IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., KWARIKO, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 48 OF 2012

SAVINGS AND FINANCE COMMERCIAL BANK

LTD. (lately known as NIC BANK TANZANIA LTD.) ---------- APPELLANT

VERSUS

BIDCO OIL AND SOAP LIMITED ---------- 1st RESPONDENT

TRANS AFRICA FORWARDERS LIMITED ----------2nd RESPONDENT

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

(Mruma, J.)

dated the 21st day of October, 2011

in

Commercial Case No. 84 of 2006

JUDGMENT OF THE COURT

30th October & 21st November, 2019

MWANGESI, J.A.:

The appellant herein, was sued by the first respondent, who was claiming against it an amount of about TZS 66,414, 835/=, being a refund to the amount of money which it paid twice to the Tanzania Harbours Authority **(the THA),** as wharfage charges, interest on the said amount from the date of judgment, to the date of payment in full,

damages for loss of patronage, reputation and good will, at the rate of TZS 50 Million, and costs of the suit. In the course of the proceedings, the appellant, joined the second respondent in the suit, as a third party.

In the decision that was handed down by the Court on the 21st day of October, 2011, it was decreed *in verbatim* that: -

1. *The defendant shall refund the plaintiff a total amount of TZS 66,414,835/=, which it collected and wrongly credited into the account of K. J. Telecommunication.*
2. *Interest at commercial rate of 21% per annum shall be chargeable on the above principal sum from the date of filing this suit to the date of judgment.*
3. *Further interest at court rate of 7% shall be chargeable on the principal sum awarded from the date of judgment till settlement in full.*

4. The plaintiff and the third party in this case shall have their costs of their respective suits.

The decision of the trial Court, aggrieved the appellant, who decided to challenge it in this Court, premising its grievance on six grounds of appeal, namely: -

(1) That the learned trial Judge, erred in his analysis and application of the evidence in the suit and has consequently erred in his decision;

(2) The learned trial Judge, erred in law in making a decision which is contrary to the provisions of the Bills of Exchange Act, Cap 215 R.E. 2002 and existing case laws;

(3) The learned trial Judge, erred in exonerating the first and second respondents herein, from any liability notwithstanding the evidence of wrongdoings by them in the suit;

(4) The learned trial Judge, erred in law in his analysis and application of the tort of conversion and in so doing, erred in his decision of the first respondent's right to maintain a claim against the appellant;

(5) The learned trial Judge, erred in his interlocutory ruling delivered on the 28th June, 2010 and in doing so, erred in his decision to permit the continuation of the suit as he did;

(6) The learned trial Judge, erred in his decision by relying upon documents which were not properly exhibited in accordance with the law and which documents were therefore not legally before the court for want of the endorsements prescribed in Order XIII rules (1) (a) – (d) inclusive of the Civil Procedure Code Cap 33 R.E 2002.

Before moving any further in dealing with the appeal before us, we think it is pertinent to give, albeit in brief, the factual background

giving rise to the decision, which is the subject of this appeal. It all started with a bill of wharfage charges, totaling about TZS 66,414,835/=, which the first respondent, had to pay to **the THA,** for release of its goods. In order to clear the said bill, the first respondent, instructed its banker the Barclays Bank, to issue a banker's cheque for the claimed amount of 66,414,835/=, in favour of **the THA.** The drawn cheque, was then handed over to the second respondent, who happened to be the clearing agent of the first respondent, who in turn presented it to the appellant, for clearance. In the process, the first respondent's goods were released. It is also on record that, even though **the THA** had no bank account with the appellant, still the appellant proceeded to clear the said cheque, from Barclays Bank.

After the lapse of about two months, the first respondent, came to learn that its wharfage bills at **the THA,** was still un-cleared. To avoid legal action being taken against it, the first respondent, rushed to pay the pending charges to **the THA**. Thereafter, it initiated investigation regarding its previous payment, which culminated to the institution of the civil proceedings against the appellant, claiming to be refunded the

monies it had paid earlier, which it believed to be still in the hands of appellant, the decision of which is the subject of this appeal.

When the appeal was called on for hearing, the appellant had the able services of Mr. Dilip Kesaria, learned counsel, whereas the respondents, were represented by Messrs. Deogratius Lyimo and Heavenlight Mlinga, learned counsel, respectively.

Upon taking the floor to argue the grounds of appeal, Mr. Kesaria, prayed to adopt the written submissions of the appellant, which were lodged on the 27th day of August, 2012 to be part and parcel of his oral submissions. In his brief amplification of the grounds of appeal, the learned counsel argued that, the learned trial Judge's analysis of the evidence on record, did not support the findings which he made. According to him, after the learned trial Judge, had properly analyzed the evidence of the witnesses from either side, he made a wrong conclusion because, it was completely in the opposite of his good analysis. He asked us to rectify the anomaly.

The learned counsel, argued further that, apart from the wrong conclusion reached upon by the learned trial Judge, as indicated in the first ground above, he again wrongly exonerated both the respondents,

from any liability, which is the gist of the third ground of appeal. This was so because, according to the correct analysis of the evidence which he made, there appeared to have been collusion between employees of the appellant, and those of both respondents. He thus opined that if anything, the liability on the diverted cheque, ought to have been shared by all the parties. The Court was invited to hold.

The complaint by the appellant in the second ground of appeal, is to the effect that, the decision which was given by the learned trial Judge, of holding that the appellant was liable to the claims made against him by the first respondent, was erroneous, because it went against the stipulation under section 85 (1) of the Bills of Exchange Act, Cap. 215 R.E. 2002 **(the Exchange Act)**. He expounded the point by arguing that, the anomaly which was occasioned of diverting the cheque that was payable to **the THA**, and paying it to K. J. Telecommunication, was a result of an inadvertent swapping of the two cheques, which did not constitute negligence or bad faith, on the part of the appellant. In reliance to his argument, the Court was referred to a Kenyan decision of **Intercom Services Limited and Others Vs Standard Chartered Bank** [2002] 2 EA 391.

In regard to the finding by the learned trial Judge that, the appellant Bank, was guilty of the tort of conversion against the first respondent, Mr. Kesaria, submitted that the learned trial Judge, erred in his analysis and application of the tort of conversion. The learned counsel, argued that the claim for the tort of conversion against the appellant, could not be maintained because **the THA**, in favour of whose cheque had been drawn, was not the claimant in the suit. He therefore, urged us to allow the fourth ground.

With regard to the last ground of appeal, it was the submission of the learned counsel for the appellant that, the exhibits which were tendered as evidence during trial in the instant suit, even though admitted in evidence, they were not endorsed in compliance with the provisions of Order XIII rule 4 of the Civil Procedure Code, Cap. 33 R.E. 2002 **(the Code**). In the view of Mr. Kesaria, the omission was fatal and invited the Court, to expunge them from the record of the appeal, or else, the entire proceedings of the trial court be nullified.

Ultimately, the learned counsel for the appellant, urged us to exonerate the appellant, from any liability in this appeal, in terms of the provisions of section 85 (1) of **the Exchange Act.** Alternatively, in case

the Court, would be of the view that, the appellant bears any liability in this appeal, then it be pleased to order a sharing of the burden by all parties involved in the suit because, each, contributed in one way or another to the occurrence of the loss under discussion.

In response to the submissions of his learned friend, Mr. Lyimo, also prayed to adopt the written submissions, which were lodged by the first respondent on the 27th day of September, 2012. He submitted that, he fully associated himself to the analysis which was made by the learned trial Judge, to the evidence which was placed before him. Additionally, the learned counsel argued that, from the evidence on record, there was no dispute to the fact that there was only one genuine cheque, which was issued by the Barclays Bank, in favour of **the THA.**

Also, not in dispute according to Mr. Lyimo, was the fact that the above named cheque, was cleared by the appellant at the Bank of Tanzania (**BOT**). However, instead of being paid to the intended payee **the THA,** the appellant paid the same to one K.J. Telecommunication, who was completely unconcerned with the said cheque. Under such circumstances, it was the submission of the learned counsel for the first respondent that, there was gross negligence and lack of good faith and

diligence on the part of the appellant, and thereby, disqualifying it from the benefit encompassed under the provisions of section 85 (1) of **the Exchange Act.**

With regard to the first respondent, being exonerated from any liability in the instant appeal, Mr. Lyimo, supported the analysis of the evidence made by the learned trial Judge, and the conclusion reached upon that, since it was established from the evidence that, there was conversion committed by the appellant, of the monies which had been directed to **the THA,** and paid to a different person, then it had to bear that burden alone, as there was nothing to be shouldered by the first respondent.

On the last ground of appeal wherein his learned friend, attacked the learned trial Judge, in using exhibits which were not endorsed, Mr. Lyimo submitted that, the same was not fatal. Alternatively, the learned counsel submitted that, in case this ground will be upheld by the Court, it will automatically incapacitate the appeal by the appellant, as it will be rendered incompetent. Regard being had to the fact that both sides had time to cross-examine on those exhibits, Mr. Lyimo, was of the firm view that, the anomaly if any, did not occasion any miscarriage of justice to

either party. He thus concluded his entire submission by imploring us, to dismiss the appeal with costs.

On his part, the learned counsel for the second respondent, also prayed to adopt the written submissions, which were lodged by the second respondent, on the 28th September, 2012. He did as well, associate himself to the oral submissions which was made by his learned friend on behalf of the first respondent. Thereafter, he chipped in on the issue of unendorsed exhibits that, the duty of the parties during trial of the suit, was just to tender the exhibits. The duty to endorse those exhibits, lay on the court, wherein the parties, had no mandate to countercheck. In any case, the alleged anomaly, was inconsequential, as it did not prejudice ether party. Mr. Mlinga, surmised his submission by urging the Court, to dismiss the appeal by the appellant, with the usual consequence as to costs.

In a brief rejoinder, Mr. Kesaria, strongly opposed his learned friends' submissions, in arguing that the appellant was negligent, by stating that such accusation could stand, only if he had paid K. J. Telecommunication through a genuine cheque. As there was evidence to establish that, the said payment was made through a fake cheque, then

the question of negligence to the appellant, does not arise. He further criticized his learned friends, for contending that, the first respondent, was the drawer of the cheque, while the same was drawn by the Barclays Bank. He thus reiterated his previous prayer, that the appeal be allowed with costs.

We are called upon to deliberate in the light of the submissions from either side above, and determine as to whether the appeal which is before us, is founded. From the outset, we would wish to point out that, neither in the written submissions, nor in the oral submissions made before us, there was mention of the fifth ground of appeal. In that regard, we were made to believe that, it was abandoned. We will therefore, treat it so, and proceed to deliberate on the remaining five grounds of appeal. In doing so, we will examine each of the grounds of appeal, in the way they were argued by the learned counsel, starting with the first one.

The issue which arises from the first ground of appeal, is whether the analysis of the evidence which was made by the learned trial Judge, does not support his decision. This ground to us, appears to be a bit so broad regard being had to the fact that, during trial of the

suit, there were about six issues which were formulated and decided. According to the decision which was given by the learned trial Judge, the appellant was ordered to refund to the first respondent, a total of about TZS 66,414,835/=, and other ancillary charges. In reaching at the said conclusion, a number of factors were considered from the issues which had been formulated. Under the circumstances, it may prove difficult for us, to resolve this ground before tackling the other issues first. We therefore, reserve this ground on the promise that, we shall revert to it after resolving the issues formulated from the subsequent grounds of appeal.

The complaint by the appellant, in the second ground of appeal is to the effect that the learned trial Judge, erred in law in making a decision which is contrary to the provisions of **the Exchange Act**. 2002. The issue therefore, is whether the decision of the trial Judge, contravened the named provisions of law. The provision which was singled out to have been contravened, is section 85 (1), which reads thus: -

> ***"S 85. Protection of bankers collecting payment of cheques,***

(1) Where a banker in good faith and without negligence-

(a) receives payment for a customer of an instrument to which this section applies; or

(b) having credited a customer's account with the amount of an instrument to which this section applies, receives payment thereof for himself,

and the customer has no title, or has a defective title, to the instrument, the banker shall not incur any liability to the true owner of the instrument by reason of having received payment thereof.

According to the decision of the learned trial Judge, which was made relying on the holding in **National Bank of Commerce Vs Said Ali Yakuti** [1989] T.L.R 119, he held that the appellant could not avail himself with the shield provided under the provisions of section 85 (1) of **the Exchange Act**, because even though the error happened in the ordinary course of business, there was no good faith, and the appellant failed to exercise due diligence in its business. On our part, after having closely considered the evidence on record, we are inclined

to join hands with the finding of the learned trial Judge, on the following reasons.

From the available evidence on record, there was no dispute to the fact that a genuine cheque, with Nos. 131863 for TZS 66,414,835/=, drawn in favour of **the THA**, was presented at the appellant's Bank, where after being cleared at the **BOT**, its proceeds were paid to K. J. Telecommunication, who was not the intended payee. There was further evidence to establish that, **the THA**, who happened to be the payee of the said cheque, had no account with the appellant Bank.

As if the foregoing was not enough, the transaction pertaining to the cheque, alleged to have been swapped with that from the Barclays Bank, which was said to have been drawn by one Manyata Investment, were not made known to the court. Under such situation, it could not affirmatively be argued by the appellant that, there was exercise of care and due diligence in the performance of its duties. Subsequently, the appellant could not be shielded by the provisions of section 85 (1) of **the Exchange Act**. It was the holding in the Kenyan

case of **Intercom Services and Others** (supra), which was cited by Mr. Kesaria, that: -

> *"A collecting banker has a responsibility to the true owner of a cheque, that is a person who in the circumstances of the case is entitled to the proceeds of the cheque. If the banker receives payment for a defective cheque and credits it to the customer's account while acting (a) in good faith; (b) without negligence; and (c) in the ordinary course of business, he does not incur liability if the customer happens not to be the payee."*

It is apparent from the above holding that, the shield provided by the provisions in **the Exchange Act**, can only be availed by a party, where there is proof of good faith and absence of negligence, a threshold which was not met by the appellant, in the instant appeal. That said, we find no merit in the second ground of appeal, and we accordingly dismiss it.

The third issue, which comes from the third ground of appeal, is whether the learned trial Judge, erred in exonerating both respondents, from liability in the instant appeal. The basis of the complaint is founded on the finding by the learned trial Judge, that there was collusion perpetrated by the employees from all parties concerned in this appeal. Indeed, it was the finding of the learned trial Judge, as reflected on page 422 of the record of appeal, which in part reads *in verbatim* thus: -

> *"--- as I have intimated earlier, collusion on the part of both (sic) the plaintiff's, defendant's and third party's employees together with those of the THA, to divert the proceeds from the cheque, is vividly discernible."*

The foregoing observation notwithstanding, the learned trial Judge, proceeded to absolve the first respondent, from liability of the loss occasioned because, the facts were clear that a cheque, was drawn by the Barclays Bank, handed to the second respondent, who in turn sent it to the appellant, and later to **the THA**, resulting to the goods of the first respondent, being released. He thus failed to see the justification for implicating the first respondent, to the loss.

With regard to the second respondent, the learned trial Judge, argued that, it as well, could not be implicated to the loss, because there was evidence to establish that it collected the genuine cheque from the first respondent, and presented it to the appellant for clearance, and that after clearance, the cheque was given again to the second respondent, who sent it to **the THA**, and the goods were released. Only to be discovered later that, the cheque which was obtained from the appellant, and presented to **the THA**, was not genuine.

The learned trial Judge, proceeded to hold the appellant only, liable to the loss which was occasioned in the said transaction, due the nature of its duties. Relying on the holding in **Barclays Bank (plc) Vs Bank of England** [1985] 1 AER, he stated that:

> *"On the side of the appellant herein, as a collecting banker, there was vivid abrogation of its prime duty, of conducting her business with care and circumspection."*

The learned trial Judge, moved further by illustrating laxity on the part of the appellant, when he gave an example of exhibit D1, which was the fake cheque used to credit the account of K. J. Telecommunication.

The same had some discrepancies among which was the fact that, it indicated to have been credited on the 16th May, 2006, while it was sent for clearance on the 18th May, 2006. We are settled on our part, that the reasoning which was given by the learned trial Judge, in exonerating the respondents from liability in the loss occasioned, was founded.

Just to cap it all, we also considered the following facts, which were established during the trial that, **one**, a genuine cheque was prepared by the Barclays Bank, on the instruction of the first respondent. **Two**, the said cheque, was presented to the appellant by the second respondent for clearance. **Three**, the said cheque, was sent for clearance at the BOT, by the appellant. **Four**, from BOT, the cheque was returned to the appellant, where payment from its proceeds, was made to K. J. Telecommunication, who unfortunately was not the intended payee. The defence given by the appellant on such anomaly, was that in the course of being taken to the **BOT**, for clearance, the cheque prepared under the instructions of the first respondent, was swapped with another cheque, alleged to have been presented to it by Manyata Investment.

In view of the foregoing scenario, even if it were to be believed that, there was indeed some collusion among the employees of all the parties to this appeal, as was observed by the learned trial Judge, that it was discernible, still the same had nothing to do with the respondents. What appears to be evident to us, is the fact that the said collusion if any, was either facilitated by the appellant, or was made possible from the conducive environment found at the appellant's working place.

We have further been inspired, by the decision of the Court of Appeal of Kenya in **Atogo Vs Agriculture Finance Corporation and Another** [1990 – 1994] 1 EA 31, where the appellant's claim for conversion against the respondents, had been dismissed for the reason that, the learned trial Judge, had suspected collusion between the appellant and one Hawala, in regard to the motor vehicle alleged to belong to the appellant, which had been attached by the respondents. In its holding the Court stated that: -

> *"The case for the Agriculture Finance Corporation, had proceeded to a wholly false premise contradicted by their own evidence, and despite the Judge's suspicion as to collusion*

between the appellant and Hawala, he was not entitled to dismiss the suit on that ground."

In the same vein, the collusion alleged by the learned trial Judge, to have been discernible if ever existed, did not disentitle the first respondent, from his claim for refund of his monies from the appellant. That said, we find the third ground of appeal, to be wanting in merits.

From the fourth ground of appeal, we have the fourth issue which is whether, the tort of conversion was properly imputed to the appellant, in favour of the first respondent. The tort of conversion is defined in the Wikipedia to mean: -

"An intentional tort consisting of 'taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession' "

The Oxford Dictionary of Law 6th Edition, defines the tort of conversion to mean: -

"A willful act in relation to a person's goods which constitutes a series and unjustified denial of his

title to them. Claimant must show possession or the right to immediate possession."

In case law, we have the holding in **CRDB (1996) Limited Vs Boniface Chimya** [2003] T.LR. 413, where the Court defined it to be: -

"The tort of conversion is constituted by an act or series of acts of ***willful interference without lawful justification, with any property, in a manner inconsistent with the right of another person, whereby that other person is deprived of use and possession of the property,*** *and to establish that the act of interference with the property was unlawful, it must be shown that demand was made for the release of the property and the demand was not complied with. Otherwise, without such indication of refusal to hand over the property to the plaintiff upon demand to do so, adverse detention of the property, may not be proved."* [Emphasis supplied]

Back to the appeal before us, there is no dispute to the fact that, monies that is, TZS 66,414,835/=, which was destined for **the THA**, was diverted in its process under the auspices of the appellant, and paid to K. J. Telecommunication, an unintended payee. Under the circumstances, the unlawful diversion of the monies from the lawful payee to someone else, undoubtedly, constituted conversion and in particular, after demand for making good of the anomaly, had been resisted.

What we gathered from the submission by Mr. Kesaria, was that, the suit by the first respondent, on the tort of conversion against the appellant, was unmaintainable, because it was neither the beneficiary of the diverted/converted monies, nor the drawer of the cheque, in respect of those monies. In the view of the learned counsel, the suit would have been maintainable, if it could be instituted by either the Barclays Bank, the drawer of the cheque, or **the THA**, the beneficiary of the said cheque. We are on our part, unable to buy such line of argument on the following reasons. **First,** in drawing the cheque, the Barclays Bank, was just acting as an agent of its principal, who happened to be the first respondent. **Secondly**, the first respondent, had already paid to **the THA,** who was the beneficiary of the converted/diverted cheque, and

thereby, making the right to the converted cheque, to revert to the owner/drawer. Under the circumstances, neither the Barclays Bank, nor **the THA**, who had suffered no injury, could maintain any meaningful claim against the appellant. It was therefore, only the first respondent, who had a maintainable claim in respect of the converted cheque, against the appellant. We therefore, dismiss the fourth ground of appeal, for being bereft of merit.

The use of unendorsed exhibits in determining the suit leading to the appeal at hand, constitutes the last ground of appeal. It was not disputed from either side that, the exhibits tendered in Court during trial and applied by the learned trial Judge, in determining the suit, were not endorsed in compliance with the requirement under the provisions of Order X111 rule 4 of **the Code**. The said provision stipulates thus: -

> ***"S. 4. Endorsements on documents admitted in evidence***
>
> *(1) Subject to the provisions of the sub rule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely–*

(a) the number and title of the suit;

(b) the name of the person producing the document;

(c) the date on which it was produced; and

(d) a statement of its having been so admitted;

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under rule 5, the particular aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialed by the judge or magistrate."

According to Mr. Kesaria, the omission to endorse the exhibits which was made by the trial court in the instant appeal, was fatal and vitiated the entire proceedings. He therefore, invited us to expunge the documents from the record, or nullify the entire proceedings of the trial

Court. On the other hand, both the learned counsel for the respondents, while they conceded to the anomaly occasioned by the trial court, of which they had no role to contribute, they were of the firm view that, the anomaly was innocuous, as it did not occasion any miscarriage of justice to either party.

What we had to ask ourselves, is the issue as to whether the omission occasioned by the learned trial Judge, in failing to endorse the exhibits was fatal. Being mindful to the advent of the oxygen principle as brought about by the amendment to the Appellate Jurisdiction Act, Cap 141, R.E. 2002 **(the AJA),** by the Written Laws (Miscellaneous Amendment) (No. 3) Act, 2017 (Act No. 8 of 2017), which enjoins the Court, to place much emphasis on the substantive justice, as against trivial technicalities, we are inclined to side with the joint opinion put forward by the learned counsel for the respondents, that the omission has not occasioned any injustice to either party. This was so for the reason that, the unendorsed exhibits, were exhaustively traversed to by the learned counsel of either side, who intensively cross-examined the witnesses of each respective side about them. See also: **Chacha Jeremiah Murimi and Others Vs Republic**, Criminal Appeal No. 551

of 2015, **Charles Bode Vs Republic,** Criminal Appeal No. 46 of 2016 and **Mtenda Company Distributors Limited and Another Vs Diamond Trust Bank Tanzania Limited and Others**, Civil Application No. 354/16 of 2018 (all unreported). With such finding, we dismiss the last ground of the appeal, and revert to the first issue, which we had earlier on skipped.

The issue on the first ground is, as to whether the analysis of the evidence by the leaned trial Judge, was faulty. As we pointed out earlier, this issue, is a bit too general in that, its answer substantially depends on the answers given to the issues concerning other grounds. Now from the answers which we have given to the other issues above, it is evident that our answer to the first issue is in the negative that, there was nothing to fault in the analysis which was made and applied by the learned trial Judge, in the appeal at hand, and that is why, we have upheld his decision. In that regard, the first ground of appeal, is as well dismissed.

Consequently, it is our holding that the appeal which has been preferred by the appellant herein, is without any founded basis and it

has to fail. We accordingly dismiss it and direct the respondents, to have their costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 18th day of November, 2019.

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 21st day of November, 2019 in the presence of Ms. Veronica Mwanasenga, counsel for the Appellant, and Heavenlight Mlinga counsel for the 2nd respondent also holding brief for Mr. Deogratius Lyimo, counsel for the 1st Respondent is hereby certified as a true copy of the original.

H.P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL