

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

PC CIVIL APPEAL NO. 20 OF 2022

(C/f the District Court of Arusha, Civil Appeal No. 72 of 2020, Originating from Arusha Urban Primary Court in Civil Case No. 235 of 2020)

CHARLES ISAYA APPELLANT

Versus

NAOMI LAMECK KIPUYO RESPONDENT

JUDGMENT

31st August & 21st October 2022

Masara, J.

This is an attempt by the Appellant herein to challenge the decisions of the District Court of Arusha (hereinafter "the first appellate court") made in Civil Appeal No. 72 of 2020. The first appellate court confirmed the decision made by the Arusha Urban Primary Court (hereinafter "the trial court") in Civil Case No. 235 of 2020. Both decisions were against the Appellant. In both decisions, the Appellant was ordered to pay the Respondent TZS 7,150,000/= being the principal amount and TZS 500,000/= as compensation. The first appellate court also ordered the Appellant to pay costs. The Appellant was dissatisfied and has preferred this appeal on the following grounds:

- a) That the first appellate court erred in law and in fact by upholding the decision of the trial court by ordering the Appellant herein to*

- pay as individual while the Respondent's loan was directed to the members of the SACCOS;*
- b) That the first appellate court erred in law and fact by upholding the decision of the trial court by ordering the Appellant to pay the gross amount while the Respondent is not a financial institution;*
- c) That the first appellate court erred in law and in fact by upholding the decision of the trial court which did not consider the evidence adduced by the Appellant; and*
- d) That the first appellate court erred in law and fact by upholding the decision of the trial court while the trial magistrate did not evaluate the evidence adduced by the Appellant.*

Thus, the Appellant prays that the decisions of both lower courts be quashed and set aside. At the hearing of the appeal, the Appellant appeared in Court in person, while the Respondent was represented by Ms Martha H. Lyimo, learned advocate from Arusha Women Legal Aid and Human Rights Organization. Hearing proceeded by way of written submissions.

Before dealing with the grounds of appeal and the submissions thereof, I find it apt to encapsulate brief facts leading to this appeal as gathered from the evidence. In 2008, parties herein, together with other members, established a cooperative society known as KIMANDOLU UTU FAMILY SACCOS ("the SACCOS"). The Appellant was the manager of the SACCOS

whereas the Respondent was a member. On diverse dates of August 2014, the Respondent issued a private loan to the Appellant, which accrued to TZS 8,030,000/=. According to the Respondent (the plaintiff in the trial court), the loan was advanced to the Appellant personally, not to the SACCOS.

The evidence adduced by the Respondent and her witnesses in the trial court showed that the first instalment was advanced by the Respondent personally to the Appellant on 01/08/2014, when the Appellant admitted to have borrowed TZS 1,000,000/= from the Respondent which he would repay with an interest of TZS 150,000/= on 01/09/2014. The same was witnessed by exhibit "A". Lulungeni Lameck (SM2), testified that on 08/08/2014 and 23/08/2014 she gave TZS 2,000,000/= on instructions from her mother, the Respondent herein. The transactions were evidenced by exhibit "A1". Thedy Mushi (SM3), witnessed when the Respondent was giving the money to the Appellant, although she did recall the exact amount. Lonana Lameck (SM4), testified that on 11/08/2014 and 13/08/2014, he gave TZS 2,000,000/= (TZS 1,000,000/= on each date) to the Appellant and on 21/10/2014, he gave him TZS 2,000,000/= on instructions of the Respondent. The transactions were acknowledged by exhibit "A2". According to the evidence on record, the

loan was to be repaid with interest as agreed between the Appellant and Respondent.

On his part, the Appellant testified that the Respondent was a member to the SACCOS. That the Respondent was advancing loans on interest, but the Appellant summoned him and warned him leading to the Respondent's voluntary resignation from the SACCOS. After ceasing to be a member, the Respondent was refunded all her dues. That to begin with, the Appellant was approached by the Respondent who asked him to witness when she will be giving loans to people with interest. He witnessed the Respondent lending money to Mary Petro, TZS 1,000,000/=; Irene, TZS 1,000,000/=; Martha, TZS 1,000,000/=; another person whose name was not disclosed, TZS 1,000,000/= and, lastly, Mariam, TZS 1,000,000/=.

According to the Appellant, three people among those who were given money, repaid. The Appellant's warning letters and the Respondent's resignation letter were admitted as exhibit D1. Repayment of the Respondent's savings, deposits and training fees were admitted as exhibit D2. Document showing repayment of the Appellant's loan to the Respondent was admitted as exhibit D3. The Appellant insisted that he was sued as the manager of the SACCOS and not in his personal capacity.

On the basis of the evidence adduced, the trial court in its decision dated 13/11/2020 decided that TZS 7,150,000/= was proved, out of the entire claim. The rest of the claimed amount was found to be interest which the Respondent had no justification to claim, since she was not a financial institution capable of lending money on interest. The trial court also ordered the Appellant to pay the Respondent compensation to the tune of TZS 500,000/=. As earlier stated, the Appellant appealed that decision to the first appellate court. The first appellate court, after re-evaluating the evidence, it agreed with the findings of the trial court. The appeal was dismissed with costs, hence this appeal.

Submitting in support of the first ground of appeal, the Appellant contended that the first appellate court erred in ordering payment of TZS 7,650,000/= to him personally while the Respondent's loan was directed to the members of the SACCOS, whose manager was the Appellant. He asserted that after being dully registered in terms of section 35(1) of the Cooperative Societies Act, 2013, the SACCOS acquired powers to sue or be sued. Hence the Respondent ought to have sued the SACCOS, not him.

On the second ground of appeal, the Appellant sought to impugn the first appellate court's decision which ordered him to pay TZS 500,000/= while the Respondent was not a financial institution. He surmised that there

was no evidence to support such compensation. That, even in the pleadings there was no such prayer.

Clarifying the third ground of appeal, the Appellant asserted that it was an error to award the whole amount without satisfying itself on existence of a valid agreement. He maintained that his evidence on TZS 3,600,000/= that the SACCOS paid to the Respondent through exhibits D1, D2 and D3 was not considered. According to the Appellant, the repaid amount was part of the loan that the Appellant witnessed being advanced to other persons known to the Respondent. He referred this Court to the Court of Appeal decision in **Nurdin Iddi Ndemule vs Republic, Criminal Appeal No. 410 of 2018** (unreported), which warrants the second appellate Court to re-evaluate the evidence on certain circumstances.

Regarding the last ground of appeal, the Appellant faulted the trial court for admitting documents purported to be the loan agreement which were not stamped as per section 47 of the Stamp Duty Act, Cap. 189 [R.E 2019]. To bolster his argument the Appellant sought reliance on the case of **Josephat L. K Lugaimukamu vs Father Kanute J. Mzuwanda [1986] TLR 69**. The Appellant insisted that the claim as reflected in the pleading was against the SACCOS and that what was determined by the

trial court ensued from the court's own invented story. In furtherance of his submission, the Appellant contended that failure to evaluate the evidence by the trial court led to awarding amount higher than what had been pleaded by the Respondent. He prayed that the appeal be allowed with costs.

Ms Lyimo vigorously opposed the appeal contending that the loan was issued to the Appellant in his personal capacity and not as the manager of the SACCOS. She fortified that there was documentary evidence between the Appellant and Respondent in which the Appellant confined himself to repay the loan in his personal capacity. She also referred to the names of the parties at the trial court, which clearly showed that it was the Respondent against the Appellant.

Submitting in response to the second ground of appeal, Ms Lyimo stated that the TZS 500,000/= awarded to the Respondent was not an interest on the loan, but compensation considering that the Respondent's money had been in the Appellant's possession for more than six years. She admitted that the Respondent is not a financial institution but since the money could have generated profit, the Respondent deserved it.

Ms Lyimo countered the third and fourth grounds of appeal collectively. She submitted that the lower courts considered and subjected the

evidence on evaluation. She maintained that exhibits D1, D2 and D3 tendered by the Appellant are irrelevant in this case, referring to Rule 9(1) and (2) of the Primary Court Evidence Rules, 1964, which require documentary evidence to be connected by oral evidence. Regarding tendering of unstamped agreement, Ms Lyimo submitted that the said documents were not contracts as they were not reflected in the trial court proceedings. She maintained that there was no written agreement between the parties herein; hence, in her view, the case of **Joseph L. K. Lugaimukamu** (supra) is distinguishable. According her, the trial court assessed the credibility of the witnesses and evidence on record and arrived at a conclusion that the Respondent's evidence was more credible. As a result, the Respondent proved her case on the required standard, she contended. She urged the Court to dismiss the appeal with costs.

Having considered the grounds of appeal, the records of the trial and first appellate courts as well as the submissions by the Appellant and that of the learned advocate for the Respondent, the issue for determination is whether the appeal before me has merit.

In the first ground of appeal, the Appellant faults the decision of the first appellate court for upholding the decision of the trial court while the loan was issued to the SACCOS. On her part, Ms Lyimo was in support of the

decisions of the lower courts stating that the SACCOS could not pay since the loan was advanced to the Appellant personally. I have considered records of both the trial court and that of the first appellate court. Notably, in the plaint filed at the trial court the Respondent sued the Appellant in his personal capacity. Her cause of action against the Appellant read as follows:

"Mnamo mwaka 2008 tuliunda SACCOS iitwayo Kimandolu Utu Family kwa ajili ya kuweka na kukopeshana. Mwaka 2014 mdaiwa akiwa meneja wa saccos hiyo akasema yeyote mwenye fedha azilete kwa ajili ya kufanyia kazi. Mimi mdai nikapeleka jumla ya Tsh. 8,030,000/= kwa mdaiwa. Matokeo yake, mdaiwa hajanipa fedha zangu hivyo naomba anilipe jumla ya Tsh. 8, 030,000/=."

The above prescripts precisely entail that the money was entrusted to the Appellant as capital. Since the capital would be invested by the Respondent either in the SACCOS or elsewhere, the SACCOS cannot be condemned for personal actions of the Appellant. In other words, the Appellant was just custodian of the funds that members saved in the SACCOS but not the funds given to him in his personal capacity for investment.

Another evidence supporting the Respondent's version that the loan was advanced to the Appellant in his personal capacity is from the evidences

of SM2, SM3 and SM4. SM1 testified at length that she advanced TZS 1,150,000/= to the Appellant. Her evidence was supported by exhibit "A", which was signed by the Appellant acknowledging receipt of TZS 1,000,000/= from the Respondent which he would repay with an interest of TZS 150,000/= on 01/09/2014. While she was handing the money to the Appellant, SM3 was present.

PW2 testified that she gave TZS 2,000,000/= to the Appellant on 08/08/2014 and 23/08/2014. He added that the loan would be refunded with interest of TZS 150,000/= for each 1,000,000/=. Hence the principal amount plus interest would be TZS 2,300,000/=. The Appellant prepared and signed exhibit "A1" acknowledging receipt of that amount. Likewise, SM4 was sent by the Respondent to the Appellant on diverse dates whereby she handed over the money to him. SM4 stated that she gave him a total of TZS 4,000,000/=. The record shows that the Appellant acknowledged receipt of that amount by signing exhibit "A2". According to the evidence of the Respondent's witnesses, the loan was extended to the Appellant. Exhibits A, A1 and A2 clearly show that they were signed by the Appellant who committed himself to refund the loan with interest. The contention that the loan was advanced to the SACCOS is without proof. The evidence adduced and the exhibits tendered support the

assertion that the loan was advanced to the Appellant in his personal capacity. This justifies the decisions of both lower courts. The first ground of appeal is thus found to be devoid of merits.

In the second ground of appeal, the Appellant faults the decision of the lower courts for awarding compensation to the Respondent. Correctly as pointed out by counsel for the Respondent, and as found by the lower courts, the TZS 500,000/= awarded to the Appellant was compensation. The trial magistrate while awarding the amount, considered that the money has been in the Appellant's possession for more than six years. That, during that time, it must have generated some profit had it been invested by the Respondent. She also considered that the value of money depreciates, hence it would not be in the same status after all those six years. Those reasons, in my considered view, justified awarding compensation to the Respondent.

Incidentally, the loan was advanced to the Appellant with an aim of being refunded after a month from each day the loan was issued. Further, the loan was issued on an interest basis, which the trial court denied. In the circumstances, payment of compensation was justified. That said, the second ground is also wanting on merits.

The third and fourth grounds of appeal are interrelated as they revolve around evaluation of evidence. At the outset, this Court will not re-evaluate the evidence because evaluation of evidence is in the domain of the trial court and or the first appellate court. The trial court is the one that is best suited to determine credibility of witnesses. Second, as a matter of principle, the second appellate court will only re-evaluate evidence where it is proved that there was a misapprehension of evidence by mis-direction or non-direction or when it is clearly shown that there has been a miscarriage of justice or violation of some principles of law or procedure. See the case of **Edwin Isdori Elias vs Serikali ya Mapinduzi Zanzibar [2004] TLR 297**. In the appeal under consideration, there is no apparent misapprehension, misdirection or non-direction encapsulated by the Appellant. The records show that the trial court evaluated the evidence of both parties. The first appellate court, as well, re-evaluated the evidence and confirmed the findings of the trial court.

Having scanned the record, I am satisfied that both lower courts properly evaluated the evidence and the decision arrived at was appropriate. The Appellant challenged the trial court's decision for admitting exhibits A, A1 and A2, while they were not stamped as per section 47 of the Stamp Duty

Act. In my considered view, exhibits A, A1 and A2 do not amount to agreements as they are one sided. They are only acknowledgment notes. It is only the Appellant's acknowledgment that he received a loan from the Respondent and that he would repay the same within a specific period of time. Again, as correctly pointed out by Ms Lyimo, the said documents were not objected on that basis. The contention raised in this appeal appears to be an afterthought. That said, the third and fourth grounds of appeal are also dismissed for being devoid of merits.

From the foregoing, the Respondent discharged her duty of proving the case on the balance of probability as required by law. The amount of TZS 7,150,000/= awarded to the Respondent as the principal sum and TZS 500,000/= awarded as compensation, are justified.

From the foregoing, the appeal has no legs to stand on. It is dismissed in its entirety with costs to the Respondent. The decisions of both the trial court as well as that of the first appellate court are hereby upheld.



Y. B. Masara
Y. B. Masara

JUDGE

21st October 2022