

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CIVIL REVISION NO.2 OF 2020

PILI AMAN..... APPLICANT

VERSUS

EMMANUEL NZENGO..... RESPONDENT

(From Ruling of Kahama District Court)

(E. N. Kyaruzi; PRM)

Dated 9th day of October, 2020

in

Civil Revision No. 1 of 2020

RULING

26th November, 2020 & 21st January, 2021.

Mdemu, J.;

This revision is a result of complaints lodged orally by the Applicant regarding her dissatisfaction on the manner civil case No.6 of 2019 got handled in the Primary Court of Kilago and the subsequent execution by the District Court of Kahama leading to her being detained as a civil prisoner. Following that complaint, and guided by the supervisory role of this court, the District Court of Kahama was directed to call the record of the Primary Court of Kilago, revise and forward the file to this court. The District Court

of Kahama (Kyaruzi-PRM) duly complied, hence the instant revision proceedings.

Briefly, the Applicant (SU1) on 15th of February, 2017 acquired a loan facility of Tshs. 6,600,000/= from the Respondent (SM1). Before she settled the said loan, the Respondent advanced her another loan of Tshs. 390,000/= on 19th of October, 2017. The loan agreement got witnessed by one Daudi Joseph (SM2). As the Applicant defaulted to service the loan, the Respondent referred his claim to Kilago Primary Court on 21st of May, 2019 which ruled in his favour on 30th of July, 2019. The Applicant was ordered by the court to pay the loan by 30th of December, 2019.

On that account, the matter was referred to the District Court of Kahama for execution. On 6th of April, 2020, the Applicant Judgment debtor committed herself to pay the said loan in three installments. As this was not complied, the court, on application of the Respondent decree holder, committed the Applicant a civil prisoner on 9th of July, 2020

In this revision proceedings, parties appeared before me in persons on 26th of November, 2020 for hearing of this revision. The Applicant, in her submissions denied to have received a loan of Tshs.6,900,000/= from the Respondent but only Tshs.300,000/= with 100% interest. She was thus

required to pay Tshs.600,000/=. She submitted further that, she paid Tshs.390,000/= but was unable to settle the remaining balance of Tshs.210,000/=. It is at this point, according to the Applicant, the Respondent brought another loan agreement of Tshs.6,900,000/=, the subject of this suit which at first, she refused to sign. Later, in order to preserve reputation of the school, she was advised by his heard teacher (SM2) to sign. She then signed.

On the post part payment of the loan; she said to have done so because of being detained as a civil prisoner. On his part, The Respondent submitted to have been approached by the Applicant for the loan facility and he advanced her Tshs.6,600,000/= and later, on further request, the Applicant was advanced another loan of Tshs.390,000. He further submitted that, the Applicant denied to have secured a loan facility amounting to Tshs.6,900,000/ but only 600,000/= and that, she objected admission of loan agreements in court.

According to the Respondent, the Applicant secured the said loan facility which got witnessed by one Daudi Joseph who testified as SM2. He thus concluded that, the trial Primary Court correctly declared him victorious as per the evidence on record. As to interests chargeable to the principal sum,

the Respondent submitted that, he did not charge any interest on the amount of loan.

Going by the record and on what parties submitted, it is not disputed that the Applicant secured a loan facility from the Respondent and that, following failure to service the loan facility in full, the Respondent referred the matter to court. What is at dispute is the amount of loan secured by the Applicant. In this, there are two versions. The Applicant reported in her evidence to have received Tshs.600,000/= and the rest is an interest charged to the principal sum. The Respondent, on the other hand, declared to have advanced the Applicant a loan amounting to Tshs.6,900,000/= in two instalments of Tshs.6,600,000/= and 390,000/= for the first and second instalments respectively.

What therefore comes to question is whether the Respondent proved to have advanced the Applicant Tshs.6,900,000/= in the alleged two installments. In the revision order, the learned Principal Resident Magistrate did not determine rights of the parties in two fold; **one**, that the trial Magistrate did not involve assessors in his findings thus violating the provisions of **section 7(1)** of the **Magistrate's Court Act, Cap.11** and

two, that the two purported loan agreements did not form part of the record for want of endorsement.

I should comment on one thing before I resolve the raised issue. **One**, is in respect of submissions of the parties regarding evidence. The Applicant stated to have objected to sign the two agreements and did so on advice of his head teacher (SM2) for the sake of school's and Applicant's reputation. In other words, the Applicant pleads to have signed those documents without her free will thus vitiating the contract. **Two**, the Respondent submitted that, the Applicant objected admissibility of the documents at trial. The two notwithstanding, do not form part of the record. However, in the latter, much as the record is silent, it is well on record that, the Applicant denied the loan as contained in the two documents. Impliedly, she objected the documents.

If that is the case, which I think it is, failure to endorse documents in the circumstances of this case at the trial Primary Court is a curable irregularity. As to involvement of assessors in the two documents, the record is quite clear that, the two assessors appended their signatures in the proceedings after the two documents got admitted and they further signed

in the judgment that declared victory to the Respondent. In my humble view, this is evident on their involvement in the findings of the trial primary court.

Now to the raised question on proof of the claim. The legal position is in Rule 1(2) of the **Magistrates' Courts (Rules of Evidence in Primary Court) Regulations, GN No.22 of 1964** which states:

"Where a person makes a claim against another in 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."

In the instant revision, the Respondent Emmanuel Nzengo made a claim such that, he advanced a loan of Tshs.6,900,000/= to the Applicant Pili Aman. As stated above, the Applicant admits to have taken the loan to the tune of Tshs.600,000/= and not Tshs.6,900,000/= stated in the claim and also as per the evidence of SM1 and SM2. That means, the Applicant denied the alleged claim thus giving duty to the Claimant Respondent to prove the claim. Was that duty discharged? The answer may not be in the affirmative on the following reasons:

One, in the evidence of SM1, the Respondent, it is stated that, along with SM2, there are other witnesses who witnessed the signing of the loan agreement. At page 4 of the typed proceedings, SM1 testified that:

*"...wakati tunapeana pesa hizo, zote tuliandikishana mbele ya Mwalimu Mkuu wake na **mashahidi walikuwepo**"(emphasis mine)*

To the conclusion of trial, no such witnesses got summoned by the Respondent. SM2 who is alleged to have witnessed the agreement was the supervisor of the Applicant and was just met at the school where the Applicant was working. It was therefore relevant for those witnesses other than SM2 to be called in evidence. **Two**, SM1 and SM2 differs materially regarding the mode of payment of the loan. Whereas SM1 stated that the Applicant was to pay the first loan on 30th of October, 2017; SM2 his was that, the Applicant had to pay the loan gradually on different instalments without specifying when the said loan be serviced in full. For clarity, I reproduce part of their testimony as hereunder: At page 4, SM1 testified:

Makubaliano yalikuwa kwanza hili deni la kwanza alilipe tarehe 30/10/2017

On his part at page 6 of the typed proceedings, SM2 testified:

Makubaliano yalikuwa ni kuwa mdaiwa atakuwa analipa kidogokidogo hadi deni litakapokwisha.

Three, SM1 and SM2 testified different accounts regarding the manner the loan got secured. SM1 testified that, the Applicant secured two loans. That is of Tshs.6,600,000/= and another of Tshs.390,000/=. SM2 on his part simply jumped to the total loan. He did not state on the two loans and even when the two entered in an agreement. **Four**, much as the Respondent is not a financial institution permitted to advance loan on interest, yet he could have been specific if no interest was chargeable to the term loan. I am saying so because in her evidence, the Applicant stated to have secured a term loan of Tshs.600,000/= and the remaining unpaid loan forming contents of the claim is just interest.


The conclusion I am making here is that, the Respondent at the trial tribunal did not prove the claim as required. While this remain the factual situation, the legal position under the circumstances is stated in the provisions of **Rule 6 the Magistrates' Courts (Rules of Evidence in Primary Court) Regulations, GN No.22 of 1964 that:**

"In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it

decides the case in its favour, but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other."

In this, the Applicant, apart from denying the claim, she advanced an untenable position that, the Respondent charged interest in the loan. The Respondent did not cross examine the Applicant in this important fact forming component of the term loan. That sums up to one thing that, the Applicant managed to establish that she secured a loan facility of Tshs.600,000/= and nothing more. It is to say, in terms of the Rules as quoted above, the evidence of the Applicant at the trial tribunal is accorded more weight compared to that of the Respondent.

Having said so, and since the Applicant does not dispute the loan save for the amount; and since while committed as a civil prisoner, the Applicant has paid substantial part to service the loan in full, it is ordered that, this application herein is allowed. The decision of both courts below are hereby quashed and set aside. Each party to bear own costs of the application, it is so ordered.


Gerson J. Mdemu
JUDGE
21/01/2021

DATED at **SHINYANGA** this 21st day of January, 2021.



Gerson J. Mdemu
JUDGE
21/01/2021