IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 151 OF 2019

MAXIMA CLEARING AND FORWARDING LIMITED ..... APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC..... RESPONDENT

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

(Mruma, J.)

dated the 4th day of April 2019
in
Commercial Case No. 123 of 2017

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JUDGMENT OF THE COURT

14th March, & 3rd June, 2022

KOROSSO, J.A.:

The appeal stems from the decision of the High Court, Commercial Division at Dar es Salaam which dismissed the appellant's claims against the respondent for specific damages amounting to Tshs. 3,619,859,579.12 and USD 1,091,717.62. The amounts claimed were for loss suffered by the appellant allegedly founded on the respondent's negligence and failure to use reasonable skills, care and diligence in opening and operating two bank accounts in the name of the appellant's company without authorization of its directors.

The background giving rise to the instant appeal, in brief, is that the appellant company was incorporated on 21/10/2011 with Joel Lucian Uisso and Anthony Lucian Uisso as shareholders and first directors. After some time, Armitel Lucian Uisso and Honesta Lucian Uisso joined the team as co-directors. To the knowledge of the appellant's directors, the name '*Maxima Clearing and Forwarding Limited*' is the name of the company as registered with the Business Registration and Licensing Agency (BRELA). Some time on an undisclosed date, while conducting normal duties, the appellant's company directors discovered the existence of two bank accounts one in Tanzania shillings and the other a US Dollars account (Account No. 20110020250 and Account No. 20110020251) operating at the respondent bank in the name of the appellant without the knowledge or consent of any of the directors. According to the appellant, on 20/6/2017 the money that was geared to be paid to its customers was paid into the disputed accounts to the tune of Tshs. 3,619,859,579.12 and USD 1,091,717.62. The appellant further claimed that there was fraud and contravention of good banking practice which was facilitated by the negligence of the respondent bank during the opening of the two accounts in the name of the appellant company.

Worth noting is also the fact that having found out the existence of the two disputed accounts mentioned above, on 10/2/2017 the

appellant wrote a letter to the respondent with a request to be supplied with documents that were used to open the respective bank accounts. By way of a letter dated 22/2/2017, the respondent refused to grant the appellant's request asserting that banking practices direct that it is only signatories of the accounts who are privileged to get any information related to the accounts.

The case for the appellant relied on the evidence adduced by Joel Luciano Uisso (PW1), a shareholder and director of the appellant company found in his statement and oral testimony while cross-examined by the respondent's counsel. He stated that the existence of the disputed two bank accounts was discovered by the appellant in the process of normal banking operations. On the part of the respondent, the statement of Lilian Rugeiyamu Komwihangiro (DW1), its principal officer gave evidence that essentially acknowledged having received the letter from the appellant dated 10/2/2017 signed by the appellant company's three directors requesting copies of documents used to open the disputed two accounts and conceded that the respondent bank's response was by way of a letter dated 22/02/2017 as testified by PW1.

She averred that the respondent's bank's refusal to grant the request from the appellant for information and details related to the opening of the disputed bank accounts was prompted by the fact that

the appellant's letter had clearly stated that they neither operated the disputed two accounts nor were they aware of their existence. After a full trial, the decision was in favour of the respondent.

Aggrieved, the appellant instituted the instant appeal through a memorandum of appeal lodged on 3/7/2019 fronting four grounds of grievances, which compressed, read:

1. *That, the trial judge erred in law and fact by holding that there were two companies registered with the Registrar of companies in the United Republic of Tanzania in the appellant's name without any evidence to support his findings.*

2. That, the trial judge erred in law and fact by holding that the respondent was not duty-bound to provide the appellant with the particulars of the disputed bank accounts opened and operated in their name.

3. That, the trial judge erred in law and fact by his failure to hold that the disputed bank accounts were opened without required banking standards and procedures for authenticating and verification of the genuineness of the details of the person who opened them as laid down by the laws, regulations, and good practice of the banking industry.

4. That, the trial court erred in law and fact by contradicting his own findings as to the registration of the two companies with the Registrar of Companies in the name of the appellant.

At the hearing of the appeal before us, Mr. Anney Semu, learned advocate entered an appearance for the appellant whereas the respondent was represented by Ms. Josephine Safiel, learned advocate.

Mr. Semu commenced his oral submissions by adopting the appellant's filed written submissions and list of authorities. He then proceeded to amplify the grounds of appeal before the Court commencing with ground number 3. He intimated that whilst addressing the said ground he will also expound on grounds 1, 2, and 4 as well since they are intertwined. Mr. Semu faulted the trial court for failure to find that the disputed two accounts were opened by the respondent bank without adhering to banking standards and procedures that require authentication and verification of the genuineness of the details of persons who open an account. The learned counsel argued that in addressing the ground under scrutiny, it is important to understand that the trial court addressed the issue when determining the first issue of the framed issues in the determination of the suit, that is, the propriety

of the respondent bank in enfolding the disputed bank accounts opened in the name of the appellant company. The learned counsel argued that in determining the said issue the trial court also reflected on the issue of whether the disputed accounts were opened with the knowledge and authority of the appellant's directors. He contended that the trial judge as can be seen on page 133 of the record of appeal, did not fully consider the matter and in consequence, he failed to determine the said issue even though it was raised in the plaint and disputed in the written statement of defence. According to the learned counsel, the trial judge failed to consider that the respondent did not observe the law when opening the disputed accounts since they failed to show any statutory requirement that allowed them not to show details of the account holder or how the accounts were opened. She urged us to thus find the ground to have substance.

The appellant's written submissions expound on grounds 1, 2, and 4 emphasizing the fact that in terms of section 30(2) of the Companies Act, [Cap 212 R.E 2002, now 2019] (The Companies Act), once a company is registered under a name no other company may be registered under the same name or one like the registered name. The appellant faults the trial judge in finding as conclusive, the claims by DW1 that investigations conducted by the respondent company Forensic

Department revealed that there were two companies incorporated at BRELA with the appellant's name, without either seeking other evidence to support the assertion or consulting BRELA to prove the claims. The learned counsel faulted the trial judge and argued that having earlier found the evidence of DW1 that the investigation conducted by the respondent bank revealed that there were two companies incorporated at BRELA with the appellant's name to be wanting, he should have scrutinized her evidence more carefully. He argued that, in essence, the trial judge found DW1 to have lied to the court which should have then led to discrediting her evidence on the issue and reflected on the reasons behind the lies which were obviously based on the need to conceal the fact that the disputed accounts, were opened and operated contrary to the governing law, rules, and regulations, particularly, section 48(1) of the Banking and Financial Institutions Act, No. 5 of 2006 (the BFIA).

The learned counsel contended further that the trial judge misdirected himself when considering the contents of exhibit P1 and how it relates to the operation of the disputed accounts since exhibit P1 only sought information and particulars of the disputed accounts. He also flawed the trial judge for not considering the evidence the appellant had availed to the trial court, information from the BRELA to show that

the appellant was the only company legally authorized to act for and on behalf of the registered entity named '*Maxima Clearing and Forwarding Limited*'. The learned advocate contended further that in the circumstances, it was upon the respondent to disclose the information requested and the refusal to grant the same was contrary to the law. He referred us to the case of **Tournier vs National Provincial and Union Bank of England** [1924]1KG 461, which laid down four conditions (Tournier principles) that should lead a bank to disclose bank account information to third parties.

The learned counsel argued that the instant case falls within the ambit of the said conditions, especially the fact that the respondent was compelled by the law to disclose the information and thus had the public duty to disclose the information sought. In reinforcing his stance, the appellant's counsel referred us to the cases of **Hedley Bryne and Co. Ltd vs Heller & Partners Ltd** [1963] 2 All ER and **Ladbroke vs Tood** [1914] 30 TLR 433 which discussed when the duty of care arises and when does one become a bank customer. He implored us to find that Guidelines for Verification of Customers Identities, No. 1 and 2 issued under section 6(f) of the Anti-Money Laundering Act, [Cap 423 R.E 2019] (AML Act), and Regulation 32(1) of the Anti-Money Laundering

Regulations of 2007, provide for such verification regarding entities and mandatory steps to be taken.

The appellant further argued that considering the evidence of DW1, and the fact that the respondent bank's due diligence exercise revealed that there were two companies with the same name and the respondent bank failed to show why they continued to open the two disputed bank accounts, the act which was in contravention of the governing laws. He argued that having regard to the respondent's failure to show the existence of any board resolution or details of the account's holder, that led them to open the accounts it should have led the trial judge to find in favour of the appellant. He urged us to find that the trial judge failed to determine who benefitted from the failure to observe governing laws in the opening and operation of the disputed accounts and that it is the appellant who produced evidence to prove their case on the balance of probability and thus implored the Court to allow the appeal.

The respondent on the other hand categorically resisted the appeal as found from both oral and written submissions. Regarding grounds 1 and 3, Ms. Safiel argued that the trial judge thoroughly addressed the issue of ownership and opening of the accounts referring

us to page 130 of the record of appeal where there was a finding that all necessary documents were submitted by the accounts' holders. She reasoned that as found by the trial judge, both the pleadings and evidence revealed that the appellant had knowledge of the existence of the disputed accounts including some deposits and withdrawals related to the accounts, and thus cannot now dispute being aware of their existence and thus prayed we find the ground to lack merit.

With regard to grounds number 1 and 4, Ms. Sefiel contended that the appellant's claims were not supported by evidence since on page 135 of the record of appeal the trial judge discussed the matter and stated that if the appellant's directors suspected that there was fraud on the part of the respondent, they should have reported the matter to authorized entities mandated to address this and thus brought evidence in court to establish the claims. In the absence of any concrete evidence, the allegations remained unproven.

Regarding ground 3 which faulted the trial judge for not considering that section 48(1) of BFIA applied to the respondent's position, the learned counsel for the respondent argued that the trial judge properly addressed this issue and finally made a finding that the appellant was not authorized to seek for information on the disputed

accounts having acknowledged not being aware of the said accounts. She argued that this is amplified by the contents of exhibit P2 found on page 122 of the record of appeal where the respondent bank in response to the request from the appellant outlined the fact that the information requested is confidential and privileged and may only be given to signatories of accounts. She argued that since none of the appellant company shareholders or directors was a signatory to the disputed accounts, the appellant failed to comply with the essential requirements as customers of the bank and cannot claim to have been denied access to the information and details of those who had opened the accounts and no law or regulation was contravened. She concluded by imploring the Court to dismiss the appeal for lack of merit.

In his brief rejoinder, the learned counsel for the appellant reiterated his submission in chief stressing the fact that the respondent failed to exercise good banking practice in opening the disputed accounts. He also stressed the fact that section 48(1) of the BFIA should not have been applied against the appellant under the circumstances and reiterated his prayer for the appeal to be allowed with costs.

We have dispassionately scrutinized the record of appeal, the list of authorities, and both oral and written submissions before us from

contending parties. Onset, we wish to point out that as the first appellate Court, we are enjoined by the provisions of Rule 36(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to reassess the evidence on the record to enable us to draw own inferences and findings in the instant appeal.

Similar to the oral and written submissions of the counsel for the parties, we kickstart by addressing grounds 1 and 4 which fault the trial judge in holding that two companies are having the name of the appellant and are registered with the Registrar of Companies in the United Republic of Tanzania in the absence of any evidence to support this and by contradicting own findings as to the registration of the two companies with the Registrar of Companies in the name of the appellant.

Having revisited the record of appeal it is revealed that there are two accounts Account No. 20110020150, and No. 20110020151 in the name of Maxima Clearing and Forwarding Limited, operating at the respondent bank. It is also unchallenged that the appellant company through its directors or shareholders did not open the disputed accounts or operated them. The complaint raised on grounds 1 and 4 emanates from the trial court's determination of the first and second framed issues

for determination of the case at the trial. In determining the concerned issues on whether the disputed accounts were opened with the authority and knowledge of the appellant's directors (then the plaintiff) and operated by them and whether the respondent's (then the defendant) refusal to supply information about the said accounts was proper, the trial judge stated as follows:

> "... *my finding is that it cannot be true that the plaintiffs were not aware of the opening and operation of the two accounts. According to paragraph 3 of the witness statement of Joel Lucian Uiso (PW1), which is his evidence in chief, the plaintiff discovered that there were two bank accounts which had been opened and were being operated in their company's name. This was immediately after the said accounts were opened in March 2016, as according to him they wrote to the defendants to request for copies used to open the accounts immediately.*"

Other evidence considered by the trial court that cemented the fact that the plaintiff was aware of the two accounts was the allegations by the appellants that they didn't have access to the said accounts and filed claims for an amount of Tshs. 3,619,859,579.12 and USD 1,091,717.62, which is the same as the amount that was deposited in

the disputed accounts without disclosing the source of such huge deposits.

In the instant appeal, whilst the appellant's counsel challenges the trial judge's findings concerning the disputed accounts favouring the respondent, the respondent's counsel agrees with the trial court's finding stating that it was based on availed evidence and pleadings before the court. We are inclined to agree with the respondent's counsel on this and are satisfied that the trial judge properly considered the pleadings in particular paragraph 7 of the plaint which augurs well with the evidence of PW1 found in his witness statement. In paragraph 3, he avers his discovery of the existence of the disputed accounts with a name like that of the appellant company and he did not know of their existence. According to PW1, the appellant sought information through exhibit P1 of 10/2/2017 and that in exhibit P2 the appellant stipulated clearly that the accounts were opened without the knowledge of shareholders and directors of the appellant company. Concerning the issue of knowledge of the operation of the two accounts, as shown above, the trial judge made a finding that exhibit P1 clearly shows that the appellant knew of the existence of the two accounts.

Our scrutiny of the record of appeal has shown that the trial court's findings were based on an assessment of availed evidence and thus concluded that since the appellant's evidence through PW1 was that they were not the respondent's bank customer although they went on to claim the amount in the two accounts as theirs without showing any evidence to prove their interest in the deposits which were made in the accounts. Similarly, there was also the fact that the evidence from the respondent's side through DW1 was that the disputed accounts were properly opened as all necessary documents were attached to accounts opening forms including photographs to facilitate the process. Taking the above into consideration, we find that the learned counsel for the appellant's assertion that the trial judge's finding was not based on evidence is misconceived. The underlying position is clear that the disputed accounts were opened and operated by persons, other than the the appellant or its directors.

We find that the issue of whether the accounts were in the name of the appellant company and the propriety of that status was an issue also framed by the trial court in the process of determination of the case. There was also no evidence provided to lead the trial court to find that they were opened fraudulently. We agree with the trial judge that if the appellant was suspicious of the authenticity or legality of the said

accounts, proper entities should have been engaged to investigate the alleged fraud and such evidence would have been part of the claims sought in the pleadings or evidence led on the same. In the absence of concrete evidence to support such claims, we cannot at this level address the allegations. We, therefore, hold that the trial judge was correct not to deal with the allegations.

In tackling the grievance found in ground 4, the record of appeal reveals that the trial judge dealt with this matter when reassessing the evidence related to the second framed issue for determination of the trial. In his oral and written submission before the Court, the appellant's counsel argued that the respondent bank's refusal in exhibit D2 to provide them with the information and details related to the opening and operation of the disputed accounts as expounded in exhibit P1 after becoming aware of their existence in the respondent bank was in contravention to the requisite law and regulations and that we should also find so and decide in their favour.

On the rival side, the respondent's counsel rejected the assertion stating that all laws were complied. She argued that since it was well established that the appellant was neither a signatory nor one who operated the disputed accounts and the information and details

requested were confidential and privileged to accounts holders only denying them access followed the law. When discussing this issue, the trial judge held that:

> *"It has been submitted by the counsel for the defendant and correctly so, that on the evidence of PW1 there were three inferences to the effect that the plaintiff knew about the opening and operation of the impugned accounts... I do agree with the defendant's counsel. The only conclusion that can be drawn from the plaintiff's pleadings and evidence is that she learned about the opening of the two accounts by unknown persons, her knowledge that some money had been deposited in the two accounts and her knowledge that on 20th June, 2017 over Tshs. 3.6 billion and over Tshs. 1 million were withdrawn by unknown persons, is that the accounts were operated with her knowledge. Accordingly, I answer the first issue in the affirmative."*

In determining ground 4, as held by the trial judge and submitted by both counsel before us, it is important to understand the bank-customer relations is regulated by Section 48(1) of the BFIA which reads:

> *"Every Bank or Financial Institution shall observe as otherwise required by law, the practice and usage customary among bankers, and in particular shall not divulge any information relating to its customers or their affairs except in circumstances in which in accordance with the law or practices and usages customary among bankers, it is necessary or appropriate for the bank or financial institutions to divulge such information."*

The bank and customer relations have been a subject of discussion in various cases including the famous case of **Tournier vs National Provincial and Union Bank of England** (supra), which was also cited by both counsel and it was observed that:

> *"one of the implied terms of the contract is that the bank enter into a qualified obligation with their customer to abstain from disclosing as to his affairs without his consent."*

The court further set conditions when a bank can disclose the information of a customer, these are:

1. *Where the bank is compelled by law to disclose the information;*
2. *If the bank has a public duty to disclose the information;*

3. If the bank's own interests require disclosure; and

4. Where the customer has agreed to the information being disclosed.

Applying the above principles to our present case, while the appellant argues that the circumstances of the instant case fall squarely within the first and second set of the conditions above, the respondent contends that the first and second principles do not apply in the present case since, as contended in the pleadings and evidence by the appellant, there was no such existing relationship of bank and customer between the appellant and the respondent and that this being the case even section 48(1) of the BFIA is inapplicable. That is why the respondent took the stand to deny the appellant any information or detail of the respective accounts. Having considered what is before us regarding the issue, we are in tandem with the respondent's position. We agree with what the trial judge stated that considering the provisions of section 48(1) of the BFIA and the **Tournier** principles shown above, it was correct for the respondent to refuse to avail of the information requested by the appellant concerning the accounts. We are also alive to the fact that the issue of the existence of the two companies with the same name was only discussed in passing by the trial court and thus had nothing to do with the finding on the issue which was fully

expounded based on the evidence before the court as can be found at page 134 of the record of appeal when the trial judge stated:

> *"Before I conclude this judgment, I think it is appropriate to say a word in passing in respect of the operating of these two accounts which seems to be fishy....."*

Therefore, this statement cannot be seen as constituting the verdict of the court. The complaint by the appellant on this issue is thus misconceived and consequently we find the fourth ground to lack merit.

Our deliberation of grounds 2 and 3 will be done conjointly. The gist of the complaints is whether it was incumbent upon the respondent to provide the appellant with the particulars of the disputed bank accounts opened and operated in their name and complaints that there was noncompliance with banking good practices, standards, and procedures for authenticating and verification of genuineness of details of persons who opened the disputed accounts. Taking account of what we have endeavored to discuss when determining grounds 1 and 4 above these grounds should not take much of our time.

We have already stated hereinabove that the appellant through his pleadings and tendered evidence did acknowledge not being a customer of the respondent and having no knowledge of the opening or operation

of the disputed bank accounts and thus had no cause to seek information and details of the disputed bank accounts. We thus find nothing to fault the trial judge on his findings that the respondent's refusal to grant the same was justified since the request sought by the appellant was against confidential and privileged information which could only be availed to the signatories of the disputed accounts.

As already shown hereinabove, section 48(1) of the BFIA provides for nondisclosure of information related to its customers or their affairs except in circumstances in which it is necessary or appropriate for the bank to reveal such information. This principle is cemented further in the **Tournier case** (supra) stating that it is implied in the terms of the contract between the bank and its customers which abstains from disclosing information as to the customer's affairs without the latter's consent. Therefore, we find nothing to lead us to conclude that there was any contravention of the law and thus the ground falls.

We have also failed to find anything to lead us to depart from the holding of the trial court that that there was a contravention of procedures in the opening of the disputed accounts. There was no evidence brought in court to show that there was any fraud or misinformation related to the operation of the disputed accounts. Suffice

to say, in civil litigation the burden of proof lies on the one who alleges, a settled position found in sections 110(1) and (2) and 112 of the Tanzania Evidence Act, [Cap 6 R.E 2002, now 2019]. The said position was well restated by the Court in **Anthony M. Masanga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (unreported).

The only issue brought forward by the appellant was that even though the accounts' names were like the appellant's name, however, there was nothing to show there is any link between the said two companies. Determining the genuineness and authenticity of the companies whose accounts were with the respondent bank was not part of the pleadings nor engrained in the issues framed for the determination of the trial and thus cannot be brought before this Court for determination. The cases restating the position that parties are bound by their pleadings include; **Exim Bank (Tanzania) Ltd Vs Dascar Limited and Another,** Civil Appeal No. 92 of 2009 (unreported), and **Mbowe Vs Eliufoo** (1967) E.A 240 and a Nigerian case of **Adetoun Oladeji (Nig) Ltd Vs N.B.** PLC (2007) 2 NWLR (Pt. 1027) 415**.**

In the instant case undoubtedly, the appellant did fail to prove her claims that the disputed accounts were opened without following procedures. Further, the appellant's directors were denied information by reason that they were not signatories to the respective accounts. In the premises we find the ground to also lack merit.

In the end, the above said and done, the appeal lacks merits and is hereby dismissed with costs.

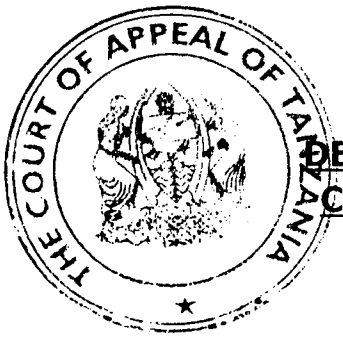
DATED at **DAR ES SALAAM** this 20th day of May 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of June, 2022 in the absence of the counsel for the appellant and Ms. Josephine Safiel, also holding brief of Anindumi Semu, learned counsel for the respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL