

**IN THE HIGH COURT OF TANZANIA  
(IN THE DISTRICT REGISTRY)  
AT MWANZA**

**(PC) CIVIL APPEAL NO. 19 OF 2021**

*(Arising from Ilemela District Court in Civil Appeal No. 10 of 2020, Original Ilemela Primary Court in Civil Case No 47 of 2020)*

**MARIAM OTHMAN MATEKELE -----APPLICANT**

**VERSUS**

**NYACHERI JOSEPH MWANGWA----- RESPONDENT**

**JUDGMENT**

*21.09.2021 & 29.09.2021*

**M. MNYUKWA, J.**

Dissatisfied by the decision of the District Court of Ilemela dated 21/12/2020 which decided in favour of the respondent one Nyacheri Joseph Mwangwa, the appellant Mariam Othman Matekele have appealed to this Court and registered the following grounds of appeal on his own verbatim as follows: -

- 1. That the Honourable learned Magistrate erred in law and fact for quashing the proceedings and judgement of the lower court without ordering re-trial.*



- 2. That the Honourable learned Magistrate erred in law and fact for holding that the evidence of the witness of the appellant was irrelevant as she was not a witness to a contract.*
- 3. That the Honourable learned Magistrate erred in Law and fact for failure to evaluate properly the evidence adduced by the appellant at the lower court.*

The brief background of the matter is as follows: -

That the respondent instituted Civil Case No 47 of 2020 at Ilemela Primary Court claiming for recovery of debts worth Tsh 11,000,000/=. The respondent alleged that he owes the appellant the said amount being the money which was advanced to her as a loan on 02/05/2017. The appellant argued that she had already paid to the respondent Tsh 6,500,000/= and what remained was Tsh 4,500,000/=. The trial Primary Court decided in favour of the appellant and ordered the appellant to pay the respondent him Tsh 4, 500,000/=. Aggrieved by the decision of the trial court, the respondent successfully filed an appeal at Ilemela District Court in Civil Appeal No 10 of 2020 in which the decision was given in his favour after quashing the proceedings and judgement of the trial court. Unsatisfied with the decision of Ilemela District Court, the appellant filed the present appeal.



Hearing of this appeal was ordered to be argued by way of written submissions. I thank both parties for complying with the order of the Court.

On the first ground of appeal the appellant submitted that, it is trite law that once the court has quashed the proceedings and judgement of the trial court, it means nothing ever existed at the lower court or trial court. The appellant went on that if the first appellate court had taken such a move of quashing the entire proceedings and judgement of the trial court, the proper order was re-trial and not otherwise. She supported her argument with the case of **Village Chairman K.C.U Mateka vs Antony Hyero** (1988) TLR 188 where it was held that "*the effect of quashing court proceedings is to put the parties in the same position as if there had been never been any proceedings instituted.*"

The appellant insisted that if the appellate court quashed the proceedings, it means the proceedings are nullity and nullity mean void ab initio. She went on to state that it was illogical for the appellate court to order payment of Tsh 11,000,000/= from non-existed proceedings. Thus, if the first appellate court quashed the proceedings and judgement, it was proper to order re-trial.

On the second ground, the appellant faulted the first appellate court's findings for holding that the testimony of the appellant's witness

was irrelevant for the reasons that she did not witness the contract. It is her submission that the appellant had the witness who was present during the signing of loan facility contract but the said witness was not present during the payment of Tsh 6,500,000/=. She went on that the one who was present was Salma Ndende as an eye witness who witnessed the payment between the parties. The appellant insisted that, the contract did not provide for the mandatory requirement to make payment in the presence of the parties' witnesses. Therefore, it was wrong for the first appellate court to declare the testimony of Salma Ndende who is an eye witness irrelevant.

Therefore, it is the submission of the appellant that she had proved the case on the balance of probability before the trial court because the respondent failed to call material witness Ester Alexander who is the wife of the respondent. She bolsters her argument by citing the case of **Hemedi Said vs Mohamed Mbilu** (1984) TLR 113.

On the third ground, the appellant submitted that the first appellate court did not consider and analyse the evidence tendered by the appellant and her witness. She avers that the appellant before the trial court testified that she paid the respondent Tsh 6,500,000/= as an advance payment in the presence of Salma Ndende who was invited by the appellant to witness the transaction. Therefore, it was wrong for the first



appellate court to disregard the evidence of Salma Ndende for a reason that she was not a witness to a contract while the standard of proof in civil cases is on the balance of probability.

The appellant concluded by praying this appeal to be allowed with costs, the judgement of Ilemela District Court be set aside for being nullity and uphold the judgement of the trial court.

Responding on the first ground of appeal, the respondent avers that, re-trial should be ordered as a final choice due to illegalities and defects on the original trial. He submitted that there is nowhere in the present case which shows that the proceedings of the trial court were tainted with illegalities and defects than negligence of the appellant for not calling the necessary witness to testify her claim. He supported his argument by referring the case of **Fatehali Manji vs R** (1966) EA 343. He insisted that since there was no irregularity or procedurally impropriety which has occasioned failure of justice there is no need to punish the litigants by ordering re-trial.

On the second ground the respondent submitted that the purported contract was in written form, thus all transactions upon the said agreement must be made with support of documentary evidence. He supports his argument by referred to section 63 and 64(1) of the Law of Evidence Act, Cap 6 R.E 2019. He went on to submit that the allegation



by the appellant that she furnished party payment of Tsh 6,500,000/= to the respondent were not proved because there was no relevant evidence tendered to support the claims apart from verbal averments supported by a witness who never witnessed the loan agreement.

He insisted that the said witness was not a witness to the contract but a mere passer-by, therefore the first appellate court was right to disregard her evidence. He insisted that it is trite law that a contract cannot impose any obligation to any person who was not party to it. He strengthens his argument by referring to the landmark decision of **Tweddle vs Atkinson** (1861) EA 762.

On the third ground the respondent submitted that the first appellate court evaluated properly the evidence adduced by both parties hence arrived at a fair decision. He went on to subscribe the decision of the case of **Hemedi Saidi** (supra) that where for undisclosed reasons a party fails to call a material witness on his side the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party's interest. He insisted that since the appellant was required to prove performance of her contractual obligation on her side it was therefore necessary for her to call the material witnesses to testify the same. He concluded by praying the appeal be dismissed with costs.



Re-joining, the appellant submitted that section 63 and 64(1) of the law of Evidence Act, Cap 6 R.E. 2019 referred by the respondent are not applicable on matter originating from the primary court. She went on to submit that the law allows other type of evidence including direct evidence. Therefore, PW2 was not a passer-by as alleged by the respondent because she was present at the time when the appellant was effecting payment to the respondent.

She went on to submit that since the said contract did not impose the mandatory conditions that payment should be made in the presence of the witnesses who witnessed the contract, the doctrine of privity to contract does not apply, therefore it was improper for the first appellate court to disregard the evidence of PW2. She went on to submit that the case of **Fatel Manji** (*supra*) cited by the respondent is distinguishable with our case at present because the main concern is on the effect of quashing the court proceedings and judgement since that means that the proceedings are nullity which means void ab initio. He finally prays the Court to allow the appeal with costs.

After considering the submissions of the parties, the following are the main issue for consideration and determination: -



- 1. Whether the first appellate court was required to order re trial after quashing the proceedings and set aside the order of the trial court.*
- 2. Whether the first appellate court was proper to hold that the evidence of the appellant's witness was not credible.*
- 3. Whether the first appellate court failed to evaluate the evidence adduced before the trial court.*

After a thorough analysis of the memorandum of appeal, evidence on record, the judgement of the District Court and the submissions made by the parties, I would like to put it clear that the law is settled that the one who alleges must prove his allegation and the standard of proof in civil case is on the balance of probability.

In the present appeal, it is a complaint of appellant in ground one of appeal which will answer the first issue framed by this court that the first appellate court was astray to quash the proceedings and set aside the judgement of the trial court without ordering re-trial.

It is the argument of the appellant that once a court has quashed the proceedings and judgement of the trial court it means nothing ever existed at the lower or trial court. The appellant contended that after the first appellate court quashed the proceedings and the judgement of the trial court it was supposed to order re-trial. She supported her argument



by referring the case of **Village Chairman K.C.U Mateka vs Antony Hyera** (1988) TLR 188.

In contention, the respondent submitted that re-trial should be ordered as a final choice for the interest of justice due to illegality and defects in the original trial. He insisted that there was no place in the original trial in our case at hand that the proceedings of the original trial was tainted with illegalities and defects rather than negligence of the appellant for not calling a key witness to justify his claim. He supported his argument on the circumstances in which the court may order re-trial by referring the case of **Fatehali Manji vs R** (1966) EA 343.

After going through the impugned decision, I am admitting that the last paragraph of the first appellate court decision quashed the proceedings and the judgement of the trial court. The first appellate court order reads as hereunder;

*"Having said so, this court is satisfied that this appeal has merit, the same is allowed, the proceedings and judgement of the trial court are hereby quashed. The order of paying the appellant Tsh 4,500,000/= by the appellant is hereby set aside in lieu the respondent is ordered to pay a total of Tsh 11,000,000/= to the appellant with costs. It is so ordered."*

I have taken trouble to go to the entire proceedings and judgement of the first appellate court, as it was rightly submitted by the respondent, there was nowhere in the said proceedings or judgement in which the first



appellate court observed or pointed out the procedural irregularity or any defect in the trial court proceedings which would warrant the ordering of the re-trial.

It is my understanding that, the illegality or defects which may necessitate the ordering of the re-trial may happen when the original trial has not been met the legal requirement that may include but not limited to the issue on jurisdiction of the court, wrong rejection of evidence, denial of the right to be heard, absence of the assessors in cases where their presence is mandatory, just to mention a few.

For that reason, not all orders to quash the proceedings may necessitate the ordering of re-trial. As I have earlier stated on, it depends on the circumstances of each and every case.

I subscribe to the decision of **Fatehali Manji** (*supra*) as quoted with approval in the case of **Malambi s/o Lukwaja vs The Director of Public Prosecutions**, Criminal Appeal No 71 of 2018, CAT at Mbeya in which the defunct Court of Appeal stated that: -

*"In general, a retrial will be ordered when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial, each case must depend on its own facts and circumstances and an*



*order for retrial should only be made when the interest of justice requires.”*

Guided by the above decision, and the circumstances in our case at hand, the reason for the first appellate court to allow the appeal and quash the proceedings and the judgement of the trial court are mainly based on the unreliability of the evidence of the appellant's witness whose evidence form the basis of the decision in the trial court. The said evidence was not considered by the first appellate court.

It is important to note that, the case of **Village Chairman K.C.U Mateka (supra)** is distinguishable with our case at hand, because in that case Hon. Judge Kazimoto (as he then was) was referring the proceedings that has been quashed due to the illegality as the trial court entertained the matter without been clothed with jurisdiction. It is settled that if the court entertained the matter without been clothed with jurisdiction, its decision is null and void.

In our case at hand there is no any illegality or defect which jeopardize the interest of justice so as this Court to order re-trial. On that basis, this ground has no merit and therefore fails.

The next compliant is on ground two of appeal that the first appellate court erred in law and fact for holding that the evidence of the witness of the appellant was irrelevant as she was not a witness to a contract. This ground is going to answer the second issue framed by this Court. The



appellant submitted that the first appellate court erred for holding that the testimony of the appellant's witness was irrelevant for the reasons that she was not witness to contract.

The appellant averred that the first appellate court misdirected itself on that issue because the contract is silent as to whether the witness who signed the contract were the ones who were supposed to witness the payment transactions. The appellant went further to submit that, her witness one Salma Ndende was an eye witness who witnessed the payment transactions between the parties and therefore credible.

Responding to this ground the respondent submitted that the agreement between the parties was made in written form, thus all transactions upon the said agreement must be made with support of documentary evidence. He supported his argument by referring to section 63 and 64 of the Law of Evidence Act, Cap 6 R.E 2019. He went on to submit that the appellant's witness who claimed to witness the payment of Tsh 6,500,000/= was not a witness to the contract but a mere passer-by that's why the first appellate court disregard her testimony. He insisted that the contract cannot impose any obligation to any person who was not party to it.

On answering this issue, the first appellate court reasoning was that the appellant's witness, Salma Ndende was neither party nor witness to a



contract. If even a passer-by who witnessed nothing on the contract can be called to testify before the court of law, there would be no meaning of having witnesses to a contract since there is a meaning and reason as to why the contract should be witnessed. The first appellate court went on to state that the appellant neither gave tangible nor detailed explanations as to why her witness did not witness payment transactions and it was not stated if Salma Ndende knew that there was a contract existing between the parties.

Let me also address this ground as advanced by the appellant. This Court after going through the trial court's proceedings at page 10 where the appellant testified at the trial court, part of her evidence reads as follows;

*"... Hivyo nilisaini barua hiyo kwa nia ya kuzuia riba ila baada ya hapo yaani tarehe 14/7/2017 saa nane mchana siku ya ijumaa mdai alifika dukani kwangu nami nilimpa 6,500,000/= kwa nia ya kupunguza deni la 11,000,000/= na hatukuandikishiana popote zaidi ya mimi kunote kwenye kitabu changu...."*

The averment of the appellant was strongly disputed by the respondent at the trial court as seen on page 6 of the trial court's proceedings when he was cross examined by the appellant in which the respondent replied that: -

"Hujawahi nipa 6.500.000/=  
Mkataba ulisaini ni 11,000,000/=



Nilikupa pesa ya kwenye mkataba tuliosaini

Sikukopeshi kwa riba"

When this Court perusing further the record it found the evidence of Salma Ndende at page 15 of the proceedings who testified and stated that: -

*"Mimi natoa Ushahidi kuwa ilikuwa tarehe 14/7/2017, ijumaa majira ya saa nane mchana, nikiwa dukani kwa mdaiwa nilikuwa na shida nae.... Tulikuwa tunakula mara Nyacheri alitoka akidai amefata hela yake na alipatiwa mbele yetu shs 6,500,000/= nikiwepo ndipo akadai na kuhoji mdaiwa kuwa mbona walikubaliana shs 7,500,000/= na ametoa shs 6,500,000/= ndipo mdaiwa alijibu kuwa alikuta pesa zimepungua kwani kuna mtu alipita na kupumzika hela zikapotea ndipo mdaiwa alinisihi apokee na pesa zingine aliye taratibu. Mdaiwa alichukua hela na kuondoka. Hicho ndicho nilichokishuhudia mimi"*

In its judgement the trial court as far as the evidence of Salma Ndende is concerned stated that: -

*....ushahidi wa upande wa mdaiwa ulieleza jinsi ulivyoshuhudia mdai akilipwa pesa lakini hoja hiyo bado mdai aliiipinga na kusistiza juu ya mkataba waliosainiana, kitu ambacho mdaiwa hakupinga kwani alieleza ni kweli alisaini mkataba ila tayari alishalipa kiasi cha 6,500,000/=.*

Literally the appellant wants this Court to believe that she had paid part of the loan to the respondent though the payment was not documented

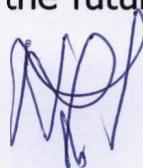


anywhere and the only evidence which this Court should rely on is the evidence of her witness, Salma Ndende.

It is evident into the trial court record through *Exhibit M1* that parties entered into a written loan contract on 2/05/2017. The said contract prescribed the modality of payments to the effect that the appellant should pay 75% of the loaned amount by June 2017.

The main controversy between the parties centred on the alleged part payment of Tsh 6,500,000/= and if a person who was not a witness in the loan agreement can be a witness during the payment of the loan amount and whether her evidence is reliable before the court. It is the submission of the appellant that since the loan contract is silent, it is not mandatory for the witnesses who witnessed the contract to be present during the payment of the loan amount. Therefore, the evidence of the third party that is Salma Ndende is reliable. On his part the respondent opposed that argument and averred that a stranger who is not a witness to the contract her testimony cannot be regarded in the court. He insisted that since the agreement of the parties was in writing, all the transactions must be made with support of the documentary evidence.

It is a settled principle that when parties entered into a contract their common intention is to create legal relationship that binds them. In order to be in a safer place and to prevent the future disputes, it is the

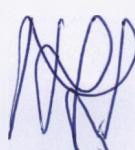


practice for the parties to the contract to have witnesses. Having witnesses helps to reinforce the validity and authenticity of the transaction.

As it was rightly held by the first appellate court that it was expected the witnesses who witnessed the signing of the contract to be also the witnesses who witnessed the payment transactions done by the parties since they were the ones who can easily prove the authenticity and validity of the contract. Ideally, a witness is like additional layer of security whenever there is dispute between the parties. I subscribe with the first appellate court's findings that there should be at least an explanation on why the witnesses who signed the contract were not involved in payment transactions instead of having a stranger who does not understand even the terms of the contract.

Again, I subscribe with the respondent's argument that since the parties entered into the written contract, the same should be proved by documentary evidence. In our case at hand, having the matter originated from the primary court, The Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations is applicable. Rule 14(1) of the said Regulations provides that: -

*"Where an agreement is in writing, no oral evidence may be given by the parties to the agreement or their representative in civil case, to contradict or vary the written terms."*



On top of that, in the case of **Charles Richard Kombe t/a Building vs Evarani Mtungi and two others**, Civil Appeal No. 38 of 2012, CAT at Dar es Salaam (unreported). The Court of Appeal of Tanzania pointed out that: -

*"... Once it is shown as in this case that the contract was reduced into writing then in terms of S 101 of the Law of Evidence Act, Cap 6 R.E 2002 (the TEA), a party to such contract is not permitted to adduce oral evidence for the purpose of contradicting, varying. Adding or subtracting from its terms."*

Guided by the above provision of law and decided case, it is my finding that the trial court was expected to have taken into consideration the above Rule and consider the nature of the loan contract when reaching its decision. I am saying so because the parties entered into written contract as evidenced by Exhibit M2. This Court finds difficult to believe the oral testimony of the appellant's witness without any proof of the documentary evidence to signifies if the said transactions was done. Thus, any contradiction on the contract was supposed to be proved by documentary evidence. It is my considered view that this ground of appeal has no merit and therefore fails.

On the last ground which is going to answer the third issue as to whether the first appellate court failed to evaluate properly the evidence adduced by the lower court. My answer to this ground will be in a



negative. It is evident from the proceedings in the trial court that the only evidence which alleged to have proved the claim of the appellant at the trial court was the evidence of appellant's witness one Salma Ndende. Her evidence was not strong to prove the claim because the same was not proved by documentary evidence as it was expected since the parties entered into the written contract.

Again; it was the duty of the appellant to call the material witness to testify for the purposes of building her case. Failure to do so this Court draw an inference that the said witness would have given evidence contrary to her interest.

As it was provided under Rule 6 of The Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations 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".*

The above Rule suggests that something is proven on the balance of probability means that it is more likely than not to have occurred. In our case at hand, the nature of the evidence of the appellant was very weak to prove the part payment of the loan agreement because the same depended on the testimony of the appellant's witness whose evidence is



not reliable as it was determined in the second ground of appeal. This Court finds the last ground of appeal has no merit and therefore fails.

In the upshot, I find the appeal has no merit in its entirely, I disallow it and I hereby dismissed it with costs.

Right of appeal explained to the parties.



**M. MNYUKWA**  
Judge  
**29/09/2021**

Judgment delivered via audio teleconference whereby all parties were remotely present.



**M. MNYUKWA**  
Judge  
**29/09/2021**

