IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 446 OF 2020

INTERNATIONAL COMMERCIAL BANK LIMITED .....APPELLANT

VERSUS

JADECAM REAL ESTATE LIMITED ..... RESPONDENT

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

(Mlyambina, J.)

dated the 29th day of July, 2020
in
Land Case No. 6 of 2019

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JUDGMENT OF THE COURT

14th September & 15th November, 2021

MWANDAMBO, J.A.:

Before the High Court sitting at Dar es Salaam, the respondent M/s. Jadecam Real Estates Limited, successfully sued International Commercial Bank Limited, the appellant, in a suit largely for declaratory reliefs and monetary ones, in consequence. Aggrieved, the appellant preferred this appeal faulting the trial court for entering judgment for the respondent and dismissing her counter-claim.

Most of the facts giving rise to the suit before the High Court and ultimately this appeal, are common ground. The appellant, a commercial

bank and the respondent had, for same time period, been banker and customer respectively. Through that relationship, the appellant extended credit facilities to the respondent. In particular, in July, 2017, the appellant extended to the respondent a term loan of TZS. 300,000,000.00 (hereinafter to be referred to as Term Loan I) pursuant to a duly signed letter of offer dated 20/070/2017 (exhibit P1). That loan was repayable within 36 months and secured by a legal mortgage over the respondent's landed property known as Plot No. 182, Block C, situated at Mbezi Beach Area, Kinondoni Municipal, henceforth to be referred to as the Mbezi Beach plot or respondent's mortgaged property.

About four months later, on 15/11/2017 to be exact, the appellant solicited the respondent to take up an offer of a mortgage finance facility for the purpose of acquiring a fully furnished apartment; No. 1706 on Plot No. 63/27 in a building christened as Uhuru Height Apartments along Bibi Titi and Magore Street in Dar es Salaam City. The solicitation letter indicated that, the selling price of the apartment was USD 335,000 according to the basis of its valuation. Subsequently, by a letter titled: *Term Loan Facility (TL) – AA No. 2017/64* dated 19/12/2017, the appellant offered the respondent a term loan of United States Dollars (USD) 335,000 for facilitating the purchase of an apartment on the 17th

on. Similarly, two other matters came to light to the respondent necessitating the variation of the terms and conditions of Term Loan II before proceeding with the transaction. These were: **one,** difference in the name of the registered owner of the Apartment reflecting Bahadur Dewji Hassham instead of Al Karim Dewji shown in the signed contract; **two,** absence of current valuation on the Apartment on the basis of which the purchase price was pegged. By way of those correspondences admitted collectively as exhibit P4, the respondent demanded the restructuring of the loan with a view to; reducing the purchase price of the Apartment, extension of the moratorium period from 6 to 12 months, security for the loan to be restricted to the legal mortgage over the Apartment and reduction of rate of interest and extension of the repayment period.

In the meantime, by her letter dated 25/06/2018 (exhibit P9), the respondent instructed the appellant to debit from her account an amount not exceeding TZS. 300,000,000.00 towards liquidation of Term Loan I and thereafter discharge the mortgage over the Mbezi Beach plot and release the certificate of title thereto.

After protracted exchange of correspondence and meetings between the officers of the appellant and respondent, on 06/08/2018,

the respondent reneged from the deal. According to her letter to the appellant (exhibit P8) copied to the Deputy Governor, Bank of Tanzania; the Regulator of the banking sector, the respondent did so as a result of the appellant's alleged lack of transparency and changing of goal posts. In particular, the respondent claimed that notwithstanding the agreement reached in a joint meeting held on 25/06/2018, the appellant went ahead and registered an encumbrance against her Mbezi Beach property which had secured Term Loan I on which there was an agreement to hive it off the securities against Term Loan II on the mortgage financing transaction. Through exhibit P9, the respondent informed the appellant that she had referred the matter to the Regulator for its intervention and asked the appellant to desist from doing anything in connection with Term Loan II until the Regulator had conclusively determined the matter referred to it. Nevertheless, the appellant did not protest against the respondent's decision to rescind the contract amidst allegations that she had breached unspecified code of conduct, laws, rules and regulations. It appears that the appellant treated the transaction unaffected by the respondent's decision.

Notwithstanding the respondent's decision, on 10/01/2019, the appellant sent a notice of default to the respondent allegedly for having

failed to discharge her obligations arising from the mortgage finance facility in Term Loan II which was shown to be standing at USD 346,525.39 inclusive of interest. Through that notice (exhibit P12) issued under section 127 of the Land Act [Cap. 113 R.E. 2002], the appellant required the respondent to rectify the default within 60 days failing which, the mortgagee (the appellant) reserved the right to enforce the mortgages on the Apartment and the respondent's Mbezi Beach property which had secured Term Loan I. As the respondent believed that she had rescinded the contract subject of Term Loan II, she instituted a suit before the High Court on 12/02/2019 challenging the appellant's notice of default claiming, principally, that the notice was illegal having emanated from an illegal transaction involving USD 335,000 mortgage finance that never was. To reinforce her assertion, the respondent claimed that the transaction was marred by fraud and misrepresentations and that the notice of default was intended to fraudulently auction the respondent's Mbezi Beach property previously mortgaged to secure Term Loan I of which had already been fully discharged. For her part, the appellant resisted the suit contending that the respondent could not renege from the transaction after accepting the offer for the grant of Term Loan II. She also claimed that the respondent had an outstanding loan balance of TZS. 15,277,004.83 in

relation to the previous term loan secured by the mortgage on Mbezi beach plot. The above formed the basis of the appellant's counter- claim which was resisted by the respondent contending that she was not indebted to the appellant on the sums claimed or at all.

From the pleadings in the amended plaint and the written statement of defence and counter- claim, the trial court framed six issues for its determination. Critical of all was issue number two which was dedicated to the perfection of the mortgage finance facility on the Apartment. Others included; the withholding of certificate of title No. 117154 by the plaintiff (respondent), whether the mortgage finance facility, subject of Term Loan II was a take-over of a non performing loan or a direct purchase. Two of the remaining issues related to some questionable transactions in the respondent's bank accounts.

The last issue was dedicated to the reliefs. Even though the respondent made a string of allegations involving fraud and misrepresentations in the transactions, the trial court did not frame any specific issue in that regard.

In relation to the perfection of the mortgage finance facility framed as issue number two, the trial court found the evidence falling short of proving its perfection and so it answered it negatively. The trial court

floor on plot No. 63/27 along UWT Street Upanga area (henceforth the Apartment). The respondent accepted the offer through a memorandum of acceptance signed on 28/12/2017 by one of her directors.

The memorandum of acceptance gave rise to a contract for a term loan of USD 335,000 henceforth, Term Loan II, on the terms and conditions stipulated in the letter of offer admitted in evidence at the trial as exhibit P2. A few of such conditions were: **one;** the purpose of the loan was to facilitate the purchase of the Apartment offered as security to the existing non-performing loan under loss category in the name of Al Karim Dewji as part of compromise settlement; **two,** the loan was to be secured by a legal mortgage over the Apartment together with the existing legal mortgage against Term Loan I on the respondent's Mbezi beach plot.

It would appear that after accepting the offer, the respondent came to her senses on the terms which necessitated engaging the appellant for variation of some of them. Towards that end, several correspondences were exchanged between the parties through which, the appellant informed the respondent that the purpose of the loan was for taking over of a non-performing loan from a defaulting borrower and not for facilitating the purchase of the Apartment as understood earlier

arrived at that conclusion upon being satisfied that the conditions precedent towards the perfection were not met. Above all, it found no evidence of registration of the mortgage of the Apartment as required by section 41 of the Land Registration Act [Cap. 334 R.E. 2019]. As to the purpose of the loan, subject of the third issue, the trial court rejected the appellant's assertion that it was for take-over of a non performing loan stating expressly that it was for facilitating exhibit P2, contrary to the purchase of the apartment offered as security to the existing non-performing loan under loss category in the name of Al-Karim Dewji as part of the compromise agreement. According to the trial court, had the purpose been take-over of the loan, that would have entailed a tripartite agreement involving the appellant, respondent and the said Al-Karim Dewji.

With regard to issues four and five meant to investigate the lawfulness of the appellant's act of withholding a sum of USD 38,232 (TZS. 88, 260,566.00) from the respondent's TZS account and a sum of USD 3,900 from the USD account, the trial court made negative findings on both of them. It did so upon being satisfied that the appellant wrongly charged interest on the loan which was not yet due amounting to TZS. 24,000,000 or its equivalent in US Dollars. That finding was

derived from DW1's evidence supported by minutes of a meeting between officers of the appellant and respondent reduced into writing through exhibit P7.

On the other hand, the trial court found no justification in the appellant's claim of TZS. 15,277,004.83 in her counter-claim since the respondent had already liquidated her liability involving Term Loan I. In any event, the trial court agreed with the respondent that the notice of default was in relation to Term Loan II of USD 335,000 which had not yet been disbursed. From the above findings, the trial court made a negative determination in relation to the first issue; whether the appellant was justified in withholding the respondent's certificate of title No. 117157, subject of the legal mortgage to secure TZS. 300,000,000.00 loan which was already liquidated.

Having determined the issues as aforesaid, the trial court entered judgment for the respondent granting all the reliefs in her favour plus an award of TZS. 100,000,000.00 in general damages. In a nutshell, the trial court granted four declaratory reliefs for the respondent, that is to say; **one,** the mortgage finance involving plot No. 63/27 Uhuru Height apartments was false, fraudulent and illegal; **two,** the unilateral act by the appellant committing plot No. 182, Block C, CT No. 117157 Mbezi

Beach area as security associated with mortgage finance on the disputed apartment was illegal and unlawful; **three**, the appellant's refusal to release the respondent's certificate of title to plot No. 182, Block C, Mbezi Beach area was illegal and unlawful; and, **four**, the appellant's act withholding USD 38,232 was illegal, unlawful and unjustified. Consequently, it dismissed the appellant's counter-claim for TZS. 15,277,004.83 and outstanding loan of USD 335,000 plus interest and penalties for being unsustainable.

As we indicated in page 7 above, the respondent made strings of allegations based on misrepresentations and fraud which were roundly denied by the appellant although no specific issue was framed. Nevertheless, the trial court made some findings on it and held that the appellant misrepresented to the respondent in relation to the registered owner of the Apartment; a fundamental term of the contract and that the appellant defrauded the respondent.

Arising from the foregoing, the trial court ordered the appellant to refund the amounts unlawfully withheld that is; USD 38,232 with compound interest, USD 3,900 and the release of the certificate of title. The appellant was also adjudged to pay TZS. 100,000,000.00 in general

damages plus interest at the court's rate of 12% per annum from the date of judgment to final satisfaction.

Aggrieved, the appellant has preferred this appeal raising eight grounds of complaint against the trial court's decision for the alleged errors in the following aspects, namely: **one**; holding that the appellant defrauded the respondent; **two,** declaring the mortgage finance involving plot No. 63/27 Uhuru Height Apartment as false, fraudulent and illegal; **three**, declaring that the appellant's act of associating plot No. 182 Mbezi Beach property, as security for the Term Loan II illegal and unlawful; **four,** declaring the appellant's refusal to release the title deed for Mbezi Beach property as illegal and unlawful; **five**, granting reliefs not prayed for in the plaint; **six**, ordering the appellant to refund the respondent the sum of USD 38,232 (TZS. 88,260,866) with compound interest at the rate of 19% per annum from April 2019 to the date of judgment and for the refund with interest of USD 3,900; **seven**, ordering the appellant to release the original title deed on Mbezi Beach plot to the respondent, and awarding the respondent general damages of TZS. 100,000,000.00; and **eight**, dismissing the appellant's counter-claim.

At the hearing of the appeal, the appellant was represented by Mr. Stanislaus Ishengoma, learned advocate like he did before the High Court, so did Mr. Samson Mbamba together with Ms. Aziza Msangi, both learned advocates who acted for the respondent.

Mr. Ishengoma attacked the trial court in ground one for making a finding that the appellant defrauded the respondent on two fronts. One, the finding was not based on any of the issues framed for the trial court's determination. It is plain from the record that the trial court did not frame any issue on fraud and so it made an error in making a finding outside the framed issues. On the other hand, the learned advocate argued that there was no evidence proving fraud. Advancing his argument, Mr. Ishengoma submitted, a claim based on fraud should have been proved strictly in line with **Ratilal Gordhanbhai Patel v. Lalji Makanji** [1957] E.A 314. Mr. Ishengoma invited the Court to sustain this ground.

Not amused, the learned advocate for the respondent submitted that the finding on fraud was inevitable based on the pleadings as well as the evidence adduced by the respondent's witnesses. Mr. Mbamba invited the Court to re- appraise the evidence and come to its own conclusion which will reveal that fraud was proved to the required

standard. The learned advocate drew our attention to the evidence of PW1 at pages 1157 and 1158 of the record of appeal, alluding to item ix in exhibit P2 showing that the registered owner of the apartment in question was Al-Karim Dewji, the purpose of the loan which turned out to be different from what was contracted for, absence of valuation of the Apartment indicating that the forced sale value of the apartment was USD 335,000 whereas the valuation carried out later revealed a value of USD 182,250 and discovery that the apartment was encumbered by a mortgage to secure a loan of TZS. 670,000,000.00 in favour of the appellant.

Submitting in rejoinder, Mr. Ishengoma contended that courts' decisions must be based on issues and as long as no issue was specifically framed on fraud it was wrong for the trial court to make a finding on it.

It is not in dispute that although the respondent pleaded fraud in the transaction revolving around the mortgage finance which was denied by the appellant, no specific issue was framed. It is equally common ground that the trial court made some findings against the appellant including the very opening sentence in the judgment. Similar mention on fraud can be found at pages 1220 and 1221 of the record of appeal

when dealing with the second issue; whether the mortgage finance facility was perfected, to which it answered negatively.

It is trite that findings in suits must be based on issues arising from pleadings. However, there is an exception to that rule. The trial court is not precluded from deciding an issue which, though not framed, parties left it for its determination. See for instance: **Agro Industries Ltd v. Attorney General** [1994] T.L.R 43 cited in **George J. Minja v. Attorney General** Civil Appeal No. 75 of 2013 (unreported). It is not too difficult to conclude that this is exactly what happened in the instant case. Allegations on fraud were pleaded and denied by the appellant and parties led evidence for or against. Without expressly stating so, it seems to us that parties left the issue of fraud to the trial court for its determination which it was legally entitled to do. Consequently, the trial court cannot be faulted for making findings on fraud which was left to it for its determination. That said, the next issue for our consideration revolves around two aspects; relevance and sufficiency of evidence. By relevance here we mean, was the issue relevant in the light of the cause of action behind the suit before the High Court?. We shall come to the sufficiency of evidence later.

Upon our examination of the pleadings, there is no dispute that the respondent's cause of action was founded on the appellant's notice of default for failure to perform her obligation under mortgage finance facility whose terms were prescribed in exhibit P2. In terms of clause ix (a) and (b), the loan was to be secured by legal mortgages on the Apartment as well as the right of occupancy on the respondent's Mbezi Beach plot. The appellant served the notice of default (exhibit P12) five months after the respondent had decided to rescind the contract constituted by exhibit P2. The appellant did not protest the respondent's act. It disregarded it silently and hence the notice of default based on the very contract the respondent had rescinded citing a string of allegations. It seems to us to be clear that the suit was not founded on the respondent's decision to rescind the contract rather on the appellant's justification to enforce her alleged rights in an agreement which had already been rescinded. That being the case, findings on fraud or misrepresentation would have been relevant to the extent of the mortgage only, and in this case, registering an encumbrance against the mortgaged property on the Mbezi beach plot on which the parties had agreed in principle in their meeting held on 25/6/2018 that it would be hived off the securities against that loan upon liquidation of Term Loan I. Anything involving the circumstances under which the

mortgage finance facility was negotiated and ultimately the signing of exhibit P2 and what transpired afterwards were irrelevant in so far as the respondent decided to exercise her contractual right to rescind from it on the grounds expressed in exhibit P8. In our view, a discussion on the justification to the contract would have been relevant at the suit of the appellant which was not the case. It is clear from the counter-claim that the appellant never intended to challenge the rescission apart from mounting her claim on defaults arising from the very contract the respondent had decided to rescind. That deposes of the first part of this ground.

The second part relates to the sufficiency of evidence to prove fraud. It is trite that the standard of proof of fraud in civil cases is higher than a mere balance of probabilities. Mr. Ishengoma placed before us two decisions; **Omary Yusuf v. Rahma Ahmed Abdulkadr** [1987] T.L.R 169 and **Ratilal Gordhanbhai Patel v. Halji Makanji** (*supra)* to reinforce his argument that an affirmative finding on fraud entails strict proof which was not the case in the instant appeal.

We respectfully agree with him being satisfied that the evidence to prove fraud against the appellant was below the required standard. We say so because the only incidences relevant to the mortgage finance

facility relate to the clandestine encumbrance against the respondent's mortgaged property on the Mbezi beach plot and the variance in the name of the owner of the Apartment for the purposes of executing a legal mortgage to secure that loan. As we have already said above, the rest of the incidences of fraud particularized in paragraph 23 of the amended plaint were irrelevant to the suit before the trial court.

Much as there was no dispute on the two incidences, there was no evidence proving that the appellant committed fraud in registering an encumbrance against the respondent's mortgaged property. Naturally, the clandestine registration of encumbrance was irregular in view of the spirit of the understanding in a meeting held on 25/6/2018. However, we are not prepared to share the trial court's view that it was necessarily fraudulent thereby attracting a finding such as; "*This is one of very few (if any) cases in which the Bank (Defendant) has defrauded her client (plaintiff)*" in the opening statement of its judgment. Equally so, the appellant's evidence through DW1 explaining the variance in the name of the owner of the Apartment attributing confusion in the Land Registry at the time of registration of the relevant documents was sufficient to reject the allegation of fraud. We are thus satisfied that there is merit in the appellant's complaint in ground one and sustain it.

Next, Mr. Ishengoma addressed us on ground two and seven conjointly and we think rightly so because they deal with the same aspect; a finding on the validity of the mortgage financing on the Apartment and the consequential order for the release of the certificate of title on the mortgaged property.

We have already held against the finding on fraud and so the validity of the mortgage finance will be determined without reference to fraud. Mr. Ishengoma contended that the respondent was not justified in walking out of her contractual obligations constituted in exhibit P2. He placed reliance on the Court's decision in **Hotel Travertine Ltd & 2 Others v. National Bank of Commerce Ltd** [2006] T.L.R 113 for the proposition that the respondent was bound by the terms in the offer letter upon the respondent accepting the offer. The learned advocate contended that since one of the terms of the contract in exhibit P2 was that the legal mortgage on the existing loan would extend to Term Loan II in the mortgage finance transaction, she was bound by that contract. Mr. Mbamba had a different view arguing, by and large, that the circumstances prior to and after the acceptance of the offer justified the respondent's decision to cancel the deal vide exhibit P8 against which there was no protest from the appellant. That being so, Mr. Mbamba

argued, there could not have been any valid mortgage on the respondent's Mbezi Beach property for the acquisition of the Apartment.

Mr. Ishengoma's submission in rejoinder was that the respondent could not validly walk out from the deal post acceptance neither could the agreement be varied except through a written agreement.

Having heard the submissions from the learned advocates in the light of the judgment of the trial court, the pleadings, issues and evidence, there is no dispute that the respondent and the appellant concluded a binding agreement through exhibit P2. Consequently, the question of the respondent cancelling the offer as argued by Mr. Ishengoma cannot arise. Nevertheless, the fact that the parties were contractually bound by the terms expressed in exhibit P2, did not, by itself, preclude any of them from rescinding the contract for justifiable reasons. Indeed, according to Mr. Mbamba, this is exactly what the respondent did through exhibit P8. Whether the reasons expressed therein were valid or not is a different issue altogether the more so because, as alluded to earlier on, the appellant did not protest the cancelation/rescission of the contract by way of a suit. She kept mum only to surface five months later with a notice of default. It is the notice of default which triggered the land case before the High Court rather

than the rescission of the contract which the respondent treated as terminated. In the premises, our decision in **Hotel Travertine Ltd** (supra) cannot be of any avail to the appellant. The relevance of that decision is limited to the extent of an argument involving binding nature of terms of an agreement upon acceptance of an offer. It is not relevant in a case such as this one where the respondent elected to rescind the contract *ab initio* for the alleged fraudulent misrepresentation. Whether the respondent was correct in rescinding the contract was, with respect, not an issue before the trial court in so far as the appellant did not seek to protest the rescission by way of a suit. Neither did she do so in her counter claim. It is the respondent who protested the notice of default in a contract involving mortgage finance for a loan of USD 335,000 from which it elected to rescind *ab initio.* Resultantly, since the underlying agreement which would have given rise to a legal mortgage was no longer in existence, the trial court was right in declaring the mortgage on Mbezi Beach plot false and illegal from which no valid notice of default could be issued for failure to perform obligations under a non-existing contract.

The record shows that through exhibit P8, the respondent complained against the appellant's clandestine registration of an

encumbrance on the property at a time when she had already agreed to consider releasing the certificate of title after the liquidation of the first loan. Despite all this, the appellant never protested against the respondent's move neither did she seek to sue the respondent for specific performance of the contract. Like the learned trial judge, we are satisfied that the unilateral act by the appellant committing Mbezi beach plot as security against Term Loan II involving acquisition of the Apartment was illegal so was the refusal to release the certificate of title. To conclude, we dismiss ground 2 and partly ground 7 to the extent it relates to the order for the release of the certificate of title to the respondent.

Next for our consideration is grounds 3 and 4 which were argued together. Ground three seeks to fault the trial court for finding and declaring illegal and unlawful the appellant's act associating the mortgaged property as security against the term loan facility under the mortgage finance. Ground four is consequential. It faults the trial court for holding that the appellant's refusal to release the certificate of title to the respondent's Mbezi Beach property was illegal and unlawful. The trial court's finding in relation to the release of the certificate of title to Mbezi Beach plot was a result of its determination of the first issue; whether

the defendant's act of withholding certificate of title No. 117157 was lawful. The trial court answered that issue in the affirmative upon being satisfied that the loan which was secured by that property had been fully liquidated and so the certificate of title should have been released long before. It likewise held that since the grant of the mortgage finance facility aborted, there could not have been any valid mortgage to secure the Term Loan II that never came into existence and thus the continued holding of the certificate of title was illegal.

Mr. Ishengoma was adamant in his submissions that the respondent was bound by the terms of exhibit P2 in which one of the securities against Term Loan II was a legal mortgage over the property which had been mortgaged as security against Term Loan I. Mr. Mbamba urged us to sustain the findings of the trial court. We respectfully concur with the finding of the trial court that from the evidence, the basis upon which the respondent agreed to execute a legal mortgage as security for the mortgage finance facility aborted. As rightly held by the trial court, not all conditions precedent in exhibit P2 were met which resulted into the respondent rescinding the contract without any protest from the appellant. It is also in evidence, which was accepted by the trial court when determining the second issue, that the

mortgage finance facility was not perfected neither was the legal mortgage over the Mbezi Beach property registered as required by section 41 of Cap. 334. The appellant has not challenged those findings in this appeal; she cannot be heard to fault the trial court for holding illegal and unlawful her act of associating the respondent's property as security for the abortive mortgage financing facility. Consequently, the appellant's refusal to release the certificate of title could not have been justifiable in the circumstances; it was unlawful as rightly held by the trial court. We thus dismiss grounds 3 and 4.

Ground six faults the trial court for ordering the appellant to refund the respondent with interest a sum of USD 38,232 equivalent to TZS. 88,260,866 and an amount of USD 3,900. The amounts were debited by the appellant from the respondent's accounts towards payment of the outstanding amounts in Term Loan I and for interest payment in Term Loan II. The complaint in ground eight is against the trial court's order dismissing the counter-claim of TZS. 15,277,004.83 outstanding amount from Term Loan I and USD 335,000 from Term Loan II. The learned advocate for the appellant had three pronged arguments in support of the two grounds. **One**, the appellant exercised her right of set- off against credit balances in other accounts of the respondent in the event

of default pursuant to clause (x) (i) of exhibit P2. **Two**, the appellant issued a notice of default in relation to Term Loan II, the subject of the counter-claim which should have been sustained by the trial court more so because the respondent was not entitled to renege from the mortgage finance facility after accepting the offer constituting the contract in exhibit P2. **Three**, the appellant paid the amount of USD 335,000 to the previous owner of the Apartment; Bahadour Hassham Dewji. However, the learned advocate was at pains pinpointing the date of the disbursement of that amount.

Submitting in reply, Mr. Mbamba argued that there could not have been any amount outstanding in Term Loan I upon the respondent liquidating it and admitted as such by one Marie Mang'enya, through her counter affidavit admitted during the trial as exhibit D3. At any rate, the learned advocate contended, the notice of default did not make reference to any outstanding amount in Term Loan I. Regarding the claim in relation to Term Loan II, the learned advocate argued that the same was predicated on a mortgage finance facility which the trial court held that it was never perfected and thus unsustainable.

We propose to dispose the last item before dealing with the rest. We think the learned trial judge was right in dismissing the counter-

claim based on the mortgage finance facility which was declared to have aborted. As indicated herein, that facility never came into existence from which the appellant could have mounted a counter-claim.

Regarding the withholding of USD 38,232 or its equivalent in TZS, there was no dispute as to the payment of that sum into the respondent's account by one of its tenants. According to para 25 of the amended plaint, that sum was deposited in April, 2019, two months after the institution of the suit before the High Court. The appellant justified the withholding of that amount in exercise of its right of set-off by reason of the respondent's default of her obligations in exhibit P2. However, DW1 admitted in evidence that the appellant wrongly debited TZS. 24,000,000.00 or its equivalent in US Dollars towards payment of mortgage finance interest in respect of Term Loan II which was not yet due. From this piece of evidence (at pages 1191 and 1192 of the record of appeal), the trial court found no justification by the appellant claiming right of set-off considering the agreement reached by the parties in the meeting held on 25/06/2018 whereby the appellant agreed to reverse instalments of accrued interest already collected on account of interest on account of Term Loan II during the moratorium period. We have

seen no reason to disturb the trial court's findings reached from the evidence.

In any event, from our own evaluation of evidence which we are to do on the authority of rule 36(1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the following appear to be beyond controversy. **One**, the respondent wrote to the appellant on 5/7/2018 vide exhibit P10 reminding her of her previous instructions of 25/6/2018 (exhibit P9) to liquidate the term loan through a debit from the account and in case of insufficient funds, to debit the USD account at Mikocheni Branch. One of the long-established rules governing the relationship between a banker and its customer requires the bank to act on its customer's instructions. See for instance: **Sheldon and Fidler's Practice and Law of Banking 11th Edition** at page 49. The appellant was bound to act on the respondent's instructions failing which, she did so at her own risk. That means, there could not have been any outstanding balance from Term Loan I account in the amount of TZS. 15,277,004.83 or at all.

Two, the debit of the amount of TZS. 24,000,000.00 from the credit arising from the deposit of USD 38,232 was done on 03/5/2019 long after the respondent had reneged from the mortgage finance transaction and during the pendency of the suit before the trial court.

Indeed, DW1 admitted (at pages 1192 of the record of appeal) that the debiting of the amount was wrongful. In relation to TZS. 15,277,004.83 part of the counter-claim, the trial court accepted the evidence in the counter affidavit of Marie Mang'enya (admitted as exhibit D3) who deponed on 8/3/2019 that the respondent had no outstanding amount in relation to Term Loan I having liquidated that loan. It is the same person who signed and verified the amended written statement of defence on 24/10/2019 claiming, in the counter-claim that the respondent was indebted in the sum of 15,277,004.00. That amount could not have remained outstanding eight months after admitting that the respondent had discharged her loan obligations in full.

As to the sum of USD 3,900 ordered by the trial court to be refunded with interest, we agree that since that amount was wrongfully deducted, the trial court cannot be faulted for ordering its refund to the respondent. Consequently, we dismiss both grounds 6 and 8 for lacking in merit.

Lastly on the award of TZS. 100,000,000.00 general damages, subject of the appellant's complaint in grounds five and seven. Messrs. Ishengoma and Mbamba were in agreement that it was not pleaded neither was it made part of the reliefs. However, Mr. Mbamba, unlike his

learned friend, urged us to sustain that award because it was rightly awarded to the respondent based on the findings showing breach. Mr. Mbamba defended the award as falling under other reliefs to which Mr. Ishengoma disagreed contending that parties are bound by their own pleadings placing reliance on our decision in **James Funke Gwagilo v. Attorney General** [2004] T.L.R 16.

It is evident from the impugned judgment; the trial court answered all issues in favour of the respondent and afterwards it granted all the reliefs in the amended plaint plus general damages. Justifying the award, the trial court relied on our decision in **Tanzania Saruji Corporation v. African Marble Company Limited** [1997] T.L.R 155 on the basis of awarding general damages. From that decision, the trial court found three aspects justifying the grant of general damages to wit; the appellant's unlawful withholding of the certificate of title despite the respondent's liquidation of Term Loan I in full; two, appellant's act of defrauding the respondent with regard to Term Loan II and; three, appellant's illegal withholding of USD 38,232 and USD. 3,900.

The critical issue for our consideration is whether a trial court can grant reliefs which are not prayed for in the plaint under the blanket prayer; any other relief as Mr. Mbamba urged us to hold.

It is not in dispute that general damages was not one of the reliefs the respondent asked to be granted before the trial court neither did any of her witnesses specifically pray for general damages in their testimonies. However, in his submissions, the learned advocate for the respondent (at page 980 of the record of appeal) urged the trial court to award general damages to compensate the respondent for the loss allegedly suffered from the appellant's refusal to release the certificate of title.

At the end of it all, the trial court awarded the respondent TZS. 100,000,000.00 which is faulted by the appellant relying on our decision in **James Funke Gwagilo v. Attorney General** (*supra*). We think that this decision is relevant only for the proposition that parties are bound by their own pleadings and that cases must be decided on the issues from pleadings. With respect, we do not think its application extends to reliefs as it were and so we decline to go along with Mr. Ishengoma's argument predicated on that proposition.

We note that the respondent prayed for any other reliefs the court shall deem fit in her plaint. That was perfectly within the ambit of the exception to Order VII rule 7 of the Civil Procedure Code, Cap. 33 R.E 2019 (the CPC) which requires the plaintiff to specify in his plaint the

reliefs he claims. That rule is a replica of Order 7 rule 7 of the Indian Code of Civil Procedure Act V of 1908. From our reading of decided cases from courts in India, there is a judicial unanimity that the court can, in fit cases, grant a relief not specifically claimed in the paint. See for instance, **Shiv Dayal v. Union** A [1963] Punj. 538 where it was held that: -

> *"The Plaintiff ought to get such relief as he is entitled to on the facts established on evidence even if that relief has not been specifically prayed for."*

Indeed, this Court did alike in **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R. 137. It sustained an award of TZS. 500,000. 00 made by the High Court in favour of the plaintiff (respondent in the appeal) under the prayer *"any other reliefs"* having found that the respondent was somehow entitled to some relief, although he had failed to prove special damages.

In awarding general damages, the learned trial judge did not specifically say that he did so under that head. We think it would have been desirable to have done so considering that the respondent did not specifically pray for general damages. On this we are alive to the principle that the award of damages was at the trial court's discretion

which must be exercised, not capriciously, but judicially. From decided cases, discretion will be taken to have been exercised erroneously and be interfered with where; **one,** the trial court misdirected itself, or; **two**, it has acted on matters on which it should not have acted, or; **three**, it has failed to take into consideration matters which it should have taken into consideration, thereby arriving at a wrong conclusion: See: **Mbogo & Another v. Shah [1968]** E.A. 93 cited in **Credo Siwale v. R.,** Criminal Appeal No. 417 of 2013, **The Commissioner General, Tanzania Revenue Authority v. New Musoma Textile Limited**, Civil Appeal No. 119 of 2019 and **Nyabazere Gora v. Charles Buya,** Civil Appeal No. 164 of 2016 (all unreported) to mention but a few.

The trial court was influenced by three considerations in awarding general damages but out of them, it is only the unlawful withholding of the certificate of title which appears to us to have been relevant. In our view, having sustained the first ground of appeal on fraud, that consideration can no longer stand. Equally so, although we have agreed with the trial court on the unlawful withholding of the appellant's money, since the respondent was awarded interest on it, she could not get an award in general damages on top of interest. This is because, not only did the respondent elect not to plead it, but also, there was no material

to support that award. As to the unlawful withholding of the certificate of title, we note from exhibit P8 that the respondent reneged from the deal in connection with Term Loan II. At the end of the letter, the respondent indicated to have referred the matter to the Bank of Tanzania for its intervention and asked the appellant to desist from taking any action until that matter had been conclusively determined by the Regulator. Needless to say, we are not satisfied that there was any justification in awarding general damages in the instant case. We say so because despite the respondent's request for the release of the certificate of title, it is plain from evidence that the very complaint surrounding the clandestine registration of a mortgage to secure Term Loan II had already been referred to the Regulator for its intervention. As there was no evidence that the Regulator determined the complaint in the respondent's favour, we are far from saying that the trial court properly exercised its discretion in awarding general damages in favour of the plaint under the general prayer; any other reliefs, or at all. Without further ado, we hold that the award of general damages was without any justification. To that extent, we allow ground five and partly ground seven and set aside the award of TZS. 100,000,000.00 in general damages.

In the event, save to the extent indicated, the appeal stands dismissed with costs.

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

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 15th day of November, 2021 in the presence of Mr. Stanslaus Ishengoma, learned advocate for the appellant and Ms. Aziza Msangi, learned advocate for the respondent is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL