IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 89 OF 2020

SHOSE SINARE..... .....APPELLANT

VERSUS

STANBIC BANK TANZANIA LIMITED.....1st RESPONDENT

ICBC STANDARD BANK PLC

(formerly STANDARD BANK PLC) .....2nd RESPONDENT

[Appeal from the Ruling and Drawn Order of the High Court of Tanzania (Dar es salaam District Registry) at Dar es salaam]

(Mugeta, J.)

dated the 14th day of June, 2019

in

Civil Case No. 34 of 2016

.....

JUDGMENT OF THE COURT

24th August & 16th September 2021

GALEBA, J.A.:

Shose Sinare, the appellant, is a citizen of the United Republic of Tanzania, and during the transactions that gave rise to the dispute that precipitated into the present appeal, she was in the service of the first respondent as Head of Corporate and Investment Banking. She resigned on 3rd June 2013, because of the very matters that constitute the background to this appeal, the aspect which we will cover in a moment. The first respondent is a limited liability company existing under the laws of

Tanzania, where she is licensed to engage in the business of banking and has a registered office at Stanbic Centre Plot 99A, Kinondoni Road/Ally Hassan Mwinyi Road in Dar es Salaam Tanzania. The second respondent, like the first, is a banking corporation regulated under the laws of England, with a registered office at 20 Gresham Street in London, the United Kingdom. Before the 1st of February 2015, the first and second respondents were sister companies, each of them being wholly owned by Standard Bank Group Limited registered in the Republic of South Africa. Subsequent to that date, that is the 1st February 2015, a Chinese banking corporation called Industrial Commercial Bank of China Limited (ICBC) based in Beijing, the Peoples' Republic of China, acquired a 60% majority in the equity of the second respondent hence the current name ICBC Standard Bank PLC.

Facts relevant to this appeal are that, from the year 2010 or thereabouts, the Government of the United Republic of Tanzania (the Government) was in need of raising foreign financing of United States Dollars Five Hundred Fifty Million (US$550,000,000.00) (the Financing) for implementation of domestic public projects in energy, transport, water and sanitation sectors.

In pursuit of that requirement, on 15th November 2012, the Government appointed the first and the second respondents to act together as a Lead Manager and Sole Book Runner in the procurement of the Financing on its behalf at a fee of two point four (2.4%) per cent of the Financing. However, out of that fee, one (1%) percent would be paid to Enterprise Growth Market Advisors Limited (EGMA), in terms of the Collaboration Agreement which had earlier been entered between the latter and the first respondent.

The Financing was later increased to United States Dollars Six Hundred Million (US$600,000,000) and in early March 2013, the funds were procured and paid to the Government less two point four (2.4%) per cent which is United States Dollars Fourteen Million Four Hundred Thousand (US$14,400,000), whose one point four (1.4%) percent was shared by the respondents and EGMA parted with its US$6,000,000, the equivalent of 1% of the Financing as agreed with the first respondent in the Collaboration Agreement.

According to written statement of defence of the second respondent, the involvement of EGMA in the procurement of the Financing was improper and when she noted the illegality she surrendered and reported

herself to the Serious Fraud Office (the SFO) in London for prosecution before English courts for:

> *"failure of a commercial organisation to prevent bribery, contrary to section 7 of the Bribery Act 2010."*

That was in terms indictment No. U20150854 which was drawn by the SFO whose particulars of offence were that:

> *"Standard Bank PLC now known as ICBC Standard Bank PLC, between the 1st day of June 2012 and the 31st day of March 2013, failed to prevent a person or persons associated with Standard Bank PLC, namely Stanbic Bank Tanzania Limited and/or Bashir Awale and/or Shose Sinare, from committing bribery in circumstances in which they intended to obtain or retain business or an advantage in the conduct of business for Standard Bank PLC, namely by;*
>
> *(i) Promising and/or giving EGMA Limited 1% of the monies raised or to be raised by Standard Bank PLC and Stanbic Bank Tanzania Limited for the Government of Tanzania, where EGMA Limited was not providing any or any reasonable consideration for the payment; and*

(ii) Intending thereby to induce a representative or representatives of the Government of Tanzania to perform a relevant function or activity improperly, namely showing favour to Standard Bank PLC and Stanbic Bank Tanzania Limited in the process of appointing or retaining them in order to raise the said monies."

Because of the above charge following the self-report that was made to the SFO by the second respondent, the appellant felt deeply offended by the second respondent. She therefore filed Civil Case No. 34 of 2016 in the High Court claiming US$ 30 million compensation for ruining her career in banking, a declaration that the information passed on to the SFO by the second respondent, was full of misrepresentations and it suppressed material facts of what actually happened. She also sought several declarations and costs of the suit.

In response to the case, each respondent filed their independent written statements of defence. Whereas in addition to denying the claims, the first respondent raised one preliminary objection that the High Court at Dar es salaam District Registry had no jurisdiction to resolve a labour

matter, the second respondent raised four preliminary points of law including the point of law at page 186 of the record of appeal that:

> *"Any statement in the context of English criminal proceedings brought by the SFO against the 2nd Defendant and any statement contained in any DPA document approved by, or produced for, the English Crown Court, including the Statement of Facts,* ***is subject to absolute privilege, under English Law*** *and the Plaintiff cannot bring any action for defamation or any similar action in respect of such statements. The second defendant cannot, therefore, be prosecuted or sued based on statements made during or in the course of, judicial proceedings, or in the course of preparations or evidence for such proceedings."*

[Emphasis added].

We have singled out this preliminary objection because the decision of the High Court was solely based on that point alone. The point was argued by way of written submissions by parties and at the end, the High Court, made a finding that:

> *"...it is my view that indeed the second defendant was legally bound to report the suspicious transaction and she was a witness to the allegations by SFO. Therefore,* ***under common law she enjoys absolute immunity***

in the UK per the Tylor's case and the case of Merricks v. Nott Bower [1965] QB 57. *On reporting to the investigation bodies of Tanzania, I hold that the second defendant had no that obligation, as a matter of law. In view of the foregoing, no suit can lie against the second defendant."*

[Emphasis added].

It was also the decision of the High Court that upon reading the pleadings, it was clear that the first respondent had done nothing to entitle the appellant to have a cause of action against her. Following the above observations, the High Court struck out the case with costs. It is that order of the High Court, that is now being challenged before us on appeal. In doing that, the appellant lodged a memorandum of appeal containing six grounds of appeal, but in our view, deciding on the second and third grounds will dispose of the appeal. Those grounds are to the effect:

"2. That the learned trial judge grossly misdirected himself in fact and in law in holding that the 2nd defendant enjoys absolute immunity in the UK per the cases of Taylor v. SFO and Merricks v. Nott.

3. That having regard to the Appellant's plaint on record and the circumstances of the case, the learned trial judge grossly misdirected himself in holding that he

found nothing done by the 1st Respondent which entitles the appellant to a cause of action."

When the appeal was called on for hearing before us on 24th August 2021, the appellant was represented by Mr. Zaharan Sinare, learned advocate, whereas the first respondent had the services of Mr. Juvenalis Ngowi, also learned advocate. Messrs Deusdedith Mayomba Duncan and Edward Nelson Mwakingwe, both learned advocates, teamed up for the second respondent.

All parties had lodged written submissions in support of their respective positions. Mr. Sinare took the floor and in addressing the above second ground of appeal, he challenged the trial judge for imposing his own views that the second respondent was a witness before the SFO, an issue which was not pleaded but first mentioned in the rejoinder submissions at page 629 of the record of appeal. He submitted that absolute immunity applies to judges, advocates and like in **Taylor's case**, it extended to investigators and prosecutors. He contended that as there was no prosecution, there is no possibility that the second respondent became a witness. He submitted further that, the second respondent being a legal entity, it has no ability to swear in which case, it cannot be a witness. On this point he relied on the cases of **Catholic University of**

Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase, Civil Appeal No. 257 of 2020 and **Jafari s/o Ramadhani v. R,** Criminal Appeal No. 311 of 2017 (both unreported). He relied also on **Hamis Chuma @ Hando Mhoja and Manyeri Kuya v. R,** Criminal Appeal No. 371 of 2015 (unreported) in supporting his argument that a corporate body cannot testify, for it cannot take oath.

Mr. Sinare contended that the fact that the second respondent was immune to civil actions was inferred by the court whereas in the case of **George Shambwe v. Attorney General and Another** [1996] TLR 394, the Court held that courts should in no case infer facts that are not pleaded by parties. As for the third ground Mr. Ngowi submitted that the court had powers to decide the issue of cause of action as a point of law and on that score, the High Court cannot be faulted.

In reply, Mr. Ngowi submitted that the second respondent was a witness in the proceedings that gave rise to the Deferred Prosecution Agreement (the DPA). He contended that immunity to civil action is provided in the laws of Tanzania mentioned in the judgment at pages 666 and 667 of the record of appeal. He finally prayed that the appeal be dismissed with costs or if it will not be dismissed then the matter be

remitted to the High Court for determination of other preliminary objections that were not determined.

For the second respondent Mr. Duncan submitted that there were two proceedings, in the SFO and in the Crown Court at Southwark and his client was a reporting person like an informer under the Whistle Blowers and Witness Protection Act No. 20 of 2015 or the Prevention and Combating of Corruption Act [Cap. 329 R.E. 2019]. He submitted that; it is the officers of the second respondent on its behalf, referring us to page 32 of the record of appeal, where there is copy of the indictment. He submitted that the case of **Taylor** can be used in Tanzania to interpret our statutes, without referring us to any particular local statute that the High Court was interpreting. Mr. Duncan submitted that there was no self-reporting document, except the DPA which the Court perused in deciding the preliminary objection. He implored us to uphold the decision of the High Court and dismiss the appeal with costs or else the record be remitted to the High Court for determination of the issues that remained outstanding. Mr. Mwakingwe submitted that the issue whether the point of immunity is pure point of law was not raised at the High Court so it cannot be entertained now.

In rejoinder, Mr. Sinare submitted that at the SFO there were no proceedings, and even in the Crown Court at Southwark, where parties just presented the DPA. He submitted further that in determining a point of law a court does not have to go to documents, like what the High Court did in this case.

In determining this ground of appeal one issue arise: was the point raised for determination, that is the issue of immunity, truly a pure point of law in the circumstances? To put our focus in proper perspective, we will go through two decisions on what we have stated already on the subject.

In **National Insurance Corporation of (T) Ltd and Parastatal Sector Reform Commission v. Shengena Ltd,** Civil Application No. 20 of 2007 (unreported), this Court asked itself the same question we are seeking to answer in this matter and answered it. It stated:

> *"What is a preliminary objection? We think the rational answer to this question can be found in what the court observed in the case of* ***Mukisa Biscuits Manufacturig Company Ltd v. West End Distributors Ltd*** *(1969) EA 696. At page 700 Law, JA observed as follows: - So far as I am aware, a preliminary objection consists of a point of law which has been or which arises by clear implication out of the*

pleadings, and which, if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

What we can add is that for a preliminary objection to be successful, generally it should not need support from evidence. In **The Soitsambu Village Council v. Tanzania Breweries Ltd and Another,** Civil Appeal No. 105 OF 2011 (unreported), this Court stated:

"A preliminary objection must be free from facts calling for proof or requiring evidence to be adduced for its verification. Where a court needs to investigate such facts, such an issue cannot be raised as a preliminary objection on a point of law. The court must therefore insist on the adoption of the proper procedure for entertaining applications for preliminary objections. It will treat as a preliminary objection only those points that are pure law, unstained by facts or evidence, especially disputed points of fact or evidence. The objector should not condescend to the affidavits or other documents accompanying the pleadings to support the objection such as exhibits."

The immediate preceding quotation is very relevant to the issue we framed above in order to determine the second ground of appeal. The question is, was a submission on absolute immunity before the High Court a point of law or it needed proof? We will start from right there.

According to the written statement of defence of the second respondent, when she noted that she had committed the crime, she submitted herself to the SFO for indictment before English Courts, and by that she pleaded that she became a witness before the SFO and also before the Crown Court. That is not all, when parties appeared before us for hearing, Mr. Sinare spent a lot of time more than that statutorily permitted in the Rules to convince the Court that the second respondent was not a witness on one hand and Mr. Duncan submitted at length that his client was a witness in England, on the other hand. Both advocates referred us to the DPA on several occasions. In rejoinder, Mr. Sinare submitted that the respondents are not entitled to rely on any documents to establish that the second respondent was a witness because the document had not been tendered in the High Court. It is our considered opinion that all this was demonstrated that for the second respondent to be able to establish that she was a witness, she had necessarily to refer to documents and explain the roles she played in the whole process in order

to satisfactorily clarify that she was a witness and therefore immune to court action under English Law.

In our view, an allegation that the second respondent was a witness in English courts or not, is not an issue of law. It is an issue of fact. We take the position therefore that the issue of whether the second respondent was a witness and therefore immune to prosecution under English law was prematurely determined as a preliminary objection because it needed proof and investigation by the High Court. We therefore uphold the second ground of appeal.

The third ground of appeal was to the effect that the High Court made a decision on the preliminary objection that was not raised at all. In supporting this ground, Mr. Sinare submitted that the issue whether the appellant had a cause of action was, **first,** not a preliminary objection, and **second,** it was not a matter raised anywhere by the first respondent as she never questioned why she was sued in the notice of preliminary objection. Adding that the first respondent complained only of the court's jurisdiction.

In respect of the third ground of appeal Mr. Ngowi submitted that the court had jurisdiction and it was justified to go through the pleadings and

hold that the appellant had no cause of action against the first respondent as it held.

Determination of this ground will not detain us. According to the preliminary objection which was raised by the first respondent by way of a notice contained at page 318 of the record of appeal, the first respondent's complaint was that the High Court at the Dar es Salaam District Registry had no jurisdiction to entertain an employment dispute and that the appropriate Division to entertain the matter was the Labour Division of the High Court. The submission of the first respondent to support the objection is contained at pages 353 to 355 of the record of appeal. In that submission, the first respondent is submitting in support of the preliminary objection on the jurisdiction of the High Court as raised in the notice of objection. The reply by the appellant was that the first respondent was wrong in that the dispute between them was not a labour dispute but that she was sued as a necessary party under Order I rule 3 of the Civil Procedure Code [Cap 33 R.E. 2002] now R.E. 2019 (the CPC). Elaborating on what a necessary party means, the appellant quoted the case of **Abdullatif Mohamed v. Mehboob Yusuf Osman and Another,** Civil Revision No. 6 of 2017 (unreported) where the Court held that a necessary party is a party whose presence in the proceedings is indispensable to the

suit, such that if absent no effective decree or order would be passed. The High Court held that because the appellant stated that the first respondent was sued as a necessary party and having read the pleadings, the appellant had no cause of action against the first respondent.

With respect to the High Court, that reasoning was incorrect, in our view. It was wrong because, **first,** the High Court did not decide the point of law that was raised by the first respondent, the point whether the court had jurisdiction or not, instead *suo motu,* it raised another matter of whether the appellant had a cause of action against the first respondent or not and resolved it by reading the pleadings. In the case of **Ex-B8356 S/SGT Sylvester S. Nyanda v. the Inspector General of Police and the Attorney General**, Civil Appeal No. 64 of 2014 (Unreported), this Court observe that:

> *"There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed suo motu which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in*

denying any of the parties the right to fair hearing – See ***Mire Artan Ismail and Another v. Sofia Njati,*** *Civil Appeal No. 75 of 2008 (unreported)."*

Another critical issue of law is that the point whether the appellant had or had no cause of action against the first respondent was not argued by either of the parties. That denied parties the right of a fair hearing on that point. In **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] TLR 251 at 253 this Court held that:

"The right of hearing is a fundamental constitutional right in Tanzania by virtue of Article 13(6)(a) of the Constitution."

That is to say, in the High Court, the court abandoned the issue before it and picked its own which it eventually determined, and worse, that happened without consulting parties on what they would have to say. This Court has held already that where in the course of preparing a judgement, the court comes across a crucial issue which, in its view, such issue needs to be determined, parties must be resummoned and required to address the court on the new issue that the court wants addressed – see **Wegesa Joseph Nyamaisa v. Chacha Muhogo,** Civil Appeal No. 161 of 2016 and **Margwe Erro, Benjamin Margwe and Peter Margwe v. Moshi Bahaluluc,** Civil Appeal No. 111 of 2014 (both unreported).

Second, the holding of the High Court at page 668 of the record of appeal made the point to be of mixed law and fact. At that page the court remarked:

> *"I have read the pleadings, I have found nothing done by the first defendant which entitles the plaintiff a cause of action."*

In our view, that remark has two meanings, **one** is that the plaint does not disclose a cause of action, which may legally be argued as a preliminary objection- See **John Byombalirwa v. Agency Maritime Internationale (Tanzania) Ltd** [1983] TLR 1, with consequences of rejection of the plaint under Order VII rule 11(a) of the CPC. In other words, even if it was to be held that the plaint was not disclosing a cause of action, the appropriate legal remedy was to reject it not to strike out the suit. **Two,** the High Court's observation on the other hand, means that the appellant did not have a cause of action against the first respondent, which is a matter of evidence. That is why we said, the judge decided a point of mixed law and fact as if it was a single pure point of law, which was not the case.

As indicated above, for a preliminary objection to succeed, the same must raise a pure point of law, - see **Ms. Safia Ahmed Okash (as**

administrator of the estate of the late Ahmed Okash) v. Ms. Sikudhani Amiri & 82 Others, Civil Appeal No. 138 of 2016 (unreported). Where the point raises both issues of law and fact, it ceases to be a pure point of law. In **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser,** Civil Application No. 133 of 2102 (unreported), this court observed that;

> *"Where a preliminary objection raised contains more than a point of law, say law and facts, it must fail."*

That is why in our case, the third ground of appeal must succeed.

As determination of the second and third grounds of appeal has an effect of disposing of the appeal, we find no sound reason to embark on a discussion seeking to determine other grounds of appeal presented. As for the way forward, counsel for the appellant urged us to allow the appeal with costs, but counsel for the respondents, submitted that in the event the Court allows the appeal, then we make an order remitting the matter to the High Court for determination. On our part, we agree with counsel for the respondents' proposed solution.

For the foregoing reasons, this appeal has merit and the same is hereby allowed. Consequently, we set aside the ruling of the High Court

and remit the record in respect of Civil Case No. 34 of 2016 to the High Court for determination of that case according to law, with further orders that costs shall abide the outcome of the proceedings in the High Court.

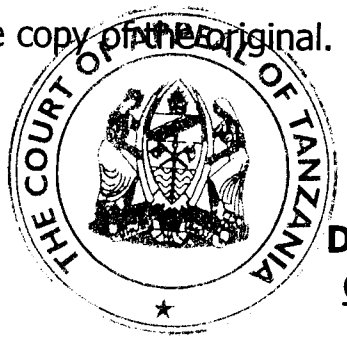
DATED at **DAR ES SALAAM**, this 10th day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 16th day of September, 2021 in the presence of Ms. Nora Marah, Counsel for the Appellant and also holding brief of Mr. Juvenalis Ngowi, Counsel for the 1st Respondent and Mr. Edward Mwakingwe, Counsel for the 2nd Respondent is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL