

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

(CORAM: MUGASHA, J.A., GALEBA, J.A. And MAIGE, J.A.)

CONSOLIDATED CIVIL APPEALS NO. 117/16 OF 2018 AND 199 OF 2019

BARCLAYS BANK TANZANIA LIMITEDAPPELLANT

VERSUS

**1. SHARAF SHIPPING AGENCY (T) LIMITED
2. HABIBU AFRICAN BANK LIMITED }RESPONDENTS**

AND

HABIB AFRICAN BANK LIMITEDAPPELLANT

VERSUS

**1. SHARAF SHIPPING AGENCY (T) LIMITED
2. BARCLAYS BANK TANZANIA LIMITED }RESPONDENTS**

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

(Mwambegele, J.)

Dated the 15th day of February, 2018

in

Commercial Case No. 115 of 2014

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JUDGMENT OF THE COURT

3rd & 16th June, 2022

MAIGE, J.A.:

At the High Court of Tanzania, Commercial Division, (the trial court), Sharaf Shipping (T) Limited who shall, for the purpose of these appeals be referred to as "the respondent", instituted a suit against Barclays Bank Tanzania Limited (the first appellant) and Habib African Banking Limited

(the second appellant) for recovery of USD 55,000.00 along with an interest at the commercial rate of 30% plus general damages.

The respondent, it is not in dispute, is a customer of the first appellant in that, she is operating an account at her bank. It was alleged that, sometimes between September 2013 and February, 2014, the respondent drew the following cheques in favour of Ballore Africa Logistics, Kuehne+ Nagel Ltd and Palm Commercial Ltd, (together, the beneficiaries):

- (i) Cheque No. 106427 dated 8th March, 2014 in the name of Kuehne & Nagel Limited worth USD 10,000.00.*
- (ii) Cheque No. 106342 dated 8th March, 2014 in the name of Ballore Africa Logistics worth USD 8,000.00.*
- (iii) Cheque No. 106153 dated 11th December, 2014 in the name of Ballore Africa Logistics worth USD 8,000.00.*
- (iv) Cheque No. 105936 dated 25th October, 2013 in the name of Palm Commercial Ltd worth USD 3,000.00.*
- (v) Cheque No. 105930 dated 24th October, 2013 in the name of Ballore Africa Logistics worth USD 10,000.00.*
- (vi) Cheque No. 105928 dated 24th October, 2013 in the name of Ballore Africa Logistics worth USD 8,000.00.*

(vii) Cheque No. 105474 dated 2nd September, 2013 in the name of Ballore Africa Logistics worth USD 8,000.00.

It is further alleged that on unspecified dates, the respondent received demands for payment from the beneficiaries signifying that they never received any payments in respect of the said cheques. In paragraph 9 of the plaint, the respondent further pleaded as follows:

*"9. That when the Plaintiff followed up the matter with the 1st Defendant with a view to finding out what went wrong, the 1st Defendant confirmed to the Plaintiff that the cheques were duly paid as instructed to the intended payees through the 2nd Defendant as the payees' collecting bank and produced copies of scanned cheques on record to that effect. **Copies of letter of correspondence issued by the 1st Defendant and scanned cheques in the 1st Defendant's archived record are annexed hereto and collectively marked SSA-1. The Plaintiff craves for leave of the honourable Court to refer them as part of this Plaint".***

In her written statement of defence, the second appellant denied collection of any cheques payable to the beneficiaries and pleaded that, none of them had an account at her bank. She however admitted collection and encashment of seven cheques drawn by the respondent

payable to Bugwema Investment (the payee) as per annexure SS-2. The payee, she further pleaded, had since 2009 an account with the second appellant's bank and the said account had been in normal operation.

On her part, the first appellant denied to have been involved in any fraud and alleged that, as issuing bank, she carried out the respondent's instructions to the extent of presenting the cheques in question to the second appellant in good faith and without negligence as evidenced in copies of the cheques attached in her written statement of defence. At paragraph 3 of her written statement of defence, she further averred as follows:

"In further response to the contents of paragraph 4 of the plaint it is averred that the 1st Defendant received the genuine cheques issued by the plaintiff together with their respective Clearing Schedules payable to Ballore Africa Logistics, Kuehne+ Nagel Ltd and Palm Commercial Ltd through the Dar es Salaam Clearing House hosted at the Bank of Tanzania from the 2nd Defendant Bank and subsequently the 1st Defendant Bank Account at the Bank of Tanzania was debited with the reflecting amounts on Cheques and paid to the 2nd Defendant Bank's account at the Bank of Tanzania and that the said cheques received through the Dar es Salaam Clearing House from the 2nd Defendant Bank as per the Clearing House requirements proving that they were received by the 2nd Defendant Bank and subsequently payments

were made to the 2nd Defendant Bank for the value of the cheques”.

Before commencement of the trial, the trial Judge, having engaged the parties, framed the following issues for determination:

- (1) Whether the plaintiff's account was debited fraudulently and without instruction;*
- (2) If the first issue is answered in the affirmative, whether the defendants acted fraudulently as alleged.*
- (3) Whether the plaintiff acted contributorily negligent in handling the cheques in dispute.*
- (4) To what reliefs are the parties entitled.*

While composing the judgment and acting on the submissions by the counsel for the respondent, the trial Judge, seemingly guided by the provision of Order XIV rule 5(1) of the Civil Procedure Code, Cap. 33 R.E. 2002, now R.E.2019, (the CPC) and the authority in **Alan Ernestine & 3 Others v. Johnson Lukaza & Another**, Commercial Case No. 51 of 2004 (unreported), stated as follows:

"There are three aspects, in my view, which call for determination in the first issue: the debiting of the amount in dispute, the question of fraud and the lack of the plaintiff's authority. This begs to answer the sub-issues as to whether the plaintiff's account was debited with the amount in question, whether there was fraud in the transection and whether the transaction was without the authority of the plaintiff”.

In resolving the first issue, the trial judge, having noted of there being no dispute that the respondent's account was debited as alleged, addressed the remaining two sub-issues and observed as follows:

"The question that the cheques were drawn in favour of the payees claimed by the plaintiff is therefore not disputed as between the plaintiff and the first defendant. How in a bizarre twist of things the cheques changed to be in favour of Bugwema Investment is a question which, in my view, exhibits fraud. The cheques drawn by the plaintiff (Exhibit P2) bear the same numbers as those in favour of Bugwema Investment. They also bear the same amounts. This is found in the testimony of DW2. Unless there was fraud, cheques drawn in favour of Kuenhe+ Nagel Ltd, Palm Commercial Ltd and Bollore Africa Logistics could not turn to be in favour of Bugwema Investment. This could not be legally possible. I therefore find and hold that there was fraud in the transaction".

On the second issue, the answer of the trial Judge was as follows:

"As I have already found and held that the cheques were not drawn in favour of Bugwema Investment, the defendants surely acted fraudulently. I say so because the clearing process by the first defendant in the name of Bugwema Investment as the beneficiary could not have been possible without her participation in the scam".

As to the third issue, the trial judge held that, since the respondent's evidence through PW1 was such that the beneficiaries handed the cheques to the first appellant who then processed the same for payment and, as the first appellant did not claim that the said cheques were in favour of Bugwema investment, the respondent could not be said to have acted recklessly in handling her cheques.

Finally, the trial court pronounced a judgment in favour of the respondent for payment of USD 55,000.00 plus interest at the rate of 21% per annum, general damages of TZS 10,000,000.00 and interest on the decretal amount at the rate of 7% per annum from the date of judgment to the date of the satisfaction of the decree in full.

Each of the appellants were not pleased with the decision. The first appellant instituted Civil Appeal No. 177 of 2018 consisting of the following grounds:

1. That the trial Judge erred in law and fact in holding that the clearing process by the Appellant herein in the name of Bugwema Investment as the beneficiary could not have been possible without participation of the Appellant in the scam which holding, is not supported by the evidence duly tendered and admitted by the Trial Court.

2. That the trial Judge erred in law and fact in holding that the Appellant fraudulently cleared the disputed cheques in favour of Bugwema Investment.
3. That the trial Judge wrongly applied the decision in the case of **Standard Chartered Bank (T) Limited v. National oil (T) Limited & Exim Bank (T) Limited**, Civil Appeal No. 98 of 2008 (unreported)
4. That the award of interests at the rate of 21% from the date of filing the suit at the trial Court to the date of judgment is grossly excessive and unjustified.
5. That the learned Judge erred in law and facts in entering judgment and decree as against the Appellant herein.

The second appellant instituted Civil Appeal No. 199 of 2019 on the following grounds:

1. That the learned trial Judge erred in law and fact in amending the first issue in the determination of the suit. Owing to the nature of the amendment of the first issue, the learned trial Judge ought to afford the defendants, the right to be heard before proceeding to act on the amended issues.
2. The learned trial Judge erred in law and facts in holding that there was no dispute that the Plaintiff's account was debited with USD. 55,000.00.

3. The learned trial Judge erred in law and fact in holding that there was fraud in the transaction while no evidence was adduced from the alleged intended beneficiaries of the cheques.
4. That the learned trial Judge erred in law and fact in generally failing to analyze properly the evidence on the record and hence granting the Plaintiff's claim in the suit.
5. That the learned trial Judge erred in law in awarding interests at the rate of 21% per annum from the date of filing the suit to the date of judgment which is excessive and unjustified. The trial Judge ought to hold that interest rate for US Dollars funds are different from Tanzania Shillings.
6. That the learned Judge erred in law and fact in entering a judgment in favour of the 1st Respondent without the requisite standard of proof applicable in fraud cases.
7. That the learned Judge erred in law and fact in admitting and relying on the evidence of Lawrence Laideson whose evidence was not cross examined in proof of the 1st Respondent's case.
8. That the learned Judge erred in law and fact in concluding that the 1st Respondent's account was fraudulently debited without proof or production of the statement of the bank account of the 1st Respondent.
9. That the learned Judge erred in law and fact in granting judgment in favour of the 1st Respondent without evidence of the intended

payees/ beneficiaries Kuenhe+Nagel Ltd, Palm Commercial Ltd and Bollore Africa Logistics.

10. That the learned Judge erred in law and fact in deciding in favour of the 1st Respondent without tendering a board resolution authorizing the suit to be commenced at the Court.
11. That the learned Judge erred in law and fact for failure to find contributory negligence on the part of the 1st respondent.
12. That the learned Judge erred in law and fact in finding that the 1st Respondent had a cause of action against the Appellant.
13. That the Learned trial Judge erred in law and fact for failure to find contributory negligence on the part of the 1st Respondent.
14. That the Learned trial Judge erred in law and fact in entering judgment and decree against the Appellant.

Soon before the commencement of the hearing, the Court, by the consent of the parties, consolidated the two proceedings.

At the hearing, the first appellant was represented by a team of three advocates namely; Dr. Alex Nguluma, Ms. Nora Marah and Ms. Jacqueline Kapinga whereas the second appellant was represented by advocate Tazan Keneth Mwaiteleke. The respondent was represented by Mr. Abdon Rwegasira, also learned advocate.

As the law requires, each of the parties, through her counsel, filed the relevant written submissions which at the hearing were duly adopted

with some clarifications. We have considered the rival submissions. For the reason which shall be apparent as we proceed, we find it necessary to start our deliberation with the first ground in the second appeal which in essence questions the correctness of framing of the issues by the trial court. The scope of the objection as raised in the first ground of appeal appears to be restricted to the motion of the trial court to amend the first issue and proceed to determine the suit basing on the amended issue without appellants being afforded a right to be heard. However, after carefully reading the record and upon consideration of other grounds of appeal more particularly the first and second grounds in the first appeal and the third and ninth grounds in the second appeal, we entertained doubts if the issues were correctly and properly addressed. We thus requested the parties to, along with the propriety of the amendment of the first issue, address us on whether the issues were correctly framed to reflect the nature of contention between the parties. For the respondent, it was submitted in the affirmative and for the second respondent negatively.

In relation to amended issue, it was Mr. Mwaiteleke's submissions that the trial judges' amendment and determination of the first issue was fatally irregular for two main reasons. First, it having been framed in the

course of composing the judgment, the appellants were denied a fundamental right of hearing. He placed reliance on the case of **People's Bank of Zanzibar v. Suleman Haji Suleman** [2000] T.L.R. 347. Second, as the amended issue was not in contemplation of the parties during trial, they were not addressed in evidence.

For the respondent, it was submitted that, the power of the trial judge or magistrate to amend issues under Order XIV rule 5 (1) of the CPC is absolute in as long as the amendment is necessary for the purpose of determining the real controversy. In his view, the authority in **People's Bank of Zanzibar** (*supra*) is distinguishable and therefore, inapplicable for two main reasons. First, unlike in the instant case, there, the trial judge amended the issue so as to include that which was not pleaded. Second, while in the said case, the issue was raised *suo motu*, in the instant case, the trial judge was moved by the counsel for the respondent. It was submitted further that, the amendment did not prejudice the appellants because what was added were simply the words, "and money paid in the payee".

Having prudently followed the counsel's debate, we think, two questions should be addressed in resolving the contention. First, whether, in the nature of the amendment of the first issue, it was necessary for the

appellants to be afforded a right to be heard. Two, whether, in view of pleadings, the trial court correctly and properly framed the issues. Before we direct our minds to the said questions, a brief exposition of the law relating to framing issues may be necessary.

Issues arise, according to Order XIV rule 1(1) of the CPC, where a material proposition of fact or law is affirmed by one party and denied by the other. Order XIV rule 1 (5) read together Order VIII B rule 4 requires the trial court to, upon reading the pleadings and hearing the parties or their pleaders at the first hearing, frame and record the issues on which the right decision of the case appears to depend. It is also the law according to Order XIV rule 1(3) that, each material proposition affirmed by one party and denied by the other constitutes a distinct and separate issue. Order XIV rule 5(1) provides as follows:

"5.-(1) The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit; and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed".

Framing of the issues is a necessary step in resolution of civil disputes because it defines and narrows down the scope of the contention and thereby making the trial more focused and short-lived.

Although the duty to frame issues is of the trial Judge, the same cannot be done without involving the parties or their advocates who have both the duty to assist the court on the process and a right of hearing as well. Admittedly, the trial Judge enjoys discretion under Order XIV rule 5 to amend issues at any time before pronouncement of the judgment. Nonetheless, unless the amended issue is captured in pleadings and evidence, he is bound, before amending the same, to afford the parties a right of hearing. See for instance, **Peter Ng'homango v. the Attorney General**, Civil Appeal No. 114 of or 2011(unreported) where it was held:

"Cases must be decided on the issues on the record and if it is desired to raise other issues they must be placed on record by amendment. In the present case the issue on which the judge decided upon was raised by himself without involving the parties and in our opinion he was not supposed to take such a course".

A similar position was stated in **People's Bank of Zanzibar case** (*supra*), where an additional issue was framed and determined in the course of composing judgment without the parties being involved. This Court, having observed as a fact that, the parties conducted their case on

the basis of the issues they agreed at the beginning of the trial, it held as follows:

"In a situation where a court amends an issue or raises fresh issue or where it considers a matter before it can only be decided on technical point which has not been addressed by the counsel the proper thing for the court to do at any stage before judgment is to re-open the case and give the counsel on each side reasonable opportunity to lead evidence or address the court on the issue before the court gives its judgment and failure to do so amount to miscarriage of justice".

Omission to frame issues, it is trite law, is an irregularity which may vitiate the judgment and proceedings of the trial court if it occasions failure of justice. See for instance, **Norman v. Overseas Motor Transport (Tanganyika) Limited [1959] 1EA 131.**

As we said above, the first issue was whether the respondent's account was debited fraudulently and without instruction. The fact that the respondent's account was debited to the extent of the amount in dispute has never be doubted. The dispute, it would appear, was whether the debiting in question was made fraudulently and without authority. In the course of composing the judgment, the trial court amended the first issue to read "whether the plaintiff's account was debited and money paid to the payee fraudulently and without authority". For the respondent, it was

submitted, the amendment could not prejudice either of the parties because it was pleaded. For the second appellant, it was submitted, much as it was not dispute that the same was pleaded, for the reason of not being framed into issue, it was not addressed in evidence.

From the record, we think, Mr. Mwaiteleke is quite right. The fact that the cheques in question were fraudulently and without authority paid to the payee, was expressly pleaded in the plaint. It was denied in the written statement of defence of the second appellant as well. The law on this issue is very settled. Parties, in adducing their evidence are guided by issues. They are not expected during trial, to adduce evidence which is extraneous the framed issues and pleadings.

We understand Mr. Mwaiteleke to mean in his submissions that, if the issue was drawn to the attention of the parties before trial, the payee and the beneficiaries could perhaps be called as witnesses. There is merit on this submission more so because the issue of the legality of payment of the cheque in favour of the payee essentially related to the second respondent. Thus, in address of the amended issue, the second appellant had a right, if he wished, to call the payee to testify on the issue. She would have a right as well, upon application, to recall any of the witnesses to testify in address of the same.

As that is not enough, the decision of the trial judge to amend the first issue was in response to the submission by the counsel for the respondent. Neither of the appellants was afforded an opportunity even to comment on the proposed amendment. In effect, therefore, the approach taken by the trial court departed from the rules of fair hearing which requires both parties to be treated equally in the hearing process.

In our opinion, therefore, the amendment of the first issue by the trial court was fatally irregular. The first issue is thus answered affirmatively. We are preparing to answer the second issue in the affirmative too. We shall assign the reasons henceforward.

From our careful reading of the pleadings, it would appear to us that, the respondent's proposition which was strongly disputed by the second appellant was that, the cheques in question were paid to the beneficiaries as instructed, through the second appellant as the beneficiaries' collecting bank. In the circumstance, therefore, the dispute could not be fully resolved without the issues of whether the second appellant, as a collecting bank, received any cheques payable to the beneficiaries and whether the said beneficiaries had accounts at the second appellant's bank being specifically addressed. These, in our view, were distinct and separate contentions. The trial court generally addressed the said contentions

under the first issue as amended. The first issue in our view, much as it appears to be an omnibus issue, is violative of Order XIV rule 1(3) of the CPC which requires distinct issues be framed on each material proposition affirmed by one party and denied by the other.

As the parties did not, in their evidence and submissions, specifically address these pertinent issues, the trial Judge, in the same token, did not, in his judgment, make any findings on them. No doubt, this occasioned failure of justice. Therefore, in **Norman v. Overseas Motor Transport** (*supra*), the defunct Court for East Africa observed as follows:

"If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court, and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed...In the instant case it would seem that the failure of the court to frame issues was to some extent the fault of counsel on both sides. Nevertheless, the failure to frame the issues is an irregularity and the question is whether, notwithstanding the failure to frame the issues, the parties at the trial knew what the real question between them was, that the evidence on the question had been taken and the court duly considered it."

The effect of improper framing of the issue could easily be noticed on how the issue of fraud was addressed. The trial court, as the record shows,

having held in relation to the first issue that, the respondent's account was debited fraudulently, sweepingly in our view, linked both the appellants with the fraud without stipulating, basing on evidence, the role each of them played. On this, it was submitted for the first appellant at paragraph 4.3 of their written submissions in support of the first appeal as follows:

"In our humble submissions, there was no evidence duly tendered and admitted by the Trial Court connecting the Appellant with the alleged fraud other than the Trial Court's own conjecture at page 610 of the Record of Appeal to compare Exhibit P-2 with copies of cheques allegedly drawn in favour of Bugwema Investment which copies, were not tendered and admitted as part of evidence at the trial."

This, in our judgment, would perhaps not happen if issues were properly and correctly framed. In line with this, the following statement of the defunct Court of Appeal for East Africa in the case of **Haj Ibrahim Mohamed Saeed v. Al-Haj Othman Kaid Sallam** [1962] EA 149 may be pertinent:

"The need to frame issues has been repeatedly stressed by the Court. Here the failure to do so, or to refer to the terms of the Rent Restriction Ordinance, appears to some extent to have misled the learned Judge in his consideration of the case."

In the final result and for the foregoing reasons, therefore, we allow the appeal to the extent of the first ground in the second appeal. We thus quash and set aside the judgement and proceedings of the trial court and remit the file to the trial court for retrial with direction that issues be properly framed. In the nature of this case, we shall not give an order as to costs.

DATED at **DAR ES SALAAM** this 14th day of June, 2022.


S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 16th day of June, 2022 in the presence of Mr. Abdon Rwegasira who hold brief for Mr. Zaharan Sinare, learned counsel for the 1st appellant, Mr. Tazaran Mwaiteleke, learned counsel for the 2nd Appellant and Mr. Abdon Rwegasira, learned counsel for the respondent is hereby certified as a true copy of the original.




A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL