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. 50 OF 2019

DIAMOND MOTORS LIMITED..... APPELLANT

VERSUS

K-GROUP (T) LIMITED..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Sheikh, J.)

dated the 28th day of August, 2014
in
Civil Case No. 66 of 2003

JUDGMENT OF THE COURT

29th October & 20th November, 2019

KWARIKO, J.A.:

In the High Court of Tanzania at Dar es Salaam (the trial court), the respondent, a limited liability company, successfully sued the appellant and Stanbic Bank Tanzania Limited (the first defendant who is not party to this appeal), for a sum of Tshs. 264,396,350/=. In that, Tshs. 83,545,500/= (equivalent to Japanese Yen 10 Million) is the value of the import support

loan grant allocated to the respondent by the Ministry of Finance (the Ministry), Tshs. 58,481,850/= (equivalent of Japanese Yen 7 Million) is the outstanding liability against the said grant due to the Ministry at the time of filing the suit. For general damages, the respondent claimed for Tshs. 122,369,000/= and interest on the outstanding entire liability at 24% per annum. At the trial, the respondent paraded only one witness, Emmanuel Nsubisi Tom (PW1), while the respondent had two witnesses namely; Mohamed Suleiman Mohamed (DW1) and Moses Wilson Dulle (DW2).

It was the respondent's case at the trial that, in September, 2002 after having applied to the Ministry, the respondent was allocated a grant of 10 Million Japanese Yen for the purchase of two trucks to enhance its business. Among other conditions, the respondent was required to repay the loan in monthly installments of Tshs. 4,323,800/=, in default was liable to pay 24% per month against the sum due. The respondent was also supposed to deposit 30% cash cover and the grant was to be utilized under a letter of credit facility (LC), which was provided by the first defendant.

Thereafter, the appellant's company approached and offered to sell the trucks to the respondent. Through her letter dated 21/11/2000 (exhibit P3), the appellant promised to deliver the trucks to the respondent in six weeks' time. Later on, the respondent was notified by the Ministry that, a down payment of 30% had been received as covenanted. After the lapse of time promised by the appellant and the goods remained undelivered, the respondent reminded the appellant through a letter dated 5/9/2001. After several follow-ups the respondent was informed by the appellant through a letter dated 2/3/2001 (exhibit P5), that the trucks had been released to her through Jerry Manase (Manase). Due to the fact that the respondent did not receive the goods, he filed the suit at the trial court for the reliefs indicated earlier.

On her part, the appellant's case was that, Manase approached her with a letter from the Ministry to the effect that the respondent had been allocated the import support loan at the tune of Japanese Yen 10 Million. The appellant deposited 30% cash cover required for the import support after being requested by the respondent through Manase, who delivered to the appellant a bus and registration card as a guarantee.

After the Treasury's confirmation of receipt of 30%, a letter of credit (LC) was opened in the first defendant's bank for the two vehicles. Again, the respondent, through Manase requested the appellant to be supplied with vehicles which were available in the respondent's warehouse for the reason that importation would take four to five months. Hence, as requested, the appellant supplied one vehicle instead of two, tyres and balance of the money in cash less 30% cover deposited by the appellant which was deducted by the appellant. Later on, the appellant was surprised by the fact that the respondent did not receive the said goods from his agent Manase. Therefore, the appellant insisted to have fulfilled part of her obligations.

The trial court found in its decision that, the appellant did not act diligently when believed that, Manase was the respondent's agent without any proof. In that end, the trial court entered judgment against the appellant and ordered her to pay 83,545,500/= as prayed plus interest on the sum at 24% per annum from the date the import support facility of Japanese Yen 10 Million was availed to the respondent, to the date of delivering of the judgment. The trial court dismissed the case against the

first defendant for the reason that, as a banker, it was not obligated to ensure that the goods were delivered to the respondent.

On being aggrieved, the appellant filed this appeal on the following five grounds: -

1) *That, the trial Judge (Hon. Sheikh J.) had no jurisdiction to proceed with the trial as reason to show why the predecessor judge could not complete the trial were not recorded. Consequently, all such proceedings before her were a nullity;*
2) *That, the learned trial Judge erred in law and facts by failing to hold that Jerry Manase who acted for the Respondent was the Respondent's implied agent and/or agent by holding out/estoppel;*
3) *That, the learned trial Judge erred in law and facts by failing to hold that one Jerry Manase, having acted as the Respondent's agent, the Respondent was bound by his acts and/or omissions;*
4) *In the alternative and without prejudice to the above, the learned trial Judge erred in law and*

facts by failing to hold that the Respondent shares part of the blame by allowing an unauthorized person to act on its behalf, and therefore, the Respondent and the Appellant should have shared the loss;

5) *That, the learned trial Judge erred in law and facts by failing in exercise discretion properly by awarding interest to the tune of 24% which is unreasonable and exorbitantly high.*

Pursuant to Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the appellant filed written submissions on 11/4/2019, whilst the respondent opted not to file any written submissions in reply.

At the hearing of the appeal, Dr. Onesmo Michael Kyauke and Ms. Miriam Majamba, both learned advocates, represented the appellant and the respondent, respectively.

When Dr. Kyauke was called upon to argue the appeal, he first adopted the written submissions to form part of his oral submissions. However, before he argued the grounds of appeal, he raised a point of law which he found the Court should first consider. It was that, the plaint was

defective for, it was not dated and the verification clause was neither dated nor indicated the place where it was signed. The learned counsel argued that the omission is in contravention of the law under Order VI Rule 15 (3) of the Civil Procedure Code [CAP 33 R.E. 2002] (the CPC). He thus, argued that the contravention of the mandatory provision of law rendered the plaint fatally defective and urged the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] and declare the proceedings before the trial court a nullity.

In relation to the first ground of appeal, Dr. Kyauke, argued that, the trial of the case was conducted by two different judges without the successor judge assigning reasons for the takeover. He referred us to page 402 of the record of appeal where Sheikh, J. took over the conduct of the case from Mandia, J. (as he then was), but no reasons were assigned to that end. In the circumstances, Dr. Kyauke argued that, the successor judge had no jurisdiction to conduct the trial whose proceedings ought to be declared a nullity. To fortify his argument, the learned counsel relied on our previous decisions in **Abdi Masoud and Three Others v. R,** Criminal

Appeal No. 116 of 2015 and **Inter-Consult Limited v. Mrs. Nora Kassanga and Another,** Civil Appeal No. 79 of 2015 (both unreported).

In the second ground of appeal, Dr. Kyauke argued that, Manase who acted for the respondent was the respondent's implied agent or agent by holding out/estoppel for the following reasons: **one,** that, according to Moses Wilson Dulle (DW2), from the Ministry, it was Manase who applied for the import support loan whose application letter was accompanied by the respondent company's accounts showing profit and loss, business plan and cash flow (exhibit D7). Dr. Kyauke argued that, this testimony was not challenged by the respondent and there is no evidence to show that Manase was an unauthorized person. Additionally, the learned counsel submitted that, DW2's testimony that in their office there was only one letter signed by Manase was equally not challenged. **Two,** the import support loan agreement (exhibit D9) was signed by the Permanent Secretary, Ministry of Finance for the Government on one side and Jerry Manase, as an authorized representative of the respondent, on the other side. Dr. Kyauke argued that, there is no evidence to the effect that the respondent rejected the agreement, because it was signed by Manase and

there is no any other contract which was signed by the parties. For these reasons, Dr. Kyauke contended that the respondent is estopped from denying that Manase was her agent.

As regards to the third ground of appeal, it was Dr. Kyauke's submission that, because Manase was the respondent's agent, the respondent was bound by his actions or omissions in relation to the transactions regarding the import support loan agreement. To that end, since the appellant delivered the trucks to the respondent, the trial judge ought to have held that the appellant had discharged his obligations to the respondent, Dr. Kyauke argued.

Dr. Kyauke submitted in relation to the fourth ground of appeal that, having held that Manase was not the respondent's agent, the trial court judge should have at least held that, there was a contributory negligence on the part of the respondent. He was of that view because, the respondent's acts and omissions led the appellant to believe that Manase was the respondent's agent. He proposed that, through that negligence, the respondent ought to have shared at least 80% of the claim.

In respect of the fifth ground of appeal, Dr. Kyauke submitted that, although the courts have discretion to award interest for the period before the delivery of judgment, the 24% awarded by the trial court is exorbitantly high. The learned counsel also complained that, the interest at court's rate was not specified. He was of the further view that, the rate should not be too far from the maximum court's rate which is 12%. For the court's rate, he thus prayed the interest rate to be fixed at 7%. Dr. Kyauke lastly urged us to allow the appeal with costs.

Ms. Majamba, who had not filed written submissions on behalf of the respondent, was allowed to argue the appeal in terms of Rule 106 (10) (b) of the Rules. She opposed the appeal. In relation to the first ground of appeal regarding the change of hands between judges during the trial, Ms. Majamba argued that, both parties were represented and the counsel informed the successor judge of the status of the predecessor judge, hence the reasons for the change of judges were known. She submitted further that, the successor judge found it appropriate to proceed with the trial and no party raised any objection. It was her view that, since the counsel for

the parties were aware of the matter, as recorded in the proceedings, the claim by the appellant is unfounded.

In relation to the second ground of appeal, it was Ms. Majamba's argument that, Manase had no authorization to act on behalf of the respondent for the following reasons: **one,** the application letter to the Ministry (exhibit P1), was signed by E.N. Tom who is the Managing Director of the respondent. **Two,** all the correspondences between the respondent and the Ministry was to the Managing Director of K-Group, while Manase purported to be the General Manager of the respondent the position which does not exist in the respondent's structure. **Three,** the memorandum and articles of association of the respondent's company do not show Manase as one of the directors. For these reasons, Ms. Majamba argued that, the appellant did not act diligently when she transacted with Manase and they were the ones who introduced him to the bank as the respondent's director. It was Ms. Majamba's further contention that, the respondent did not know Manase and the trial court had opened the door for the appellant to bring him into the proceedings as a third party, but nothing was done.

Ms. Majamba argued in respect of the third ground of appeal that, the respondent had applied for the import support loan to buy trucks to enhance his business. However, the appellant indicated through Mohamed Suleiman Mohamed (DW1), that they supplied to Manase one vehicle, tyres and cash, which was different from what the respondent had applied for. The learned counsel added that, the vehicle was not imported, but it was in the appellant's warehouse. Ms. Majamba was thus of the view that, the foregoing scenario shows that, the appellant and Manase knew what they were doing, and now the Government is claiming from the respondent and does not want to deal with either the appellant or Manase.

In relation to the fourth ground of appeal, Ms. Majamba argued that, the respondent did not do anything wrong. She contended that, the respondent was only naïve and found the grant had already been utilized by a stranger. The learned counsel was of the view that the respondent did not commit any contributory negligence.

As for the interest chargeable which forms complaint in the fifth ground of appeal, Ms. Majamba argued that all correspondences between

the respondent and the Government show that, interest was part of the deal and hence 24 % is quite sufficient.

Responding to the Court's query, Ms. Majamba said that, the interest of 24 % was not specifically indicated, but at page 270 of the record of appeal, it is shown that the interest is chargeable at the Bank of Tanzania's rate. Further, Ms. Majamba said that, the trial judge ought to have specified the interest at court's rate preferably the highest one of 12 % as this is an old matter.

In his rejoinder, Dr. Kyauke reiterated his earlier submission and added that, exhibit P1 is not genuine as it was not received by the Ministry and was undated. He submitted further that, it was Manase who signed the import support loan agreement and not the Managing Director of the respondent. Dr. Kyauke contended that, PW1 did not deny that the respondent is liable to pay the Government and at page 169 of the record of appeal it shows that the Government told the respondent that the liability extends to the directors.

Furthermore, Dr. Kyauke argued that, as one of the preconditions for the grant of the import support loan was for the applicant to deposit 30 %, the respondent did not say if they separately deposited the money and who specifically did that. He therefore argued that, the respondent deposited the money through Manase.

We have gone through the record of appeal and considered the grounds of appeal together with the submissions of the counsel for the parties. We are thus ready to decide the grounds of appeal. Being a first appellate Court, we are entitled to review the evidence on record to satisfy ourselves that the findings by the trial court were correct (**Standard Chartered Bank Tanzania Limited v. National Oil Tanzania Limited and Another,** Civil Appeal No. 98 of 2008 (unreported).

We shall start with the point of law, raised by Dr. Kyauke which does not form part of the grounds of appeal. The same is in regards to the undated plaint and the verification clause neither dated nor indicating the place where it was signed. This was said by Dr. Kyauke to be contrary to Order VI Rule 1 of the CPC. Ms. Majamba did not specifically respond to this issue. We have gone through the said plaint and the verification clause

and we are in agreement with Dr. Kyauke that, both were not dated or indicated the place where the verification clause was signed. However, we are of the decided view that, the omission is not fatal. We are of this view, because the plaint and the verification clause are all stamped with the respondent's official seal containing the Dar es Salaam address. We therefore find that they were signed in Dar es Salaam. As for the date, we find this omission to have been cured by the date of filing, which was indicated to be 24/3/2003, since we are alive that the importance of the date is also to gauge the period of limitation. With the overriding objective principle now enshrined under section 3A and 3B of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] vide The Written Laws (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018, we find this omission not fatal as no any injustice was occasioned to the parties.

As regards to the first ground of appeal, we find it appropriate to reproduce Order XVII Rule (10) of the CPC which provides that: -

> *Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the*

foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

The case at hand was assigned to Mandia, J. (as he then was), who presided over it and heard all witnesses from both sides except cross-examination of DW2. He was thereafter, appointed as Justice of the Court of Appeal. Subsequently, Sheikh, J. took over the conduct of the case as shown at page 405 of the record of appeal. For the sake of clarity, we find it pertinent to reproduce what transpired during the trial on 13/5/2009 thus: -

"Date 13/05/200

Coram: Hon. Sheikh, J
For the Plaintiff: Ms. Majamba Adv.
For the 1st Defendant: Mr. Ndikili, Adv.
For the 2nd Defendant: Mr. Kobas Adv.
CC: Raymond

Ms. Majamba

This hearing is at an advanced stage of hearing. It is at the stage of x-examination of the last defence witness Hon. Mandia J (As he then) who was the trial judge has been appointed to the Court of appeal. We pray for direction.

Ms. Ndikili

That is the position Madam Judge.

Mr. Kobas

That is the position.

Order:

1. *Further hearing to proceed before me.*
2. *By consent hearing to continue on 29/09/2009*

Sgd: Hon. R. Sheikh

Judge

13/5/2009."

As the record speaks, Sheikh, J. who took over the case from her predecessor did not record in the proceedings as to why she took over. However, Ms. Majamba, learned advocate, addressed the Court that the predecessor judge, Mandia, J. (as he then was), had been appointed to the

Court of Appeal. Other advocates were recorded to have accepted the reasons for the change of the trial judge. The successor judge opted to take over the case where it had stopped. In our considered view, we agree with Ms. Majamba that, the reasons for the takeover were well known by all parties and the successor judge was ready to proceed from where her predecessor had stopped.

We are aware of the recent decision of this Court in **Mariam Samburo** *(Legal Representative of the late Ramadhani Abas)* **v. Masoud Mohamed Joshi and Two Others,** Civil Appeal No. 109 of 2016 (unreported), in which the Court insisted that recording of reasons for taking over the trial of a suit by a judge is a mandatory requirement, as it promotes accountability on the part of successor judge. The Court went further to state that overriding objective principle is not applicable against the mandatory provisions of the procedural law which goes to the very foundation of the case. The Court held that,

> *"In the appeal at hand, we find and hold that, the takeover of the partly heard case by the successor judges mentioned above was highly irregular as there were no reasons for the succession advanced*

on record of appeal. We think that in the circumstances of the suit which was before the High Court, reasons for successor judges were important especially the first who took over. In the circumstances, we are settled that, failure by the said successor judges to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullify."

Unlike in the cited case, the parties in the instant appeal were all aware as to why the successor judge was reassigned with the case. They only sought the direction/a way forward from the successor judge. Therefore, the parties were not prejudiced in any way. The first ground of appeal thus has no merit.

As regards to the second and third grounds of appeal, we are in agreement with the trial judge that, the appellant ought to have taken due diligence to satisfy himself as to whether Manase was a director or a duly appointed agent of the respondent. For instance, they ought to have received an authorization from the respondent and ensure that the Memorandum and Articles of Association of the company recognized him as

a director and other verification for that purpose. In our opinion the appellant acted negligently, because he dealt with unauthorized person. The second and third grounds of appeal too have no merit.

Despite our findings in the second and third grounds of appeal, we concur with Dr. Kyauke in relation to the fourth ground of appeal that, the respondent shares part of the blame in the whole transaction; not because he officially authorized Manase to do what he did, but by necessary implication, he knew Manase. We have the following reasons: **one,** during cross-examination Emmanuel Nsubisi Tom (PW1), said that, he knew one Nehemiah Manase Mwambona, who was also known by the nickname of Jerry Manase. However, PW1 denied to be related to this person or had any business relationship with him or that he was a shareholder or employee in his company. Although this information is omitted in the record of appeal, but it is contained in the trial court's original record and the trial judge reproduced it in the judgment at page 445 of the record of appeal. We have considered this evidence and we are of the view that, it could not have been a coincidence that the same Jerry Manase was the signatory of the application letter for the import support loan which was

received by the Ministry. DW2 said it was this letter (exhibit D7), that was found in their office thus disowning the letter signed by PW1 (exhibit P1).

Two, Manase is the one who signed the import support loan agreement, on behalf of the respondent on one side, and the Ministry on the other side. This agreement is the one which bred the allocation letter dated 8/9/2000 by the Ministry upon which the respondent based her belief that she was entitled to the grant. **Three,** if the respondent did not apply for the grant and signed the agreement, how did she know of its existence and started to make a follow up, if not through Manase whom he knew.

Four, one of the preconditions for the loan was down payment of 30% to be paid by the respondent. However, the record is clear that, the respondent did not pay that amount, but it was made by the appellant on behalf of Manase. **Five,** the application letter (exhibit D7) contains the respondent company's accounts and projected cash flow for June, 2000 - June, 2001, company's Certificate of Incorporation and a name of a guarantor one Anderson Mwanyato, which are similar to the one contained in exhibit P1 which was prepared by the respondent's Managing Director (PW1). There is no evidence to show that, Manase stole documents

belonging to the respondent. This shows that PW1 and Manase knew each other very well. For these reasons, we are settled in our minds that the respondent was not an innocent bystander and that she contributed to this transaction. We are therefore apportioning her liability to 40% of the claimed amount and the appellant shall shoulder the remaining 60%. The fourth ground of appeal has merit.

Lastly, the fifth ground of appeal concerns the award of 24% by the trial judge as an interest to the amount due. The issue is whether the trial judge exercised its discretion judiciously? We have gone through the import support loan agreement, where Article IV (c) provides as follows: -

> *Interest shall be charged per annum on the outstanding balance of the loan which will fall due and payable simultaneously with the sum payable by installments at the prevailing rate charged by the Bank of Tanzania on advances to the Government.*

It is our considered view that, in the absence of express figure of chargeable interest, we have pegged the same at 18% from the time it fell due to the date of judgment. This rate of interest should also be shared between the appellant and the respondent at 60% and 40% respectively.

Due to the shared liability, we shall not award the interest at court's rate. The fifth ground of appeal therefore succeeds.

Consequently, we allow the appeal partly as indicated above and each party to bear its own costs.

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 20th day of November, 2019 in the presence of Ms. Rashida Jamaldin Hussein, for the Appellant and Ms. Miriam Ismail Majamba, for the Respondent is hereby certified as a true copy of the original.

H.P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL