IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 222 OF 2018

MEXONS INVESTMENT LIMITED..... APPELLANT

VERSUS

CRDB BANK PLC..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Songoro, J.)

dated the 29th day of August, 2018
in
Commercial Case No. 51 of 2016

JUDGMENT OF THE COURT

5th & 13th May, 2022

KEREFU, J.A.:

In the High Court of Tanzania (Commercial Division), Mexons Investment Limited, the appellant herein, sued CRDB Bank PLC, the respondent vide Commercial Case No. 51 of 2016 claiming for payment of the sum of TZS 234,135,000 alleging that it was wrongly and unlawfully debited from her bank account No. 01J1008623700 at Lumumba Branch by the respondent. The appellant also claimed for payment of interest on the said sum at 31% per annum from 15th October, 2015 to the date of

judgment. In addition, the appellant claimed for payment of general damages and costs of the suit.

The material facts of the matter as obtained from the record of appeal indicate that, the appellant is a customer of the respondent as she operates two bank accounts with her, to *wit*, (i) bank account No. 01J1008623700 at Lumumba Branch at Dar es Salaam (Lumumba account) and (ii) bank account No. 01J1008623701 at Njombe Branch (Njombe account). In relation to the Njombe account, on 20th November, 2014, in course of her business, the appellant applied and secured a credit facility in the form of bank guarantee at the tune of TZS 400,000,000.00 from the Njombe Branch in favour of Mogas Tanzania Limited (Mogas) who was a supplier of petroleum products to the appellant. The said bank guarantee was approved on 20th April, 2015 and was to expire on 15th October, 2015 unless it is revoked earlier. In their contractual business relationship, the appellant and Mogas agreed that Mogas will supply petroleum products to the appellant on credit and the appellant would pay for the same within fourteen (14) days from the date of issuing of an invoice for payment of products supplied. Therefore, the purpose of the said bank guarantee was to facilitate and secure Mogas business upon default by the appellant to honour the invoices to be supplied by Mogas. On 13th October, 2015,

Mogas wrote to the respondent calling for the bank guarantee claiming that the appellant had failed to honour the payments at the tune of TZS 234,135,000.00 contrary to the terms and condition of the agreement. Following the said demand, the respondent paid the said claim and accordingly, she debited the amount from the appellant's Lumumba account.

Subsequently, and upon becoming aware of the said payments on 22nd October, 2015, the appellant disputed the same as she contended that as at 13th October, 2015 Mogas had no claim against her as there were no overdue invoice, which was conditional precedent for calling in the bank guarantee. As such, the appellant contended that the said transaction was erroneously and unlawfully made. The appellant also faulted the respondent for debiting the said amount from her Lumumba account instead of the Njombe account where the bank guarantee was made. On that basis, the appellant instituted the suit against the respondent as indicated above.

In his written statement of defence, the respondent disputed the appellant's claim and contended that under the guarantee agreement, the respondent reserves rights to recover any monies, fees, charges and interest from any account of the appellant held in her branches, if need to

do so would arise. The respondent contended further that, other issues raised by the appellant in her plaint are purely contractual matters between the appellant and the Mogas. On that regard, the respondent raised a notice of preliminary objection challenging the competence of the suit that the same was not maintainable for non-joinder of the necessary party; that is Mogas. However, on 29th June, 2016, the said objection was dismissed for want of prosecution and the suit proceeded to hearing on merit.

Having heard the parties and considered the evidence adduced before it, the trial court decided the case in favour of the respondent. Aggrieved, the appellant preferred the current appeal which comprises two grounds of appeal. However, for reasons which will be apparently shortly, we do not deem it appropriate, for the purpose of this judgment, to reproduce them herein.

When the appeal was placed before us for hearing, the appellant was represented by Mr. Daniel Bernard WelWel, learned counsel whereas the respondent had the services of Mr. Geofrey Joseph Lugomo, also learned counsel.

At the outset and before the hearing of the appeal on merit, we wanted to satisfy ourselves on the propriety or otherwise of the proceedings before the High Court. Specifically, as to whether there was

any adverse effect for non-joinder of Mogas as a necessary party to the case considering the fact that most of the facts alleged by the appellant in the plaints were based on the contractual business relationship between her and Mogas. As such, we invited the counsel for the parties to address us on that issue.

In his response, Mr. Welwel submitted that there are two different disputes involved in the appellant's claims; **one,** the dispute between the appellant and the respondent which is founded in the banker-customer relationship and the duty of care by the respondent towards the appellant as the customer; **two,** the business agreement between the appellant and Mogas. It was his argument that, the suit which was before the High Court was mainly based on the banker-customer relationship and the duty of care of the respondent towards the appellant. He argued that, the said dispute had nothing to do with the business relationship between the appellant and Mogas and their agreement thereto. Therefore, according to him, the issue of non-joinder of Mogas in the suit, did not in any way prejudice any party and the proceedings before the High Court.

When prompted by the Court as to whether the material facts indicated under paragraphs 12, 13 and 14 of the appellant's plaint could have been established without impleading Mogas as a necessary party to

the suit, Mr. Welwel referred us to paragraphs 5, 6 and 7 of the respondent's written statement of defence and argued that the facts indicated in the appellant's plaint on the pointed-out paragraphs were not seriously disputed by the respondent. He however submitted that, after being served with the appellant's plaint, the respondent raised a notice of preliminary objection on the non-joinder of Mogas, but the same was dismissed for want of prosecution. He thus insisted that the proceedings before the High Court were properly conducted and urged the Court to determine the appeal on merit.

On his part, Mr. Lugomo firmly contended that the non-joinder of Mogas in the suit was a fundamental procedural error as the appellant's claims indicated in the plaint were based on her business agreement with Mogas. To fortify his contention, he referred us to paragraphs 11, 12, 13, 14, 15 and 16 of the plaint and argued that, all material facts alleged under the said paragraphs are based on the business agreement between the appellant and Mogas which the respondent is not privy to. He added that, the said agreement was not availed to the parties during the trial. It was his argument that, since the appellant was contesting that, as at 13th October, 2015 Mogas had no claim against her and there was no overdue invoice, which was the condition precedent for calling in the bank

guarantee, it was only Mogas who could explain the basis of her claim under the bank guarantee.

Mr. Lugomo also challenged the argument by his learned friend that the respondent had not seriously disputed the material facts indicated in the plaint. He specifically referred us to paragraphs 5, 7, 8 and 9 of the respondent's written statement of defence and argued that in all those paragraphs the respondent clearly disputed the material facts indicated under paragraphs 12, 14 (i) –(vi), 15, 16 and 17 of the appellant's plaint by stating that matters indicated by the appellant in those paragraphs are purely contractual matters between her (the appellant) and Mogas and are only well known to them and not by the respondent as she was not privy to the said agreement. As such, Mr. Lugomo insisted that the presence of Mogas in the suit is indispensable and the non-joinder of her had vitiated the proceedings before the High Court. Based on his submission, Mr. Lugomo beseeched us to nullify the proceedings before the High Court and remit the case file to the High Court for it to determine the dispute afresh after joining Mogas to the suit. He also prayed that the respondent be awarded costs.

In a brief rejoinder, Mr. Welwel, though conceded that the respondent is not privy to the business agreement between the appellant

and Mogas, he maintained that non-joinder of Mogas in the suit, did not, in any way, prejudice any party to the suit. He however, intimated that he is not objecting the prayer made by his learned friend that the suit be retried afresh after joining Mogas as a party therein, if the Court makes a finding contrary to the contention that the proceedings before the High Court were proper. He finally prayed that the appellant be spared from costs as he argued that, issues that may lead to the nullification of the High Court's proceedings was raised *suo motu* by the Court.

On our part, having examined the record of appeal and considered the submissions advanced by the learned counsel for the parties, it is clear to us that the main issue for our consideration is whether Mogas was a necessary party to be joined in the suit before the High Court.

We wish to start by stating that the question of who may be joined as a party to a suit is governed by Order 1 of the Civil Procedure Code, Cap. 33 R.E 2019 (the CPC). In addition, the said Order contains elaborate provisions prescribing the procedure to be followed in cases of the non-joinder of the parties. Specifically, Order 1 Rule 10 (2) of the CPC provides that: -

> *"The court may, at any stage of the proceedings, either upon or without the application of either*

party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

In terms of the above rule, a person may be added as a party to a suit (i) when he ought to have been joined as a plaintiff or defendant or (ii) when, without his presence, the questions in the suit cannot be effectually and completely decided upon. (iii) where such a person, who is necessary or proper party to a suit has not been joined by an application of any party to the suit as a party, the court is empowered to join him or her.

It is also common ground that, over the years, courts have made a distinction between necessary and non-necessary parties. This Court in the case of **Tang Gas Distributors Limited v. Mohamed Salim Said & 2 Others**, Civil Application for Revision No. 68 of 2011 (unreported) when considering circumstances upon which a necessary party ought to be added in a suit stated that: -

"*...an intervener, otherwise commonly referred to as a* ***NECESSARY PARTY,*** *would be added in a suit under this rule ...even though there is no distinct cause of action against him/ where: -*

(a) NA

(b) ***his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits, his joinder is necessary so as to have him bound by the decision of the court in the suit."*** [Emphasis added]

Again, in **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another,** Civil Revision No.6 of 2017 (unreported), when faced with an akin situation, we stated that: -

"*The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."*

Being guided by the above authorities and having reflected on the material facts alleged by the appellant in the plaint, we agree with Mr. Lugomo that Mogas is a necessary party who ought to have been joined in

the proceedings before the High Court involving the present parties. This is so because; **one**, the basis of the appellant's claim in the plaint was the business agreement between the appellant and Mogas indicated under paragraphs 12, 13, 14, 15 and 16 of the plaint; **two**, the credit facility in the form of bank guarantee was obtained by the appellant from the respondent in favour of Mogas in relation to their business relationship; **three,** while the respondent alleged that on 13th October, 2015 she received a letter from Mogas calling for the bank guarantee claiming that the appellant had failed to honour the payments of TZS 234,135,000.00 contrary to the terms and condition of the agreement, the appellant is disputing that fact by arguing that as at 13th October, 2015 Mogas had no claim against her as there were no overdue invoices and the demand by Mogas was made prematurely and the said amount was unlawfully debited from her account. All these facts, in our views, were supposed to be established by the appellant and Mogas based on the terms and conditions agreed between them in their business agreement after both parties were heard by the court during the trial.

It is also not in dispute that, the trial court together with the appellant became aware of the existence of the alleged necessary party to the case at the initial stage of the trial. This is due to the fact that, in her written

statement of defence, apart from indicating that the material facts in the appellant's plaint are purely contractual matters between her and Mogas, the respondent raised a point of preliminary objection challenging the competence of the suit that the same was not maintainable for non-joinder of the necessary party.

That being the case, it is our considered view that the appellant or even the trial court ought to have joined Mogas, a necessary party to the suit, as a defendant. In **Tang Gas Distributors Limited** (supra) the Court, while considering the issue of a necessary party to be joined in a suit stated that: -

> *"Settled law is to the effect that* ***once it is discovered that a necessary party has not been joined in the suit*** *and neither party is ready to apply to have him added as a party,* ***the Court has a separate and independent duty from the parties to have him added..."*** [Emphasis added]

As to the effect of not joining a necessary party to the case, the Court in the same case, at page 37 of that decision stated that: -

> *"... it is now an accepted principle of law (see Mulla Treatise (supra) at p. 810) that it is a material irregularity for a court to decide a case in the*

absence of a necessary party. Failure to join a necessary party, therefore is fatal (MULLA at p 1020)."

It is therefore our respectful view that, although the notice of preliminary objection was not determined on merit, but since the trial court was alerted from the pre-trial stages of the said necessary party, it ought to have joined her, but that was not done, hence rendering the proceeding thereto a nullity. In **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) the Court, after detecting that the necessary party was not joined into the suit, it remitted the suit to the High Court with directions that hearing should proceed after joining the necessary party. The respondent in that case claimed ownership of a house on Plot No. 105/6 House No. 2, Burundi Road, Kinondoni Area in Dar es Salaam, which she had allegedly purchased from the Government through the Tanzania Housing Agency. On the other hand, the second appellant's claim on the house was derived from the liquidator of AISCO. However, the respondent who was originally the plaintiff had not impleaded the Tanzania Housing Agency. The Court observed that the respondent as plaintiff could not be compelled to sue a party she did not wish to sue, but still the determination of the suit would

not be effective without the Tanzania Housing Agency being joined, hence the order directing the High Court to proceed upon joining the necessary party.

Similarly, in the case at hand, as the appellant did not wish to join Mogas to the suit even after the prompting by the respondent through a notice of preliminary objection, it was crucial for the trial court to join the necessary party to effectually and completely adjudicate and settle all the questions related to the suit. Ultimately, all parties would be bound by the decision, hence, avoidance of multiplicity of suits. In this regard, we agree with the submission made by Mr. Lugomo that the proceedings before the High Court were not properly conducted for a non-joinder of Mogas to the suit. On the contrary, we respectful disagree with the contention advanced by Mr. Welwel that it was not necessary to join Mogas to the suit and that the proceedings before the High Court were properly conducted.

In the event, we invoke revisional powers vested in this Court under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and hereby nullify the entire proceedings, quash the judgement and set aside the resultant decree issued by the trial court on 29th August, 2018.

Consequently, we remit the case file in Commercial Case No. 51 of 2016 to the High Court for it to re-hear the case after the necessary party

has been added to the suit in accordance with the law. Since, the issue leading to the nullification of the High Court's proceedings was raised *suo motu* by the Court, we make no order as to costs.

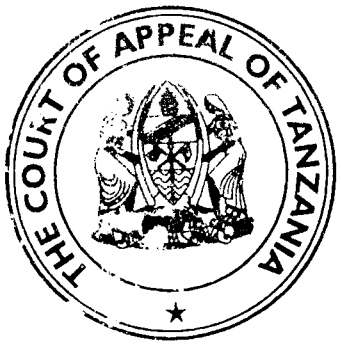
DATED at **DAR ES SALAAM** this 12th day of May, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 13th day of May, 2022 in the presence of Ms. Blandina Kihampa, learned counsel for the Appellant and Mr. Ganjatuni Kilemile, learned counsel for the Respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL