counsel's complaint is the fact that the appellate court abdicated its duty by failing to nullify the decision of the trial court after it had observed that no notice was given to the appellant on default while that is a pre requisite condition in debts collection and recovery as per Microfinance Act, 2018. The same is provided for under section 51(2) of the Act. He further claimed that the respondent instead of attaching the appellant's properties i.e. TV and a Coach which were placed as security in case of default opted to go to the court and claimed arbitrary interest which is itself prohibited by the law.

Lastly, in the fifth ground, the counsel submitted that, it is the first four grounds of appeal collectively which give rise to the last ground that the whole of the impugned decision is against the evidence on record and the laws applicable.

Submitting in reply to the submission in chief, counsel for the respondent claimed that the applicant's grounds of appeal are baseless and misconceived. That the applicant entered into a loan agreement with the respondent and acquired a loan of Tshs 250,000/= which he was supposed to repay after one month. The appellant defaulted and so he contended that the decisions in both the trial and appellate courts were not erroneous as complained by the appellant. He cited sections 10, 13 and 14 both of the law of Contract Act stating that the appellant consented to the said agreement and that his consent was obtained freely. He submitted further that once a contract has been signed, then it cannot be denied by a party who signed it.

As regards to the document titled "masharti na utaratibu" the learned counsel sated that, the same formed part and parcel of the contract so the appellant cannot claim that he never consented to it since terms and conditions form part of a contract. To cement his arguments he cited the case of **Sluis Brothers (EA) Ltd versus Mathias & Taiwan** [1980] TLR 294.

He stated in conclusion that the court cannot in any way vary the terms of the contract and the appellant herein is duty bound to perform his obligations as per the contract.

Rejoining, the learned counsel for the appellant submitted that since the counsel for the respondent has failed to make any reply as to the issue of notice then it means that he admitted the same. He went on reiterating what he had submitted in chief that, it was illegal for the respondent to charge daily interest and that the same was to be charged monthly or annually as per regulation 66 of the Banking and

Financial Institutions (microfinance activities) Regulations. He further rejoined that the sum awarded by the trial and appellate District Court was erroneously awarded.

The counsel rejoined further that, the offer and acceptance was revealed in Form No.1 and 2 only and that the document titled "masharti na utaratibu" was never part of the loan agreement.

Going through the submissions from both parties, the contending part of this matter seems to be the loan agreement, while the appellant contends that the said agreement was signed without the portion titled "Masharti na Utaratibu" while the respondent said the same was there and the appellant entered into that contract while aware of the condition that, on default, the loan will be charged interest of 15% daily. That being the most contentious issue, both courts bellow also based on the said evidence in their decisions. That means the main evidence relied upon is the loan agreement signed by the parties.

The record shows that the said loan agreement was tendered and admitted by the trial Primary Court that is why it was based upon as conclusive evidence that the said loan was taken under the conditions stipulated under the loan agreement which was binding the parties.

However, when I passed through the proceedings I noticed one major irregularity in the tendering and admissions of all exhibits. From the proceedings, it is vividly clear that, the exhibits were tendered by the respondent during re-examination, which means it was after the respondent had finished testifying in chief and after he was cross examined by the appellant, as well as after being questioned by the court. This means, the appellant who was the defendant was not

accorded any right to cross examine on those exhibits as after the admission of the said exhibits, the respondent who was then the plaintiff, closed his case.

The procedure which provide for order and manner in which the evidence shall be recorded in Primary Court is provided under rule 45 of the of the Magistrates Courts, (Civil Procedure in Primary Court) Rules, G.N.310 of 1964 as amended by GN.119 of 1983 which provides that;

> *"(1) the evidence shall be given in such order as the court directs;*
>
> *Provided that, unless the court otherwise directs, the claimant shall first state his case* ***and produce the evidence in support of it*** *and the defendant shall then state his case* ***and produce the evidence in support of it.***
>
> *(2) At the conclusion of the evidence, the parties may, if they wish, address the court: the defendant first and then the claimant."* Emphasis added.

From this provision it was a procedure that the said documents in support of the claimant's case were supposed to be tendered during the testimony in chief. It was un-procedural to tender them after he has been cross examined by the appellant and examined by the Court. This trend is also seen when the appellant was tendering the 14 days Notice during his defence. That said, it is instructive to find that, exhibits, P1, P2, P3 and P4 as tendered by the respondent who was the plaintiff

before, as well as exhibit DEL are declared to be unprocedurally tendered and admitted, they are thus expunged from the records.

Now, having expunged the said exhibits, the issue remains to be whether the remaining evidence is capable of proving the claim of Tshs. 13,750,000/=? As I have already pointed out, the base of the decision of the trial Primary Court and appellate District Court was the loan agreement exhibit.P1. Without such evidence no way the respondent can be taken to have proved the claim.

The only claim which can be taken to be proved is the amount of Tshs. 250,000/= which was admitted by the appellant who was the defendant before the trial Primary Court. This is because according to the oral evidence, the appellant herein admit to have entered in a loan agreement with the respondent and took as a loan Tshs. 200,000/= which was supposed to be repaid in one month with the interest of Tshs. 50,000/= thus making the amount to be repaid to be Tshs. 250,000/=. Although the respondent through PW1, in his evidence claimed that the amount taken as a loan was Tshs. 250,000/= and that it was supposed to be paid without interests, I find the said evidence to be un reasonable and wanting of truth. I hold so because, according to him, the respondent was licensed for microfinance business and being, a business there is no way the company could have been doing it without profit. As we all know, the loaning business realizes its profit in the interest charged from the loan. It could not be expected for the respondent to have given a loan without interest. For that reasons, I find and agree with the appellant that the principal amount taken as a loan was Tshs. 200,000/= and the additional Tshs. 50,000/= was interest, thus making it Tsh. 250,000/=

It is also clear and undisputed fact that the loan taken by the appellant on 11th June, 2018, was supposed to be repaid after a month, which is on 11th July, 2018. It was one of contractual terms also that, in case of default, the respondent was entitled to sell the appellant's pledged property or bring the appellant to court.

The question that arises at this point is whether or not the lower courts were justified in awarding the respondent the above claimed sum. It is clear from the proceedings in the trial court that, the respondent arrived at the contested sum of money that is Tshs. 13,750,000/= after he had calculated 15% daily interest charges after the appellant had defaulted. The base of that calculation is that, that is according to one of the terms and conditions included in the loan agreement and was agreed/ consented to by the appellant by signing the said agreement. Now as the loan agreement was irregularly tendered and admitted, it was not proper for, and both lower courts were not justified to allow the claim as the claimant has failed to prove the claim in terms of regulation 1(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations G.Ns. Nos. 22 of 1964 and 66 of 1972, which provides that;

> *"1(2) Where a person makes a claim against another in a civil case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim."*

Even if we agree for the sake of argument, that the contract was properly admitted and it is good evidence, nevertheless, the computation of interest is against the law, that is, regulation 66 of GN

No.298, which provides that, the institutions involving in microfinance activities must state *inter alia*, interest rate either on **monthly** or **annual** bases. More over section 50(4) of the Microfinance Act of 2018 nullifies any loan conditions purporting to grant any microfinance service provider authority to modify interest rate.

It follows therefore that the act of the respondent herein to change the interest rate from 4% monthly as stipulated in its loan policy to 15% daily, was, as rightly argued by the counsel for the appellant, not only against the said policy but also contrary to the governing laws thus making the purported term invalid which consequently invalidates the whole agreement.

Moreover, the respondent first right after the default of the appellant, was to proceed against the pledged security which according to the parties were a TV and a coach, however, he opted not to sell the said security and instead started charging the 15% interest daily, which is contrary to laws. From that conduct, one would be justified to think that, it was a calculated move wanted the interest to accumulate into the sum, he is now claiming before he decided to take the appellant to court. It may also not be taken to be wrong, for one to think that the respondent did it purposely with a view to gaining a higher profit than what he actually deserves. The respondent therefore cannot pursue legal remedy which arises out of his own illegal act (*ex turpi causa non oritur actio*).

Now, since it has been proved that, the appellant he obtained loan from the respondent, which was supposed to be repaid, in one month at the tune of (Tshs 250,000/=) principal amount plus interest which is

inclusive. The respondent is actually entitled to be paid back Tshs 250,000/=. Any other extra amount claimed needs to be proved and has not been proved by evidence. It is so decided because the primary rights for the respondent was to proceed on time against the security and realize what was entitled as to per contract.

Having said as above, I allow the appeal for extent explained herein above. The decision of the District Court is quashed, and so to that of the Primary Court as the respondent who had the duty to prove his claim. The respondent pay cost to the appellant.

It is accordingly ordered

DATED at **MWANZA** this 09th day of October, 2020

J. C. Tiganga

Judge

09/10/2020

Ruling delivered in open chambers in the presence of the appellant and the absence of the respondent.

J. C. Tiganga

Judge

09/10/2020