IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., MWANDAMBO, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 248 OF 2017

NIC BANK TANZANIA LIMITED.....APPELLANT

VERSUS

PRINCESS SHABAHA COMPANY LIMITED.....1ST RESPONDENT
HAMZA ABDULRAHIMAN MRINGO.....2ND RESPONDENT
ABDULRAHMAN HAMZA MRINGO.....3RD RESPONDENT

(An Appeal from the decision of the High Court of Tanzania, (Commercial Division), at Dar es Salaam)

(Mansoor, J.)

dated the 16th day of September, 2016
in
Commercial Case No. 94 of 2015

JUDGMENT OF THE COURT

30th March & 13th May, 2020

MZIRAY, J.A.:

In Commercial Case No. 94 of 2015 of the High Court of Tanzania (Commercial Division), the first respondent, Princess Shabaha Company Limited, sued the appellant, NIC Bank Tanzania Limited, seeking the following reliefs; unconditional order to release the first respondent motor vehicles with registration number T606 CFK and T689 BVM which were unlawfully impounded by the appellant, payment of compensation at the tune of TZS. 324,000,000.00 for loss caused by the appellant for supplying two used defective motor vehicles, payment of TZS.

35,345,000.00 being specific damages caused by the appellant for loss of passengers baggages and goods and a declaration that, the impounding of the two motor vehicles was illegal and a further declaration that the appellant has breached asset finance facility agreement made on 9/10/2012.

In her written statement of defence the appellant denied the claim and raised a counter-claim in the sum of TZS. 297,427,667.00 being the principal amount and accrued interest arising from the loan advanced to the first respondent and guaranteed by the second and third respondents.

The facts leading to this appeal could be placed in this outline. On 3/9/2012 the first respondent applied for a loan facility from the appellant in the sum of TZS. 400,000,000.00. It was a condition in the loan agreement that out of the amount released, a sum of TZS. 200,000,000.00 would be used by the first respondent to purchase new buses and the remaining sum of TZS. 200,000,000.00 would be used to pay a loan facility which the first respondent was indebted to the Tanzania Postal Bank.

On 9/10/2012 the appellant approved the loan facility on the aforementioned terms but for unknown reasons as alleged by the first

respondent the appellant delayed and executed the agreement in July 2014 and above all breached the terms of the agreement by supplying old defective buses which operated with difficulties for only six months. Despite the breach, on 9/6/2015, the appellant issued a demand notice which on receipt, the first respondent made a plea to reschedule the period of repaying the loan. The appellant agreed with the rescheduling but surprisingly, on 8/8/2015 she impounded the two motor vehicles the subject of the loan facility. The act prompted the first respondent to seek redress in the trial court. On the other hand the appellant raised a counter-claim.

During proceedings at the trial court both parties complied with the requirement of filing witnesses' statements. The trial commenced before Mansoor, J. on 16/3/2016 on which the appellant was represented by Mr. Malamsha, learned advocate and on the part of the respondents had the services of Mr. Gabriel Mnyele, learned advocate. The hearing proceeded smoothly until on 15/6/2016 when the appellant closed her case. On 1/7/2016 when the case was called for defence hearing, Mr. Msengezi, learned advocate rose to inform the trial court that he was holding brief of Mr. Mnyele who had been appointed the District Commissioner for Uyui District. He requested for an adjournment to enable Mr. Mnyele to

arrange for another advocate to take over the case. On that reason, the learned trial judge adjourned the defence hearing to 25/7/2016.

On the date fixed for hearing of the case, Mr. Msengezi appeared for the respondents and informed the trial court that following the appointment of Mr. Mnyele to a position of District Commissioner, he has reassigned all the cases to Firm Peak Attorneys and in that regard he needed more time to familiarise with the case files. On that reason, he prayed for an adjournment and the hearing was rescheduled to 24/8/2016. On the date fixed, neither the appellant nor her advocate appeared and upon a prayer made by Mr. Malamsha, learned advocate for the first respondent, a default judgment was entered against the appellant and all the reliefs sought were granted. On the other hand, the counter claim was dismissed with costs.

Being aggrieved, on 29/9/2017 the appellant lodged a memorandum of appeal with nine grounds of complaint. When the appeal was called on for hearing the appellant enjoyed the services of Mr. Adronicus Byamungu, learned advocate, while Mr. Abraham Hamza Senguji, learned advocate, represented the respondents. We heard both learned counsel orally in addition to their written submissions filed earlier

on pursuant to rule 106(1) and (7) of the Court of Appeal Rules, 2009 (as amended).

Upon going through the grounds of appeal raised and the submissions of the learned advocates, we have observed that the fourth ground of appeal raises a pertinent legal issue which need to be discussed first and if we find this ground to be meritorious, then there will be no need to discuss the other grounds. The fourth ground is couched in the following words: -

> *"The trial Judge erred in law by striking out the witness statement of the defence witnesses and determining that the appellant failed to defend the suit and prosecute the counter-claim.* ***The trial Judge having noted with appreciation of inability to act of the advocate of the appellant, she should have directed the appellant to be served personally instead of entertaining another person purporting to act for the appellant without any proof of instructions; as such the appellant was condemned unheard.***" [Emphasis ours]

Submitting in support of the above ground, Mr. Byamungu argued that before accepting Mr. Msengezi to take over the case from Mr.

Mnyele, the trial Judge should have directed that the appellant be served with summons personally instead of entertaining another person purporting to act for the appellant without any proof of instructions. It is the contention of the learned advocate that the default judgement entered and the order dismissing the appellant's counter-claim condemned the appellant unheard hence breached the principles of natural justice. He insisted that Mr. Mnyele had no mandate in law to instruct Mr. Msengezi to take over the case from him without getting specific instructions from the appellant to do so.

In reply thereto, Mr. Senguji was of the view that advocate Msengezi did not appear out of blue but with instructions from Mr. Mnyele without any contention from the appellant who knew the existence of such arrangements. In his written submissions, he pointed out that the appointment of Mr. Gabriel Mnyele to be the District Commissioner of Uyui District is a public knowledge, of which the appellant ought to have known about it and therefore inquire about the fate of her case upon such deviation. He blamed the appellant to have not been diligent on inquiring about her case otherwise if she had done so, she would have realised the absence of Mr. Mnyele as early as on 1/7/2017 when the case came for defence hearing at first instance. In the light of the above,

he submitted that this ground of appeal is devoid of merit hence be dismissed.

In rejoinder, Mr. Byamungu reiterated his submissions in chief and emphasized that the two advocates cannot give instructions to each other without involving the appellant.

Our main concern is on that part of the complaint focused on the right of legal representation in a trial. Our discussion will concentrate mostly on this area. According to the record of appeal and from the submissions from either side, on 1/7/2016 when the case was called on for defence hearing, Mr. Msengezi who appeared for the respondents informed the court that Mr. Mnyele who was appearing for the respondents had been appointed as the District Commissioner for Uyui District and on that reason he prayed for an adjournment so as to have another advocate to take over the case. The case was adjourned for defence hearing to 25/7/2016. On the fixed date, Mr. Msengezi informed the trial court that Mr. Mnyele re-assigned all the cases to his law firm and therefore he prayed for an adjournment to enable him familiarize himself with the case files.

According to the record, there is nothing suggesting that upon Mr. Mnyele being appointed as the District Commissioner, he followed the required procedure to hand over the case to Mr. Msengezi. There is no evidence either to show that Mr. Msengezi received instructions from the appellant to proceed with the conduct of the case. Likewise, there is no evidence to suggest that the appellant withdrew instructions from Mr. Mnyele upon a proper notice to her. In our view, Mr. Msengezi had to be instructed first by the appellant before he received the instruction to take over the matter from Mr. Mnyele. As rightly submitted by Mr. Byamugu, the two advocates had no mandate to give instructions to each other without involving the appellant. In the existing circumstances, there is no doubt that the principle of right to be heard was not observed when the trial court entered default judgment on account of the absence of Mr. Msengezi who had no instructions from the appellant. In this country, the right to be heard is a fundamental constitutional right enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania as amended from time to time. (See the cases of **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestine George Mwakyoma** [2003] TLR 251, **Damiano Qadwe v. R,** Criminal Appeal No. 317 of 2016 and

Menyengwa Tandi v. R, Criminal Appeal No. 351 of 2018 (both unreported).

From the above cases and what we have discussed herein above, we are of the firm view that the learned trial judge ought to have directed the appellant to appear in person and not allowing an advocate without proper instructions to appear and represent her under an arrangement which she did not approve. Following that omission, we are of the firm view that the rights of the appellant were prejudiced and for that matter it was not proper for the learned trial judge to enter a default judgment against her as she did.

The question we ask now is what are the consequences of a breach of this principle. The answer to this question can be found from the case of **Tanga Gas Distributors Limited v. Mohamed Salim Said and Two others,** Civil Application No. 68 of 2011 where we held that:-

> *"Settled law is to the effect that, its breach or violation, unless expressly or impliedly authorized by law, renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had the party been heard..."*

Based on the above decision, we find that the judgment of the trial court delivered on 16/9/2016 was reached in breach of the principles of natural justice hence null and void. Consequently, we invoke our revisionary powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141, [R.E. 2019] and quash the judgment and part of the proceedings from 27/7/2016 so that each partly will have an opportunity to present her case. The proceedings from the commencement of the suit up to 1/7/2016 to remain intact. Costs to be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 20th day of April, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 13th day of May, 2020 in the presence of Mr. Adronicus Byamungu, learned advocate for the Appellant and Mr. Thobias Kavishe, learned advocate holding brief for Mr. Abraham Hamza Senguji, learned advocatefor the respondents is hereby certified as a true copy of the original.

G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL