IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., MASSATI,J.A., And MANDIA,J.A.)

CIVIL APPEAL NO. 11 OF 2013

JALUMA GENERAL SUPPLIES LTD.....APPELLANT

VERSUS

STANBIC BANK (T) LTD.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam)

(Makaramba, J.)

Dated the 24th day of March, 2010
in
Commercial Case No. 37 of 2008

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JUDGMENT OF THE COURT

2nd & 30th July, 2013

MASSATI, J.A:

The appellant is a limited liability company incorporated in Tanzania. It operates a current account No. 0140017542201 with the respondent bank at its City Branch. On 27th February, 2008, the appellant received cheque No. 000003 drawn by Ms J.O Investment Company Limited, for the sum of Shs 250,320,000/= which was deposited in the said account on the

same day. Initially the cheque was returned to the payee with the endorsement "Confirmation of the Drawer Required". On 5th March, 2008 the cheque was redeposited. On the 10th March, 2008, the appellant drew requisition for a banker's cheque in favour of the respondent in the sum of Shs 250,000,000/=. The cheque was however dishonored with the endorsement "effects not cleared".

The appellant then instituted a suit in the High Court (Commercial Division) claiming that as a result of the respondent's negligence, the appellant had suffered damages, by way of the Shs 250,320,000/= which was illegally debited in his account, and Shs 45,000,000/= per month, from March, 2008 as loss of earnings, for which it was claiming compensation together with the attendant general damages, interests and costs.

In its defence, the respondent bank denied liability. Specifically the respondent averred in paragraph 11 of its statement of defence that it could not comply with the appellant's requisition for a banker's cheque on 10th March, 2008 because the value date of the cheque against which the appellant sought to obtain the said banker's cheque was the 11th March,

2008; and not on 10th March 2008 when the proceeds of the deposited cheque were yet to be cleared.

At the end of the trial, the High Court dismissed the suit with costs, hence the present appeal.

At the hearing of the appeal Mr. George Kilindu, along with Mr James Bwana, learned counsel appeared for the appellant. Mr. Dilip Kesaria learned counsel, represented the respondent bank.

The appellant preferred 7 grounds of appeal. If we may be allowed to paraphrase the said grounds; they are to the following effect:-

1) That, the trial court should have found that the respondent bank misrepresented to the appellant that the cheque had been cleared, and the appellant acted on the said representation to his detriment.
2) That, the trial court should have found that the respondent's branch manager was negligent in advising the customer about the position of the cheque.
3) That, the trial court should have drawn adverse inference against the respondent for not calling the Branch Manager as its witness.

4) That ,the trial court misdirected itself in law and fact in relying on Exh D-3 (the Bank Statements) as proof of liquidity of the appellant's account.

5) That the trial court should have found that the respondent was negligent in failing to return the uncleared cheque to the appellant for further action.

6) That the trial court should have found that, since only the respondent had control on the value date, the appellant was eligible to withdraw funds from its account after getting the respondent's approval; and.

7) That despite the documentary evidence in the form of endorsements in Exh P-1, it was wrong for the trial court to have found that there was no negligent oral advice dispensed by the respondent's branch manager.

After going through the appellant's written submission as amplified orally by Mr. Kilindu, learned counsel, the appellant's case is that as a banker the respondent owed a duty to the appellant as its customer, in seeing that it gave a correct financial statement of its customer's account; that the respondent breached that duty by its negligent misrepresentation to the customer that its cheque for Shs 250.230.000/= had been cleared

on 10/3/2008; which statement the appellant relied on and placed an order to its suppliers, which would have earned it Shs 45.000.000/= per month as profits. So the respondent bank should be held liable for negligence and be condemned to pay general damages and refund the shs 250.230,000/= which was illegally debited to its account. To show that it had proved its case to the requisite standard, the appellant referred the Court to exhibits P1, and D1 and castigated the trial court for relying too heavily on Exh D3, and for not drawing adverse inference against the respondent bank for not calling its branch manager to testify in support of the existence of an oral representation he had made to its witness, PW1. The appellant also referred to us several decisions in support of its case. Those include: **GOLD COIN JOAILLERS SA v UNITED BANK OF KUWAIT** 1995 – 1996 vol. 13 Legal Decisions Affecting Bankers, **HEDLEY BYRNE & CO. LTD v HELLER & PATNERS LTD** (1964)AC 465 **LOMBARD BANKING LTD v CENTRAL GARAGE & ENGINEERING CO. LTD & OTHERS** (1963) 1 Q.B. 220 **NATIONAL BANK OF COMMERCE v SAID ALLY YAKUT** (1989, TLR 119 **AZIZ ABDALLAH v R** (1991, TLR. 71 **GABRIEL MNYELE Vs** Criminal Appeal No. 437 of 2007 (CAT, DSM (unreported) **LUBELELE MAVINA & ANOTHER vR** Criminal Appeal No. 172 of 2006 CAT Dodoma (unreported) **HEMED SAID v MOHAMED MBILU**

(1984,TLR. 113. The appellant was therefore convinced that it had a good case, and prayed that the appeal be allowed with costs.

On his part, Mr. Kesaria, addressed the Court on all the grounds generally. His starting point was that the appellant did not plead negligent misrepresentation in his plaint and that the story now presented before this Court was an after thought.

Mr. Kesaria submitted that no party could traverse beyond its pleadings, and that proof without pleadings was of no relevance. He then referred to the plaint, and said that the facts being referred to by the appellant in his submission were not pleaded.

As a corollary, the learned counsel submitted that **first**, the trial court was correct in not acting on the alleged oral representation that its cheque had been cleared, because it was not pleaded in the plaint **Second**, that the respondent bank was not negligent towards the appellant because it had no duty to honour the appellant's payment against a stopped cheque, or to avail it with a banker's cheque, where there were uncleared or insufficient funds in the appellant's account. **Third** that the trial court correctly determined the value date of the cheque on the basis of the evidence on record. **Fourthly** there was no basis for faulting the trial court for failing to find that the respondent bank had failed

to return the unpaid cheque because this was neither pleaded nor framed as an issue. Lastly, having found that the appellant had failed to prove its case on a balance of probability the trial court correctly dismissed the suit.

In support of his submission, Mr. Kesaria also referred to Exh P1 P2, D1,D3 and the BOT Clearing Housing Rules, and cited a number of decisions to us; including **GWAGILO v ATTORNEY GENERAL** (2002) 2 EA 381, **KHAMISI v ANGELO** (2010) 2 EA 212 **GITAHI AND ANOTHER v MABOKO DISTRIBUTORS LIMITED AND ANOTHER** (2005)IEA 65 **GALAXY PAINTS CO. LTD v FALCON GUARDS LTD** (2010, 2 EA 385 and **FATMA IDHA SALUM v KHALIFA KHAMIS SAID** 2004 TLR 423, as well as extracts from **MULLA ON CODE OF CIVIL PROCEDURE** 16th ed vol. 2. The learned counsel then prayed for the dismissal of the appeal with costs.

We are grateful to the learned counsel for their industry. From the submissions and the evidence on record, we think that, the following facts and principles of law which we intend to adopt to guide us are common knowledge and not seriously disputed.

First , the relationship between the appellant and the respondent was that of a banker and a customer; and that in respect of cheque no.

000003 (Exh D1) which was deposited in the appellant's account with the respondent bank, first on 27/2/2008 and then again on 5/3/2008, the respondent bank was a collecting bank. In **SILAYO Vs CRDB** (1996) LTD (2002, 1 EA 288 it was held by this Court that:

> " *As a general rule, a collecting bank is bound to use reasonable skill, care and diligence in presenting and securing payments of cheques entrusted to it for collection and placing the proceeds to the customer's account, or taking such steps as may be proper to secure the customer's interests"*

And that

> " *But should the banker represent to the customer either expressly or by conduct that he might treat the money as his own, or negligently fails to discharge his duty to the customer as to lead the customer to change his position and act to his detriment the banker will not be permitted to recover money paid under a mistake"*

But in respect of the requisition for a banker's cheque No 000275 drawn by the appellant on 10/3/2008, (Exh P1,) the respondent bank also turned into a paying bank. According to **PAGEANT'S LAW OF BANKING** (10th ed 1989 at p.199):-

> " *The paying banker's obligations is to honour its customer's payment instructions, including payment orders constituted by the drawing of cheques in legal form provided that he has sufficient funds available to do so"*

Secondly, we have also no doubt in our minds that, in general the law is that, courts should determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues framed for the court's determination by the parties and it is a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case (See **GALAXY PAINTS COMPANY LTD. FALCON GUARDS LTD** (2000) 2 EA 385). However, a court may decide on an unpleaded issue if left to it for decision or if the advocate for the appellant led evidence and addressed the Court on it (See **ODD JOBS v MUBIA** (1970)EA 475, followed in **AGRO INDUSTRIES LTD v GENERAL** (1994) TLR. 43

We shall now apply these principles in resolving the issues raised by the parties in this appeal.

In this case the appellant's claim was based on negligence of the respondent bank in debiting its account. The particulars of the negligence were:-

(a) That the respondent owed a duty to confirm the status of liquidity in the appellant's account prior to allowing it to withdraw the funds.

(b) That the respondent had a duty to effect clearance of the deposit within the time prescribed by law.

(c) That the respondent had a duty to make sure that the appellant's account once posted was not debited without prior authority and.

(d) That the respondent should have known that once settled successfully the instructions to pay could not be debited.

All these allegations were denied by the respondent and so the following issues were agreed by the parties and adopted by the trial court:-

(1) Whether or not the plaintiff had cleared funds in its account to enable it to obtain a banker's cheque on 10th March, 2008 ?

(2) Whether or not the defendant acted negligently or unlawfully in debiting the value of the cheque to the plaintiff's account on the 10th March, 2008?

(3) Whether or not the defendant was contractually duty bound to honour the plaintiff's instructions contained in cheque no 000275 ?

(4) If the answer to the first issue is affirmative, whether there was any breach in performance of the said duty by the defendant?

(5) What reliefs are the parties entitled ?

The trial court answered all the first four issues in the negative and dismissed the suit with costs.

The first, second, third, and the seventh grounds of appeal relate to the issue of negligent oral misrepresentation and the non calling of the branch manager to refute these allegations. We agree with Mr. Kesaria, learned counsel for the respondent, that, on the law, as set out above, and the pleadings of the parties, the issue of oral negligent misrepresentation was neither pleaded nor framed as an issue for determination by the trial court. However, with due respect to Mr. kesaria and on the authority of **AGRO INDUSTRIES LTD** case the appellant presented evidence to that effect and both learned c ounsel addressed the court on that issue, and the trial court made a finding on that issue although not pleaded. The trial judge found as a fact that, on the evidence on record the appellant failed to establish that there was such oral representation, and so no burden of proof shifted to the respondent to rebut.

We agree. In the circumstances of this case, we do not think it probable that the bank manager could have given such a representation. We make this inference from the appellant's conduct prior to the filing of the suit. Three demand letters were written for the appellant to the respondent. These was tendered as Exh P2 collectively. None of these mentions the existence of such a misrepresentation.

It is true, and we agree with Mr. Kilindu, that in certain circumstances, a court may draw adverse inference if a party in a judicial proceeding does not call a certain witness. (See AZIZ **ABDALLAH v R** (1991, TLR 71) This inference has its basis in section 122 of the Tanzania Evidence Act Cap 6. RE 2002. But the presence of the word "may" in that section, suggests that it is optional. The court is not bound to make it, and whether or not to do so, may be dictated by the circumstances of each case. An adverse inference under that provision may legitimately be drawn against a party if, for instance:-

(i) a witness or piece of evidence is material to the matter in controversy.

(ii) the witness is available and within reach

(iii) the presence of the witness is otherwise necessary in the interests of justice; for instance, if the evidence is essential in some material particulars and there is no substitute.

(iv) the burden of proof is on the party in question

In this case, we have studied the pleadings of the parties, the issues, Exh P1, P2 and Exh, D1, D2 and D3, as well as the testimonies of PW1 and DW1, and do not see the necessity of calling the branch manager because the endorsements in Exh P1, D1 and the entries in Exh D3 speak for themselves and do not support the appellant's case. But with respect, the appellant presented only half the version of what, if it was true, and amounted to a representation. That he was allowed to draw against the deposited cheque. The other part is that when he came back later to collect the banker's cheque, he was informed that the effects of his deposited cheque had not been cleared. This completes the picture. What the full picture means is that the requisition for the banker's cheque was approved subject to the clearance of the cheque. As DW1 testified, if there were no funds, the approval of the requisition, could be cancelled as happened in this case generally. This was because, in law a cheque, unless dishonoured, is payable when it is cleared. (See **NANJI KHODABHAI vs SOHAN SINGH AND ANOTHER** (1957),5 EA .291. So

it was not, in our view, actionable misrepresentation when the respondent approved the appellant's requisition for a banker's cheque, but later cancelled it when the deposited cheque had not been cleared. The position would have been different, if the appellant had been allowed to draw cash against an uncleared cheque. The debiting of the appellant's account with the sum of the uncleared cheque, was entirely within the powers of the bank to do. The appellant has cited several decisions in support of his arguments in this aspect. But with unfeigned respect, **GOLD COIN JOALLERS SA'**case was decided on the basis of the identity of the person with whom the plaintiff was dealing and not on the accuracy information of a customer's financial standing. **HEDLEY BYRNE's** case is authority for the statement that a party with special skills owes a duty of care to a party seeking information from such person. In this case it was submitted that the special skill possessed by the respondent was in respect of clearance of cheque D-1. That was a case in which the bank was sued for negligence in answering inquiries about the financial standing of its customers. It was held that the bank owed no duty of care to a third party:- In **LOMBARD BANKING LTD's** case the issue was whether it was reasonable for the plaintiffs to wait for return of dishonoured bills of exchange before receiving notice of dishonour. In **NATIONAL BANK OF COMMERCE v**

SAID ALLY YAKUT 'case, the bank allowed the customer to draw from an uncleared cheque, but the cheque got lost, and the bank attempted to treat the proceeds as an overdraft, but the High Court found the bank liable for gross negligence. So all the cases relied on by the appellant were decided on different principles and different sets of facts, completely distinguishable from those in the present one. We accordingly dismiss the first, second, third and seventh grounds of appeal.

The fourth and sixth grounds of appeal attack the trial court for relying on Exh D3 as proof of liquidity of the appellant's account, without considering that these documents were in possession of the respondent when the appellant was advised so. Exh D3 collectively, are bank statements detailing the history of the appellant's account up to 11/3/2008. It shows that the cheque in question (Exh D1) was first deposited in that account on 27/2/2008, debited, and then redeposited on 5/3/2008 but debited again on 10/3/2008 when it was dishonored with the endorsement "effects not cleared". But of significance, is that, when it was last deposited on 5/3/2008, the value date of the cheque was shown to be on 11/3/2008.

The appellant's complaint is that the trial court should not have relied on these statements to discredit his testimony because they were not

supplied to him. Instead, the trial court should only have relied on exh P1. to corroborate PW1's testimony, that the appellant was in fact allowed to withdraw from its account.

We are unable to see any basis for that criticism. First, these documents were exhibited in the respondent's list of documents to be relied upon which was served on the appellant. Assuming therefore that, the appellant had no prior access to those documents, it had the opportunity to examine the documents even before they were tendered as Exh D3; which were infact tendered without any objection. So there was no problem with the admissibility of Exh D3. Secondly, we think they were relevant for the purpose of resolving the controversy between the parties about the history of the cheque and the value date. Thirdly, Exh D 3 shows that the appellant's requisition for a banker's cheque was not granted on 10/3/2008 because the value date of the cheque was 11/3/2008 and the cheque was returned unpaid with the endorsement "effects uncleared". All these were material facts, and Exh D3 had a decisive part to play, and together with the endorsements in ExhPI and Exh DI, they were enough to refute the appellant's case, not the other way round. A trial court is duty bound to consider and give effect to all the

evidence on record. It was not therefore open for the lower court to consider only Exh PI and ignore Exh D3 as the appellant suggests.

As a banker, the respondent had a duty to all its customers and had to see that it protects itself and others that may be affected by consequences of its negligence (See **THURNIER v NATIONAL PROVINCIAL AND UNION BANK OF ENGLAND LTD (1923, ALL E.R.505.** It has also been held that mere crediting of a customer's account does not give value to the cheque, nor does it, without more, indicate that' he is permitted to draw against the uncleared component of the balance (See **DHUKHIYA v STANDARD BANK** (1959, EA 958).

The bottom line is that the appellant's account had no sufficient funds. And so, as a paying bank, the respondent had no obligation to honour the appellant's requisition for a banker's cheque when it was presented on 10/3/2008. We therefore find it amusing for the appellant to argue that the respondent should not have debited its account, after the cheque it had deposited had been dishonoured with the endorsements "effects not cleared" If the appellant had any cause of action, it was against the drawer of the cheque, and not the respondent/as a collecting

or paying bank. We therefore find no merit in the fourth and sixth grounds of appeal and dismiss them.

The fifth ground of appeal is that the trial court did not find that the respondent bank had a duty to return the uncleared cheque to the appellant for further action. We entirely agree again with Mr. Kesaria, that this matter was neither pleaded, nor raised as an issue, but with respect, the appellant led evidence to that effect and the learned counsel for the appellant addressed the court on it, though Mr. Kesaria did not. But the trial court did not make any finding on it. On the authority of the law of pleadings and the **AGRO INDUSTRIES'** case the court did not have to. Under section 49 (1)(e) of the Bills of Exchange Act Cap 215 R. E. 2002, a notice of dishonor of a Bill of exchange may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonouned by non acceptance or non payment. In the light of the evidence on record, there is no dispute that the appellant was given notice of dishonor of the cheque in question as the law requires. That is the least the respondent could do, and we think it did. Although according to PW2 and DW1 a dishonoured cheque should be returned to the customer, in practice, there was no uniform mode among banks in Tanzania, of returning dishonoured

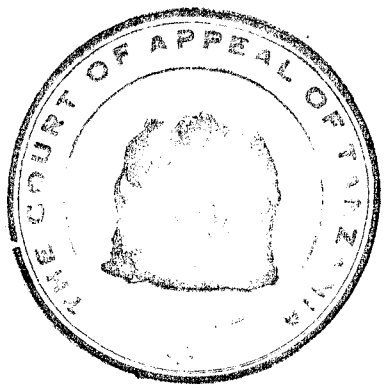
cheques. Although PW1 told the court that when he asked for the cheque, the manager told him he did not have it, is clear from the evidence that he did not follow it up, as evidenced in his answer to a question put by Mr. Kesaria in cross-examination on p. 204 of the record.

" I never asked for return of J.O's cheque"

But even in the demand letters (Exh P2 collectively) there was no mention of demanding "the return" of the cheque. So the inference that the appellant did not make any efforts to get back the dishonoured cheque, for reasons not clear from the record is easily drawn. This means the appellant waived that right. This ground therefore also lacks substance.

For all the above reasons, we find that this appeal has been lodged without sufficient grounds. We accordingly dismiss it with costs.

DATED at **DAR ES SALAAM** this 18th day of July, 2013.



N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P. M. KENTE
REGISTRAR
COURT OF APPEAL