IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., JUMA, J.A., And MZIRAY, J.A.)

CONSOLIDATED CIVIL APPEALS NO. 95 OF 2009 &

CIVIL APPEAL NO. 29 OF 2010

1. **SYLVESTER LWEGIRA BANDIO**
2. **HILDA KARABARUNGA BANDIO ..... APPELLANTS**

VERSUS

THE NATIONAL BANK OF COMMERCE LTD..... RESPONDENT

(Appeals from the ruling, judgment and decree of the High Court of Tanzania Commercial Division at Dar es Salaam)

(Kimaro, J.)

Dated the 23rd day of September, 2003 and 31st day of October, 2003
In
Commercial Case No. 171 of 2002

JUDGMENT OF THE COURT

Date 3rd Dec 2015 & 29th Jan 2016
MZIRAY, J.A.

These are two consolidated appeals. They both arise from the decision of Commercial Case No. 171 of 2002 instituted in the Commercial Division of the High Court on which the respondent successfully won a claim of shs 76,083,979 as a result of the appellants' failure to repay a loan of Tshs 16,050,000/= as principal sum and interest which accrued thereto totaling Tshs 66,083,979.

The plaint before the trial court was filed under Order XXXV of the Civil Procedure Code in a form of a summary suit but upon application by the appellants, leave to defend the suit was granted. The appellants then filed their joint written statement of defence and raised a counter claim. A preliminary objection was raised by the respondent to challenge the validity of the written statement of defence filed and in the end, a decision was made which upheld the preliminary objection and struck out the written statement of defence for being incurably defective and the counter claim to have been filed out of the prescribed time. It is on the basis of this decision that Civil Appeal No. 29 of 2010 was filed to challenge the order reached. Prior to that, Civil Appeal No. 95 of 2009 had been filed to challenge the judgment which awarded the respondent a sum of shs 76,083,979/=. As the two appeals originate in one case, the Court found it prudent to consolidate the two appeals.

Before we go further, we think that it is important first to have the background facts which have resulted in the filing of this appeal. These facts in a nutshell are as follows. By a loan agreement dated 12th March 1992, the respondent granted a loan of Tshs 16,050,000/= to the appellants jointly and severally trading as Mwanza Textile Enterprises.

According to the terms of the said agreement, the repayment was to be effected in 20 successive quarterly equal installments of Tshs 877,500/= effective September, 1992 and the last such installment was to be paid by 30th June, 1997. The agreement stipulated that the interest was chargeable at the rate of 27.5 % per annum and upon default, a further penal interest of 1% per annum was chargeable. The repayment of the loan amount was guaranteed by a chattels mortgage on which the first appellant mortgaged his marine vessel MZA 140. The loan was also secured by the pre-existing mortgage registered on 16th September, 1987 over the first appellant's property comprised in the Right of occupancy CT No. 033011/29 on plot No. 166, Block D, Isamilo area in Mwanza City. Several documents related to this loan are annexed in the pleadings. These documents include copies of Loan Agreement, Chattel Mortgage, Guarantee Instrument, Mortgage and Title Deed and Statement of Balance showing that up to and by 30th June, 2002, a total sum of Tshs 76,083,979/= remaining due and payable to the respondent. On hearing the suit ex parte, the respondent obtained judgment on this sum. The appellants are aggrieved by this decision, hence this appeal.

In the memorandum of appeal in respect of Civil Appeal No. 95 of 2009, the appellants filed a total of four grounds of appeal, whereas the memorandum of appeal in Civil Appeal No. 29 of 2010, three grounds are filed. When the appeal was called for hearing, Mr. Richard Rweyongeza learned Counsel for the two appellants proposed to argue the first ground in Civil Appeal No. 95 of 2009 separately and then consolidated grounds Nos. 2,3, and 4. For Civil Appeal No. 29/2010, the learned Counsel pointed out that he had already filed written submission on which grounds No. 1 and 2 are consolidated. The proposition for consolidation was agreed by Mr. Gaspar Nyika, learned Counsel for the respondent and the Court blessed the arrangement.

We shall start discussing the memorandum of Appeal in respect of Civil Appeal No. 95 of 2009. Submitting on the first ground of appeal, Mr. Richard Rweyongeza, learned Counsel argued that the learned trial Judge grossly misdirected herself in law in proceeding to hear and determine the case while the appellant had filed a notice of appeal to challenge the trial Judges decision of striking out the appellants' written statement of defence and the counter claim. It is the contention of the learned counsel that it was not proper for the learned trial judge to proceed with the

hearing of the suit while she knew that there was a notice of appeal filed in this Court to challenge the order striking out the written statement of defence. The learned Counsel argued that once a notice of appeal is filed everything at the level of the High Court connected with the case comes at a stand still to allow the appeal process to proceed. To support his argument, he referred us to the decision of this Court in **Arcado Ntagazwa v Buyagera Bunyambo** (1997) TLR 242 at page 248 which held that once a formal notice of intention to appeal was lodged in the Registry the trial judge was obliged to halt the proceedings at once and allow for the appeal process to take effect, or until that Notice was withdrawn or was deemed to be withdrawn. Basing on this ground of appeal, the learned Counsel prayed for the appeal be allowed.

On the rest of the grounds of appeal in Civil Appeal No. 95 of 2009, Mr. Rweyongeza informed the Court that they are purely based on evidence. He told the Court that the trial court having struck out the written statement of defence and counter claim, granted leave for the suit to proceed exparte but in the evidence adduced the plaintiff failed to prove the claim. He submitted that PW1 Venant Lawrent, the only witness who testified for the plaintiff did not produce any documentary evidence from

the Bank or elsewhere to prove the claim or show how the amount of shs 76,083,979/= was arrived at. The learned counsel also challenged the trial court to have failed to analyse properly the evidence before it thereby arriving at a wrong decision. He further criticized the trial court to have failed to frame issues for the determination of the case before the commencement of the hearing of the suit as required by the law. In the end he prayed for the appeal be allowed with costs.

In Civil Appeal No. 29 of 2010, Mr. Rweyongeza, on behalf of the appellants filed a memorandum of Appeal containing three grounds of appeal. In his written submission, he abandoned the first ground of appeal having been satisfied that it was properly covered in the second ground of appeal. He therefore argued issues which are embodied in the second and third ground of appeal. In the second ground of appeal the learned Counsel submitted that having regard to the contents of the written statement of defence which raised clearly issues in controversy between the appellants and the respondent, the learned trial Judge grossly misdirected herself in fact and in law in holding that the written statement of defence by the appellants was incurably defective.

Submitting in support of the second ground of appeal the learned counsel argued that Order VI Rule 16 of the Civil Procedure Code (the CPC) used by the trial Judge to strike out the written statement of defence was wrongly invoked because that Order does not empower the court to strike out the whole written statement of defence but instead, it empowers the court to strike out any matter in the pleadings which is unnecessary or scandalous or unnecessary as envisaged under Order VI Rule 17 of the CPC. Having argued to that extent, the learned Advocate conceded that the written statement of defence filed by the appellants had defects which could be cured if the court invoked the provisions of Order VI Rule 17 instead of Order VI Rule 16 of the CPC which was inapplicable for purpose of striking out the whole pleadings. It is therefore the prayer of the appellants through their Advocate that the appeal be allowed and the Court steps into the shoes of the High Court Commercial Division and order that the appellants be allowed to amend their written statement of defence so as to bring out all issues in controversy under the provisions they have already pointed out.

We now turn to consider the third ground of appeal wherein it is stated that having regard to the terms of the loan, the learned trial Judge

misdirected herself in fact and in law in holding that the counter claim filed by the appellants had been filed out of the prescribed period without having regard to the date on which the breach was actually committed. Mr. Rweyongeza has pointed out that the question of limitation particularly as to when did time begun to run was raised by the respondent in its preliminary objection but contradictory versions have been given by the respondent as clearly shown in the proceedings. Mr. Rweyongeza has taken us to page 91 of the record of appeal where the respondent claims that the cause of action rose in 1994, a period which contradicts the one stipulated in the preliminary objection to be 1993. Yet in another version, as vividly seen in the pleadings filed by the respondent at paragraph 10 of the reply to the written statement of defence, it states that there could not be any disbursement until the appellant had fulfilled all conditions precedent. The learned counsel maintained that the question as to when time began to run was to be determined on facts that would have been adduced and not on contradictory calculations produced by the respondent from the Bar.

On the counter claim, the learned counsel maintained that it was filed within the period prescribed under the Law of Limitation Act, Cap 89, as per the letter of approval of the loan dated 17th December, 1990 which

appears at page 62 of the record, on which the loan period was given as six years from the date of sanction. It is the view of the learned counsel that there is no limit on when disbursement should stop provided that it takes place within six years of the loan period. Hence, there could not be any breach by the Bank within the contract period. He opined that a breach could only occur if a loan had been cancelled etc. it is therefore the contention of Mr. Rweyongeza that since the loan was for a period of six years, there could not be any default before the expiry of the loan period taking into consideration that the counter claim was filed on 30th September, 2002 which is a period less than six years after the expiry of the loan term.

The learned Counsel concluded his submission by praying that the appeal be allowed with costs.

Mr. Gaspar Nyika, learned counsel for the respondent Bank gave a concise response. At the outset he conceded to the first ground of appeal made in Civil Appeal No. 95 of 2009 that the trial court committed an error in proceeding to hear and determine the suit while the appellant had filed a notice of appeal to challenge the trial court's decision of striking out the

appellants written statement of defence. He affirmed the position laid in the cited case of **Arcado Ntagazwa** (supra). Nevertheless, he had a different view on the counter claim. According to him it was proper for the trial court to proceed with the counter claim notwithstanding the existence of the notice of appeal filed in this Court.

Reacting to the consolidated grounds No. 2,3, and 4 in Civil Appeal No. 95 of 2009, Mr. Nyika had a different position from that of Mr. Rweyongeza. The position of Mr. Nyika was that the evidence of PW1 Venant Lawrent sufficiently proved that the appellants borrowed the sum claimed and the money is still outstanding as shown at page 109 of the judgment attached in the record. In his view, it is not necessary to have documentary evidence from the respondent Bank to prove the assertion that the appellant defaulted payment. Discussing the appeal in Civil Appeal No. 95 of 2009 as a whole, the learned counsel commented that in event the Court allows the appeal based on the first ground of appeal raised, then the respondent should not be condemned to pay costs as this issue was not raised in the High Court. Mr. Nyika suggested that the appeal be partly allowed but the effect should be to set aside the trial court's judgment.

Moving to Civil Appeal No. 29 of 2010, Mr. Nyika adopted his filed submission. He maintained that a decision of the High Court striking out a defence is interlocutory in nature as that decision does not bring the proceedings to finality. According to him, the case has not come to an end, meaning that the plaintiffs right against defendants have not been determined. The remedy in his view available to the defendants lies on section 5(1) (a) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002.

With regards as whether it was correct for the trial court to strike the written statement of defence, Mr. Nyika argued that Order VI rule 16 of the CPC gives discretion either to make an Order to strike out or order for an amendment. In the instant case the trial court found out nothing to amend so it ordered the written statement of defence be struck out. Mr. Nyika cautioned us not to interfere with that discretion. Having argued to that extent he prayed for the appeal be dismissed with costs.

In rejoinder, Mr. Rweyongeza insisted that as the transaction between the appellants and the respondent was through the Bank, then documentary evidence was essential, which apparently was missing. On the question as to whether the counter claim could not be affected by the

strike order Mr. Rweyongeza firmly stated that the said order affected the counter claim. Responding on the proper construction of Order VI rule 16, the learned counsel pointed out that the spirit of that order is to strike out the offensive part and if it affects the whole written statement of defence then the remedy is to order amendment. He then prayed for the appeal be allowed with costs.

We have given anxious consideration to the rival submissions of the Advocates for the parties in respect of these consolidated appeals. We note that both Advocates agree on one vital point that the trial court proceeded with the hearing of the suit and delivered its decision while there was already a notice of appeal filed in this Court. This point is incorporated as ground No. 1 in Civil Appeal No. 95 of 2009. In this ground, both counsels are of unanimous view that it was not proper for the trial court to proceed with the hearing of the suit after the notice of appeal has been lodged in this Court. With such detected anomaly, both Advocates are in consensus that the remedy is to quash and set aside the trial court's decision and order a retrial. The basis of their arguments is grounded in the case of **ARCADO NTAGAZWA (supra).**

We note from the record that pursuant to a preliminary objection raised, the trial court on 26/9/2003 made a decision which struck out the written statement of defence and at the same time dismissed the counter claim raised by the present appellants in commercial case No. 171 of 2002. The appellant were dissatisfied with that decision and filed an appeal to this Court, which was admitted and registered as Civil Appeal No. 98 of 2003. The record further reveals that while the appeal was still pending, the trial court proceeded with the case and gave its judgment on 3/10/2003. In our considered view that was not proper. We entirely agree with both learned counsels that it was irregular for the trial court to proceed with the hearing of the suit after the notice of appeal has been lodged in this court.

In the case of **ARCADO NTAGAZWA** (supra), this Court faced with similar predicament had this to say,

> *"It must be pointed out that the learned judge acted improperly here. Once the formal notice of intention to appeal was lodged in the Registry the trial judge was obliged to halt the proceedings at once and allow for the appeal process to take effect or until that notice was withdrawn or was deemed to be withdrawn. But the course adopted by the judge here effectively thwarted the appeal. That*

was wrong, and had the correct procedure been adopted the present proceedings might not have been necessary."

With the buttress of the above decision, we have no flicker of doubt that the appeal is meritorious. There was a point raised by Mr. Nyika that the order to strike out the written statement of defence did not affect the counter claim. With due respect we don't share his view. We say so because on the same day when the written statement of defence was struck out, the trial court simultaneously made an order dismissing the counterclaim. By all necessary implications therefore the strike order affected also the counter claim.

As ground one is sufficient to dispose of this appeal, we think that it becomes unnecessary to deal with other remaining grounds in which we heard their submissions. We shall end here. Exercising the powers of revision conferred on the Court by section 4(2) of the Appellate Jurisdiction Act (Cap 141 R.E. 2002), we quash the entire proceedings and decisions made in Commercial Case No. 171 of 2002 of the High Court, Commercial Division and we direct that the suit be heard afresh immediately. Since

the irregularity in handling the trial was occasioned by the trial court, we make no order for costs.

DATED at DAR ES SALAAM this 25th day of January, 2016.

M.S.MBAROUK
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL