IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 8 OF 2015

ASTEPRO INVESTMENT CO. LTD ---------- APPELLANT

VERSUS

JAWINGA COMPANY LIMITED---------- RESPONDENT

(Appeal from the decision of the High Court of Tanzania

(Commercial Division) at Dar es Salaam)

(Nyangarika, J.)

dated the 16th day of April, 2014
in
Commercial Case No. 103 of 2012

JUDGMENT OF THE COURT

20th Aug. & 30th Oct. 2018

MWANGESI, J.A.:

In the High Court of Tanzania (Commercial Division) at Dar es Salaam, the respondent herein instituted proceedings against the appellant for judgment and decree in the sum of TZs 107,934,323/= as compensation for loss of goods and the sum of TZs 37,777, 013/= as special damages.

The basis of the claim according to the plaint, was founded on a contract that had been entered between the two whereby, the respondent

who had imported goods from China, assigned the appellant who was a Clearing and Forwarding Agent, to clear the goods on arrival at the Port of Dar es Salaam, and deliver them to her premises. It was the contention of the respondent that, after the goods had arrived at the port of Dar es Salaam on the 18th day of July, 2012, they were inspected and found to conform to the contents in container No. MS U67733017. However, after the respondent had cleared them on the 31st day of August, 2012, failed to deliver them to her premises as per the terms of the contract agreed between them.

On his part, the appellant was at one with the respondent in regard to the contract that had been entered between them. She also did not resist the fact that the container containing the imported goods arrived at the port of Dar es Salaam and got cleared by her on the 31st August, 2012. She however, strenuously resisted the averment by her adversary that, the goods were not delivered to the destined premises. She firmly argued that, upon clearance of the container carrying the goods, it was instantly sent to the premises of the respondent, under escort and delivered on the same date through one Bruno Sebastian Asenga, a driver who used a motor vehicle with registration No. T 196 AGX.

During the hearing of the suit before the learned trial Judge, as reflected at page 80 of the record of appeal, three issues were framed for determination that is, **first,** whether the kind, quality and quantity of goods imported by the plaintiff from China were correctly and properly shipped and arrived at Dar es Salaam port; **second,** if the first issue is answered in the affirmative, whether the said goods were tampered with by the defendant before delivery to the plaintiff; and **third**; to what relief(s) if any, are the parties entitled to.

In establishing her claim, the respondent relied on the testimony of one witness only going by the name of Jason Wilbrand Bigambo, whose testimony was supplemented by seventeen exhibits. On the part of the appellant, four witnesses gave their testimonies namely, Charles Prosper Ishemwabura Mbelwa, John Juma Makanda, Merikior Swai and Bruno Sebastian Asenga.

In the judgment that was handed down by the learned trial Judge on the 16th day of April, 2014, which is the subject of this appeal, both the first and second issues, were answered in the affirmative that, the quality and quantity of goods imported had arrived properly at the port of Dar es Salaam, but were tempered with by the appellant before being delivered to

the respondent. And, with regard to the third issue which concerned reliefs to the parties, it was decreed in favour of the respondent as hereunder:

(1) The defendant shall pay the plaintiff a total sum of TZs 107,935,323/= for loss of goods;

(2) The defendant shall pay the plaintiff interest on the decretal sum at the Court rate of 7% from the date of judgment till full and final payment;

(3) The defendant shall pay the plaintiff costs of the suit.

The appellant felt aggrieved by the decision of the trial Court and as a result, he lodged this appeal to the Court, to challenge it. In his memorandum of appeal, the appellant premised his grievances on seven grounds which we desire to reproduce verbatim as follows:

(1) That the honourable trial Judge erred both in law and fact in holding that the opening of the container involving the chemicals should have involved the carrier and the plaintiff (respondent).

(2) That the honourable trial Judge erred both in law and fact in holding that no record was tendered in showing any request from the defendant or TRA for the pre-verification and pre-assessment

of chemicals for tax purposes, while inspection of goods in the container was not a matter in dispute.

(3). That the honourable trial Judge erred both in law and fact in holding that, exhibit DE2 tendered in evidence by the appellant was very doubtful, without taking into consideration the fact that, authenticity of the said document was not in dispute as the same was pleaded and annexed to the plaint to support the respondent's assertion that goods arrived at Dar es Salaam port and that, upon inspection conformed to the contents in container No. MS U6733017 which had brought the chemicals.

(4) That the honourable trial Judge erred both in law and fact in holding that, the seals of the container were tampered with as the stickers which were later replaced differ from those of the shipping documents against the evidence on record.

(5) That the honourable trial Judge erred both in law and fact, in holding that, the appellant never delivered to the respondent such identical ascendance documents to the shipping documents which were used in clearing the goods from Dar es Salaam port against

the evidence on record and whereas, delivery or non-delivery of the alleged documents was not a matter in dispute.

(6) That the honourable trial Judge erred both in law and fact, in holding that the goods were tampered with while in the hands of the appellant before they were delivered to the respondent (plaintiff).

(7) That the honourable trial Judge erred both in law and fact in awarding TZs 107,934,323/= as specific damages for loss of the imported chemicals without proof and against the evidence on record.

Further, in compliance with the provisions of Rule 106 (1) of the Court of Appeal Rules, 2009 **(the Rules)**, the learned counsel for the appellant lodged written submission to amplify the grounds of appeal, which in turn, were responded to by his learned friend on behalf of the respondent pursuant to Rule 106 (8) of the same Rules.

At the hearing of the appeal, the appellant enjoyed the services of Mr. Wilson Ogunde learned counsel, whereas, the respondent had the services of Mr. Richard Rweyongeza also learned counsel. In his oral

submission to expound the grounds of appeal, Mr. Ogunde requested us to adopt his written submission which he filed on the 30th day of March, 2015, to form part and parcel of his oral submission.

In further elaboration to the seventh ground of appeal, the learned counsel challenged the award of TZs 107,934,323/=, which was made by the learned trial Judge to the respondent as special damages. He argued that there was no justification to do so because the same had in the first place not been pleaded by the respondent in the plaint. And secondly, there was no proof of such special damages. It was the averment of the learned counsel that, the award of such damages by the learned trial Judge, contravened the settled position of law that, special damages have to be pleaded and specifically established.

Mr. Ogunde further submitted to the effect that, in her attempt to establish as to how the figure of TZs 107,934,323/= alleged to be special damages was arrived at, the respondent led evidence before the trial court, which had nothing to do with the value of the goods alleged to have been imported and not delivered. He gave examples of such evidence to include, exhibit P 9, which was TRA customer declaration form, exhibit P 10 that is, the cargo transmission insurance policy, which was not money paid from

the respondent's pocket, as well as exhibit P 16, which were documents concerning a loan which had been taken by the respondent in respect of something else not related to the imported goods.

The learned counsel further submitted that, even though the claim concerning the loan which had been taken by the respondent somewhere else (exhibit P16), was rejected by the learned trial Judge during trial that it did not constitute part of claimed amount in the suit, yet the same was included by the trial Judge, in the award in the judgment and thereby, forming part of the summations which were made in arriving at the figure of TZs 107,935,323/=.

As regards the other remaining grounds of appeal that is, the first, second, third, fourth, fifth and sixth grounds, Mr. Ogunde implored us to sustain what was argued in the written submission, because the respondent miserably failed to lead any evidence, to establish the claims contained in the plaint. In fortification to his contention, the learned counsel relied on the decisions in **Mediterranean Shipping Company Limited Vs Millenium Links Limited and Choice Investment Company Limited,** Civil Appeal No. 124 of 2008 and **Pride Com Limited Vs NMB,** Civil Appeal No. 112 of 2009 (both unreported).

In rebuttal to the submission by his learned friend, Mr. Rweyongeza, also requested to adopt the written submission in reply, which was lodged on the 3rd day of October, 2017, to form part and parcel of his oral submission. The general observation of the learned counsel to the suit, was to the effect that the burden lay on the appellant, to establish as to why the cargo imported by the respondent from China, failed to reach its final destination in the way it had been exported by International Kelli Creative Company Limited of China. This was so from the fact that, the appellant was the one, who received the cargo at the port of Dar es Salaam.

Alternatively, the learned counsel, shouldered the blames to the learned trial Judge, arguing that he was the one who contributed to a great extent, the poor handling of the suit during trial, and thereby, causing his client to fail to establish his case properly. This mishap was occasioned by the unnecessary interventions which were being made by the learned Judge, to the respondent when he was testifying in court. In that regard, he urged us to find that there was mistrial of the suit. And, for the interest of justice, he asked us to clothe ourselves with the powers conferred on us by the provisions of section 4 (2) of the Appellate Jurisdiction Act, CAP 141

R.E. 2002, to nullify the proceedings of the trial court, and direct for a trial *de novo* before another Judge of competent jurisdiction.

In his brief rejoinder, Mr. Ogunde agreed with his learned friend that, indeed to some extent, the learned trial Judge contributed to the mishandling of the suit. He nevertheless, hastened to point out that, the basis of the whole problem in the conduct of the suit, was attributed by the poor drafting of the plaint itself, which was occasioned by the respondent. In view of the fact that it was the primary duty of the respondent to properly prepare his suit before presenting it in court, the consequences arising from the poorly drafted plaint, cannot be borne by anybody else, other than the respondent herself.

The learned counsel went on to submit that, according to the plaint lodged by the respondent, what stood to be established were the claims contained in paragraphs 3 and 6 of the plaint. However, there was no evidence led by the respondent, to establish that the imported goods were not delivered at the respondent's premises as complained in paragraph six of the plaint. Either, there was no evidence tendered to prove that the value of the imported goods was TZs 107,934,323/=, as claimed in paragraph three of the plaint. Under the circumstances, Mr. Ogunde

concluded that, the proposal by his learned friend for an order of retrial has no basis. He therefore urged us to allow the appeal with costs.

In dealing with the appeal before us, we propose to start with the first six grounds of appeal all of which, will be considered conjointly because the basis of the complaint in all, is centered on the chain of delivery of the goods which were imported by the respondent. The chain started with the process of inspection of the container which carried the goods by Officials of the TRA after its arrival. In the course of the inspection wherein some stickers on the container were changed by the officials, the respondent argued that, he ought to have been involved as well as the carrier. It was alleged further by the respondent that at the material period, the goods were tampered with by the appellant before they could be delivered to her.

Upon dispassionately going through the pleadings, the evidence on record, and the written submissions from the learned counsel of either side, we are persuaded to join hands with the submission made by the learned counsel for the appellant, on the following aspects:

One, that the procedure pertaining to the handling of imported goods at the port, did not require the Officials of the TRA to involve both the carrier and the respondent, while opening and inspecting the imported goods in the container. This was so from the fact that, on the part of the carrier, was exempted by the disclaimer clause contained in the contract of carriage. And, on the part of the respondent, there was the Agent (appellant) in terms of the provision of section 140 of the Law of Contract Act, Cap. 445 R.E 2002 **(the LOCA)**, which stipulates that:

> *"S. 140. an Agent having authority to do an act, has authority to do every lawful thing which is necessary in order to do such act."*

Two, after the container had been inspected by the Officials of the TRA as evidenced by exhibit DE2, it was found that the goods contained therein, conformed with the goods which had been imported by International Keli Creative Company Limited of China. In that regard, there was no basis for the learned trial Judge, to doubt the authenticity of exhibit DE-2 of which after all, was no disputed by the parties.

Three, for the whole period when the imported goods were at the port of Dar es Salaam, their custody remained in the hands of the Port

Authority, until when they were cleared by the appellant on the 31st August, 2012, the very date on which the container carrying the goods, was delivered to the premises of the respondent. Under the circumstances, the holding by the learned trial Judge that, there was possibility for the appellant to have tampered with the imported goods at the period when they were at the port, had no basis.

Four, the imported goods were put into the custody of the appellant after they had been cleared at the port on the 31st day of August, 2012. It was on the said date, when the cleared container comprising of the imported goods, was sent to the premises of the respondent under escort and delivered to her as per the unchallenged testimonies of DW1, DW3, and DW4. The only complaint which was alleged to have been registered later by the respondent, was to the effect that what was delivered at her premises, were not the goods which had been imported from China.

Either, the contention by the respondent that, there was discrepancy between the goods which she had imported from China, and the ones which were delivered at her premises by the appellant, had no evidence from an independent witness to back it up. This was so for the reason that the alleged discovery, was made by the respondent alone. And, even

though the respondent claimed to have reported the alleged discovered discrepancy to the police station; there was no police officer, who was called to give evidence before the trial Court, to support the contention.

Things being as they were, there was no evidence to establish that, different goods from the ones which had been imported, were contained in the container that was delivered at the premises of the respondent on the 31st August, 2012. In the event, we find merit in all the first six grounds of appeal by the appellant.

The foregoing apart, we noted that there was variance between the cause of action as contained in the plaint which was lodged by the respondent, and what continued in the proceedings in court, and the evidence which was led to establish the case. According to the plaint lodged by the respondent on the 14th day of September, 2012, the paragraphs which we think disclosed the cause of action by the respondent, were paragraphs 3 and 6, which bore the following wording in verbatim:

3. The plaintiff imported the following chemicals from China worth TZs 107,934,323/=;

(a) ***Tolvene Diisolynate:*** *14 iron drums TDI 80/20 net weight 3,500 Kgs;*

(b) ***Polyol:*** *35 plastic drums 200 Kgs/plastic drums net weight 7,000 Kgs.* ***Total:*** *14 iron drums and 35 plastic drums net weight 10,500Kgs.*

Consigner: *International Keli Creative Company Limited of China.*

6. The cause of action arose after the defendant cleared the imported goods on the 31st August, 2012, from the Port as Clearing and Forwarding Agent of the plaintiff, ***but failed to deliver them to the plaintiff to date,*** *despite the notice made by his advocate on the 10th September, 2012."* [Emphasis supplied]

And, the response by the appellant to the claims above by the respondent as contained in paragraphs 2 and 5 of the written statement of defence which was lodged on the 27th September, 2012, was to the effect that:

2. The contents of paragraph 3 of the plaint are disputed. The defendant states that according to the commercial invoice attached to the plaint as annexure 'B', the total value of the consignment CIF

Dar es Salaam, was USD 20,900.00 and not TZs 107,934,323/= as alleged. The defendant shall rely on annexure 'B' to the plaint to prove that fact. Further that, according to the plaintiff's letter of the 18th June, 2012, addressed to the Tanzania Revenue Authority (TRA), the value of the total consignment is USD 20,930. 00. Copy of the said letter is hereto attached and marked annexure 'A', to form part of the defence."

5. The contents of paragraph 6 of the plaint are denied in toto. ***The defendant states that, after having cleared the said consignment, the same was delivered to the plaintiff on the 31st August, 2012 by a driver namely Bruno Sebastian Asenga using a motor vehicle with registration No. T 196 AGX."*** [Emphasis supplied]

From the foregoing pleadings, in our view the issues which stood for determination, ought to have two that is; **first,** whether or not, the respondent (plaintiff) imported goods from China worth TZs 107,934, 323/=; **two,** whether or not, the appellant (defendant) **failed to deliver the goods which he cleared at the Port of Dar es Salaam to the premises of the respondent.** [Emphasis supplied]

Now looking at the issues which were framed by the learned trial Judge, which were reproduced above, and the proceedings thereto, it is evident that there was departure from what had been pleaded by the parties. In the circumstances, we are constrained to subscribe to what was submitted by the learned counsel for the appellant that, the issues framed did not reflect the actual dispute which existed between the parties. As a result, the procedure offended the cherished principle in pleading that, the proceedings in a civil suit and the decision thereof, has to come from what has been pleaded, and so goes the parlance 'parties are bound to their own pleadings'. **See: Nkulabo Vs Kibirige [1973] EA 102, Peter Ng'homango Vs the Attorney General, Civil Appeal No. 214 of 2011, Scan TAN Tours Limited Vs the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (both unreported) and James Funge Ngwagilo Vs the Attorney General [2004] TLR 161.**

Explaining the purpose of pleadings in civil suits, the Court held in the case of **James Funge Ngwagilo's** case (supra), that:

"The functions of pleading, is to give notice of the case which is to be met. A party must therefore, so state his case that his opponent will not be taken by surprise. It is also to define with precision the

matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate and determine the matters in dispute."

Also the then Court of Appeal of East Africa, speaking through Spry, Vice President (as he then was), in **Nkulabo Vs Kirige** (supra), had almost similar observation, while discussing an appeal wherein, damages was awarded in a claim for defamation, while the words in the plaint differed with the evidence, it stated that:

"If in a defamation case, a suit was founded on allegation that certain words were used and then, without any amendment of the pleadings, the plaintiff was awarded damages on evidence that substantially different words were used, no defendant would know how to prepare his case in defence and injustice rather than justice would result."

Back to the appeal before us, the decision which was delivered by the learned trial Judge, did not arise from what had been averred by the parties in their pleadings. In almost a similar scenario in the case of **Odds**

Jobs Vs Mubira [1970] EA 476, the then Court of Appeal of East Africa, had an occasion to discuss a decision that was based on un-pleaded facts and it stated that:

> *"A Court may base its decision on un-pleaded issues if it appears from the course followed at the trial that, the issue had been left to the court for decision. And this could only arise, if on the facts, the issue had been left for decision by the court as there was led evidence on issue and an address made to the court.*

The foregoing position was also shared by the Supreme Court of Uganda in **Oriental Insurance Brokers Limited Vs Transocean (Uganda) Limited** [1999] 2 EA 260, when it stated that:

> *"Under the provisions of Order 13 of the Civil Procedure Rules, a trial court has the jurisdiction to frame, settle and determine issues in a suit. A trial court may frame issues based on the evidence of the parties or statements made up by their counsel though the point has not been covered by the pleadings provided that that parties are afforded an opportunity to address the court on the new issues framed."*

What we had to ask ourselves, is whether or not, the appeal at hand falls in any of the situations discussed in the two cases cited above. Our

answer is in the negative. As earlier pointed out above, the first issue framed by the trial Judge was in respect of the kind, quantity and quality of the goods which had been imported by the respondent. Even though the respondent on his part, used some time in his testimony to elaborate on the kind and nature of the goods (chemicals) which he had imported, such a thing was not in dispute. And, it was from such reality that, there was no evidence led by the appellant to dispute what was alleged by the respondent in his testimony. As such, there was no basis for the trial Judge to make a finding on such undisputed facts.

With regard to the second issue framed by the trial Judge, which was also discussed above, it was based on the allegation that, the appellant had tampered with the imported goods. We held above that even though such complaint had not been pleaded by the respondent, still the possibility for such a thing never existed because, all the time when the goods were at the port, they remained in the custody of the Port Authority and that, the appellant came to have access on the goods on the 31st August, 2012, when he cleared them, which was the very date the goods were delivered to the respondent. Under the circumstances, the position taken by the

learned Judge could not be salvaged by any of the avenue which have been discussed in the two cases cited above.

To that end, we hold that, the respondent in this appeal failed to establish loss of the goods which he imported from China, instead of which he shifted the blames to the appellant, who cleared the goods at the port. In that regard, the appeal by the appellant is merited.

The foregoing notwithstanding, for the sake of completeness, we find ourselves obligated to also consider the seventh ground of appeal that is, as to whether the goods imported by the respondent from China, were worthy TZs 107,934,323/=. The answer to this question is easily obtainable from the Commercial Invoice that is, annexure "B" to the plaint. It has been indicated in the same that, the total value of the consignment which was exported at China was USD 20,900.00. When the said amount is converted into Tanzanian shillings at the prevailing rate by then of TZs 1,581.50, it translates into TZs 33,053,350/=, which is by very far below the figure of TZs 107,934,323/=, which was claimed by the respondent and granted by the learned trial Judge.

We are as well in agreement with Mr. Ogunde that, it was not proper to include the expenses contained in annexures P9, P10 and P16, of which the respondent alleged to have incurred on various other expenses, to the value of the goods which had been imported. Those expenses had nothing to do with the value of the goods imported. That said and done, we find the appeal by the appellant to be meritorious and we hereby allow it. We further direct that the appellant will have her costs.

Order accordingly.

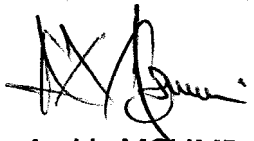
DATED at **DAR ES SALAAM** this 24th day of October, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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



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