

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 374 OF 2019

STANBIC BANK TANZANIA LTD APPELLANT

VERSUS

TRUST ENGINEERING WORK LTD RESPONDENT

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

(Bongole, J.)

**dated 19th day of August, 2016
in**

Civil Case No. 156 of 2013

JUDGMENT OF THE COURT

16th February & 11th March, 2022

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam in Civil Case No. 156 of 2013 (the suit). The respondent, Trust Engineering Work Limited filed the suit against the appellant, Stanbic Tanzania Limited claiming for losses said to have arisen out of a lease agreement concerning a purchase of construction equipment which included a grader, a roller and an excavator.

It is on record that, on 22/10/2010, the parties entered into a contract in which the respondent was availed a credit facility of TZS 541,031,841.70

to enable it to purchase a motor roller, a grader and an excavator (the equipment). The respondent had to repay that amount by instalments within the period of three years ending on 26/10/2013.

Although by February 2013, the respondent had paid a substantial amount of the credit facility (the facilities), because it had defaulted to effect payments according to the agreed schedule, on 12/8/2013 the appellant took possession of the equipment and sold the same to one Deogratius Kulwa Ncheye. The appellant contended that by 13/9/2013, the respondent was owing the former an outstanding amount of TZS 281,018,045.77.

As a result of the action taken by the appellant, the respondent instituted the suit claiming for the following reliefs.

- "(a) A declaration that there was misrepresentation of contract.*
- (b) Payment of Tanzania Shillings Two Forty Seven Million Two Hundred and Twenty Six Thousand Five Hundred and Ninety Five (Tshs. 247,226,595/=) being losses incurred by the Plaintiff as a result of the Defendant's actions.*
- (c) Interest on the above sum at court's rate from the date of filing this suit to the date of Judgment.*
- (d) Interest on the decretal sum at commercial rate from the date of Judgment till the date of payment in full.*

- (e) Punitive damages for misrepresentation of contract to be assessed by the Court.*
- (f) General damages to be assessed by the Court.*
- (g) Costs of the case to borne by the defendants.*
- (h) Any other remedy that this Honourable Court may deem fit, just and equitable to grant."*

On the other hand, apart from denying the respondent's claims, the appellant raised a counterclaim seeking the following reliefs:

- " (a) The principal sum outstanding and due, Tshs. 281,018,045.77.*
- (b) Interest on item (a) at the rate of 18% per annum until judgment or sooner payment;*
- (c) Interest at the court's rate post-Judgment on the decretal sum in respect of the defendant's counterclaim;*
- (d) Costs of and incidental to this suit;*
- (e) Such further orders or reliefs this honourable court deems just, equitable and convenient.*

The dispute between the parties centered on the issue whether or not, from the nature of the agreement, the appellant was justified to repossess the equipment from the respondent who had at the material time, repaid a substantial amount of the facility.

At the hearing of the suit, each part relied on the evidence of one witness. Having considered the adduced evidence as well as the tendered exhibits, the learned trial Judge found that the agreement was deceitful on the part of the respondent. He was of the view that the respondent was made to understand the agreement as one of hire purchase but the appellant repossessed the equipment on account of the respondent's default in repayment of the facility in accordance with the agreed schedule, taking the same as having been granted in the form of a loan.

On that finding, the trial court declared that the appellant did not have the right of repossessing the equipment and thus ordered the same to be returned to the respondent. The respondent was also awarded general and punitive damages of TZS 150,000,000.00 and 100,000,000.00 respectively as well as the costs of the suit. With regard to the counterclaim, in his judgment, the learned trial Judge did neither consider nor determine the issue which arose from that counterclaim. The counterclaim was in effect, left undecided.

The appellant was aggrieved by the decision of the High Court and thus filed this appeal which is predicated on the following nine grounds:

1. *The trial court erred in law and in fact by holding and deciding the suit based on Hire Purchase Act, Cap. 14 (R.E. 2002) instead of Financial Lease Act.*
2. *The trial court erred in law and fact by holding that the relationship that existed between the appellant and respondent was deceitful.*
3. *The trial court erred in law and fact by holding that the act of the appellant's seizing equipments was unlawful based on ill-practices for personal gains.*
4. *The trial court erred in law and fact by deciding the case based on the annexure (the newspaper) that was never admitted as exhibit in court.*
5. *The trial court erred in law and in fact for holding that the respondent hired alternative equipments while there was no any evidence tendered during the trial to that effect.*
6. *The trial court erred in law and fact for awarding the respondent punitive damages.*
7. *The trial court erred in law and fact for awarding the respondent general damages.*
8. *The trial court erred in law and fact for failure to determine the counterclaim raised by the appellant.*
9. *That the trial court was biased on evaluation of evidence.*

At the hearing of the appeal, the appellant was represented by Mr. Pascal Kamala, learned counsel while the respondent had the services of Mr. Geoffrey Lugomo, also learned counsel. The counsel for the parties duly filed

their respective written submissions in terms of Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended.

Given the effect which the finding on the eighth grounds would have on the appeal, we required the counsel for the parties to address us on that ground first. On his part, Mr. Kamala reiterated the argument contained in his written submission. His submission was to the effect that, since the trial court framed the issue which arose from the counterclaim, that issue ought to have been determined after having heard the parties' evidence. The framed issue was whether or not the appellant was entitled to the reliefs sought in the counterclaim.

The learned counsel went on to argue that, since the appellant had led evidence with a view of proving that the respondent had an outstanding amount of TZS 281,018,045.77, the trial court was enjoined to determine that issue. According to the learned counsel, the decision on that issue was crucial in deciding the reliefs to which the parties would be entitled. Relying on the decision in the case of **Sosthenes Bruno v. Flora Shauri**, Civil Appeal No. 84 of 2016 (unreported), Mr. Kamala submitted that the omission rendered the entire judgment and the decree of the trial court defective. He thus urged us to quash the judgment and set aside the decree.

Although in his reply submission filed in Court, the learned counsel for the respondent had resisted that ground of appeal by shifting the blame to the appellant, that it failed to prosecute the counterclaim, at the hearing of the appeal, he charged his line of argument. He contended that, because the suit was determined in favour of the respondent, it should be taken that the counterclaim was dismissed. He agreed however, that if that assumption is wrong, then it is obvious that the judgment is defective and the remedy is for the Court to quash it and order the trial court to compose it afresh.

From the submissions of the learned counsel for the parties, we think the issue which arises for our determination in this ground of appeal is whether or not the counterclaim was determined and if the answer is in the negative, whether the omission is fatal. From the record, the counterclaim was heard together with the suit. It was not heard separately. In his evidence, Bernard Laurent Tengio (PW1) who was at the material time, the respondent's Director, stated that at the time when the appellant decided to repossess the equipment, the respondent was in arrears of repayment of the agreed instalment to the tune of TZS 181,000,000.00. He went on to state that, the value of the equipment at the time of the sell would have not only set-off that outstanding amount but the seizure and sale of the same caused

the respondent a loss of TZS 247,000,000. Testifying further at page 310 of the record of appeal, PW1 prayed for dismissal of the counterclaim.

On its part, the appellant led evidence through John Lukilo (DW1). His evidence was to the effect that, despite the repossession and sale of the equipment, it was still owed by the respondent a total of TZS 86,000,000.00. Later on, at page 321, he prayed that the appellant be awarded the outstanding amount claimed in the counterclaim.

As the record reveals therefore, it is a correct position that the trial court had framed the issue arising from the counterclaim and in their evidence, the parties had adduced evidence on it. However, as submitted by Mr. Kamala, the trial court did not determine the issue which was crucial as regards the reliefs claimed by the parties. The issue ought therefore, to have been expressly determined. That was not done. With respect, we are unable to agree with Mr. Lugomo that, since the suit was decided in favour of the respondent, the counterclaim was in effect, dismissed.

On the effect of the trial court's omission, we agree with the appellant's counsel, **first**, that since the counterclaim is an independent suit, failure to determine it renders the judgment incomplete and therefore defective. **Secondly**, determination of the issue framed by the trial court (issue No.

4), that is; whether the appellant was entitled to the reliefs sought in the counterclaim, was crucial. The reason is that, if the answer to that issue should have been in the affirmative, then it would have an effect on the award of the reliefs claimed by the parties. In our considered view therefore, the omission is fatal. We are supported in that view by the decisions of the Court in the cases of **Sosthenes Bruno** (supra) cited by the counsel for the appellant and **Runway (T) Limited v. WIA Company Limited and Another**, Civil Appeal No. 59 of 2015 (unreported). In the latter case, despite the existence of a counterclaim from which an issue was framed, the same was not heard and determined. As a result of that omission, the Court proceeded to nullify the judgment and set aside the resultant orders.

In this case, although the parties were heard on the counterclaim, the issue arising therefrom was not determined. The judgment was for that reason, rendered defective. In the circumstances, the same is hereby quashed and the orders arising therefrom are set aside. In the event, we order that the record be remitted to the trial court for it to compose a judgment afresh in accordance with the law.

Given the fact that the error was occasioned by the court, we make no order as to costs.

DATED at DAR ES SALAAM this 10th day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The judgment delivered this 11th day of March, 2022 in the presence of Mr. Pascal Kamala, learned counsel for the appellant and Mr. Haji Litete, learned counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL