

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

(CORAM: KOROSSO, J.A., GALEBA, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 202 OF 2019

STANBIC BANK TANZANIA LIMITED.....APPELLANT

VERSUS

SALVATORY KAZONEYE SEGWENDA RESPONDENT

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

(Kimaro, J)

dated the 9th day of June, 2004

in

Commercial Case No. 307 of 2002

JUDGMENT OF THE COURT

16th & 24th March, 2022

MAKUNGU, J.A.

This appeal arises from the decision of the High Court of Tanzania, Commercial Division, at Dar es Salaam (the trial court) dated 9th June, 2004 in Commercial Case No. 307 of 2002 between Stanbic Bank Tanzania Limited and HSK Intertrade and two others. The High Court dismissed the suit against the 3rd defendant (the respondent in this appeal).

From what can be discerned in the record before us, the background to the present appeal is briefly as follows: the appellant instituted a summary suit at the trial court against the respondent and two others H.S.K Intertrade

Company Limited and Kabulluh H.S. Said then the 1st and 2nd defendants respectively and not subject of the present appeal. The respondent was the 3rd defendant in the said suit. The appellant claimed against the respondent and two others jointly and severally for payment of the sum of Tshs. 59,734,002/= (Fifty nine million seven hundred thirty four thousand and two shillings) plus accrued interest and costs, being the balance due and payable to the plaintiff (appellant in this appeal) on account of the overdraft facility granted to the H.S.K Intertrade Company Ltd, vacant possession and sale of the properties over CT. No. 36231, L.O 78787, Plot No. 221, Block 'A' Kilakala Medium Density, Morogoro Region, and interest at the rate of 27% per annum from August 13, 2002 to the date of judgment.

In the said suit in the trial court when the matter was fixed for hearing on 9/6/2004, the 2nd defendant who was also the Managing Director for the 1st defendant admitted the claim, hence the trial court entered judgment on admission as per prayers (i), (iii), (iv) and (v) of the plaint against the 1st and 2nd defendants under order XII rule 4 of the Civil Procedure Code, [Cap 33 R.E 2002] (CPC). After the 2nd defendant had admitted the claim, the advocate for the respondent prayed for the suit to be dismissed. The trial court granted the prayer for dismissal of the suit against the 3rd defendant (the respondent in the appeal).

The appellant was aggrieved by part of the decision of trial Court and decided to appeal to this Court. He filed his Memorandum of Appeal containing four grounds of appeal.

After going through the four grounds of appeal and written submissions earlier on filed by the counsel for both sides, we are satisfied that this appeal can be satisfactorily and conclusively disposed of on the basis of 2nd ground which reads as follows;

"2. The learned trial judge misdirected herself and erred in law in not giving counsel for the appellant opportunity to reply to the prayer for dismissal of the suit as against the 3^d defendant by the counsel for the 3^d defendant".

When the appeal was called on for hearing, the appellant was represented by Mr. Gasper Nyika, learned counsel and the respondent had the services of Mr. Leonard T. Manyama, learned counsel.

At the outset, we noted that, the respondent and his co-defendants then initially denied the claim but on 9/6/2004 when the matter came for defence hearing the 2nd defendant who was also the Managing Director of the 1st defendant admitted the claim. The trial court forthwith entered judgment on admission against the 1st and 2nd defendants. The proceedings

in question found at pages 000085 – 000087 of the record of appeal are reproduced hereunder:

"DEFENCE CASE

OPENS

DW1 – Kabulluh Harun Said, Male, Adult, Muslim, Sworn, States:-

I admit the claim. It was within our control I took the money from the account and also on how to make payment. What I am praying for is for time to repay the debt by instalments. I took the loan. That is all. I made my proposals for the repayment to the advocate for the plaintiff. I pray to the Court to give me time to pay by instalments. I did not take the money by myself. I also gave some money to the 3rd defendant.

Cross examined by Kashumbungu: *I talked to the 3rd defendant about the payment by instalments but he said we will negotiate out of court. I did not raise counter claim. I agree to pay the debt. However I pray to the Court to order the 3rd defendant to pay the amount I gave to him. There are payment vouchers which show that I gave the money to the 3rd defendant. I have made a claim to the 3rd defendant to return the money orally but not*

in writing. The witnesses I mentioned would not come to give evidence about the 3^d defendant. I admit the debt as per the claim.

Cross examined by Mr. Mtafya: Nil.

Mr. Mtafya: *I pray for judgment on admission against the 1st and 2nd defendants under Order XII rule 4 of the Civil Procedure Code 1966. That is all.*

DW1: *I would also pray that myself and the bank sit down to negotiate on the interest.*

N.P. Kimaro

Judge

9/6/2004

Mr. Kashumbugu: *In view of the evidence produced by the 1st and 2nd defendants, I do not intend to call the 3^d defendant to give evidence. Instead, I pray that the suit against the 3^d defendant be dismissed with costs. The third defendant was only a guarantee and the 1st and 2nd defendants have agreed to pay. That is all.*

Court: *Given the admission made by Mr. Kabulluh H. Said who is the Managing Director of the 1st defendants and also 2nd defendant in this case, I enter judgment on admission against the 1st and 2nd defendants as per prayers (i), (iii), (iv) and (v) of the*

plaint under Order XII rule 4 of the Civil Procedure Code, 1966.

Order: *Judgment for the plaintiff on admission as per prayers (i), (iii), (iv) and (v) of the plaint against the 1st and 2nd defendants under Order XII rule 4 of the Civil Procedure Code 1966. As against the 3^d defendant, the suit is dismissed.*

N.P. Kimaro

Judge

9/6/2004"

The appellant has faulted the trial court for dismissing the suit against the respondent following the prayer by the respondent's counsel and for not giving the appellant the opportunity to reply to the prayer for dismissal of the suit as against the respondent. In his written submission the appellant submitted that it is trite law that no party shall be condemned unheard. He argued that, failure to give the appellant's counsel an opportunity to respond to the respondent's advocate prayer was in violation of the principle of natural justice as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). He further submitted that the principle of the right to be heard has been explained in the landmark case of **Cowasjee v. Cowasjee** (1963) E.A. 84 where it was

held, at page 88 among other things that, a party should have an opportunity of presenting his points of view and controverting statements which may be prejudicial to him. To fortify his point further, he referred us to the decision of **Onesmo Nangole v. Dr. Sterven Lemomo Kiruswa**, Civil Case No. 129 of 2016 (unreported) which quoted with approval the case of **Abbas Sharally and Another v. Abdul Fazalboy**, Civil Application No. 33 of 2002 (unreported) stating as follows: -

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the Courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice".

It follows therefore that by not giving the appellant the opportunity to be heard on whether its suit against the respondent should be dismissed or not the trial court denied the appellant the right to be heard.

The respondent in his written submission has omitted to reply specifically to the grounds of appeal and instead, he generally addressed the validity of the loan agreement as well as the additional loan given by the

appellant without his consent. Similarly the respondent submitted that his liability was for one year only hence he cannot be held responsible for what happened after the lapse of one year. He submitted further that the 1st and 2nd defendants having admitted the claim, the respondent's liability as a guarantor to the loan was discharged.

Having carefully considered the record before us and the written submissions of the learned counsel, the issue for our determination is whether the trial court under the circumstance, was justified in dismissing the suit against the respondent. It is apparent from the record that, the trial court did not accord the appellant an opportunity to be heard when the counsel for the respondent prayed to have the suit dismissed against the respondent. After hearing only the counsel for the respondent, the trial court proceeded to enter judgment on admission against the 1st and 2nd defendants and to dismiss the suit against the respondent. This was an error. The appellant ought to have been given an opportunity to submit as to whether he objected or conceded to the prayer for dismissal of the suit against the respondent.

The Court on a number of decisions has insisted that violation of the rule of natural justice on the right to be heard, results into any decision

arrived at to be a nullity. In **Mbeya – Rukwa Auto Parts and Transport Ltd. V. Jestina George Mwakyoma** [2003] TLR 251, it was observed that:

"In this Country, natural justice is not merely a principle of common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard among the attributes of the equality before the law and declares in part;
(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..."

From the foregoing referred decision, it was imperative for the trial court to give the appellant a right to be heard in respect of the prayer for dismissal of the suit made by the respondent. As the order for dismissal of the suit against the respondent was made without according the appellant right to be heard on the matter, we find this with due respect to be erroneous. We hold that a decision reached without regard to the principles of natural justice as in the instant case to be flawed.

In the light of the foregoing, we are constrained to allow the 2nd ground of appeal. Consequently, we set aside the order for dismissal of the suit against the respondent. We further order that the case record be remitted to the trial court for rehearing of the matter starting from where the

respondent prayed for an order to dismiss the case in his favour. Other proceedings of the trial court before that order remain undisturbed. We further make no order as to costs.

Since the 2nd ground of appeal suffices to dispose of the appeal, we find no profound reason to proceed to determine the remaining grounds of appeal.

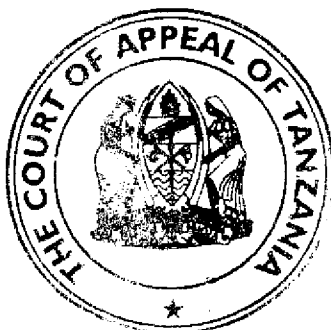
DATED at DAR ES SALAAM this 23rd day of March, 2022.

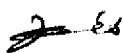
W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 24th day of March, 2022 in the presence of Ms. Grace Kibaki, advocate for the appellant and also holding brief of Mr. Leonard Manyama, advocate for the respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL