IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A, And FIKIRINI, J.A)

CIVIL APPEAL NO. 262 OF 2019

HOOD TRANSPORT COMPANY LIMITED.....APPELLANT

VERSUS

EAST AFRICAN DEVELOPMENT BANK..... RESPONDENT

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

dated the 22nd day of May, 2019

in

Commercial Case No. 132 of 2016

.....

JUDGMENT OF THE COURT

10th & 21th June, 2022.

FIKIRINI, J.A.:

The respondent, East African Development Bank, and the appellant, Hood Transport Company Limited, entered into a Lease Agreement on 22nd October, 2007, whereby the respondent leased seven buses made Scania Marcopolo Torino, Model F94HB4X 2220 to the appellant. The initial payment was USD 579,000, followed by thirty five (35) consecutive monthly installments, including interest.

In course of making the monthly payments, the appellant defaulted lease agreement which prompted the respondent to institute a suit against the appellant in a Commercial Case No. 132 of 2016 claiming payment of USD 776,282.98, being rental arrears, plus interest, general damages, costs, and any other reliefs deemed fit to grant by the Court. In its judgment and decree pronounced on 22nd May, 2019, in favour of the respondent, the Court ordered the appellant to pay the respondent USD 776,282.98 being rental arrears, interests, penalties, and as well to pay interest on the claimed amount at the rate of 9.99% per annum from the date of filing the suit to the judgment day, and at the court's interest rate of 7% on the outstanding balance from the date of judgment till full payment and costs of the case.

Dissatisfied, the appellant now appeals to this Court on the following grounds:

1. *Upon admission by the plaintiff's (respondent) witness that they did not exercise their right of repossession as per the contract, the trial court erred in law and in fact by ordering the appellant to pay USD 776, 282.98 with interest and costs, contrary to the parties' agreement.*

2. *That, the trial judge erred in law and, in fact, for not, according to the appellant, the right to prosecute and close his case, hence denying him the right to be heard.*

3. *The trial judge grossly misdirected herself for expunging paragraphs of the appellant's witness statement, which is yet to be adopted as part of the evidence before the trial court.*

4. *The trial court proceedings were tainted with irregularities, which, inter alia, failed to rule on the objection raised on 10th December, 2018.*

5. *The trial judge erred in fact and law for failure to evaluate and analyze properly the evidence on record, hence reaching the wrong decision.*

Parties filed their written submissions as per Rule 106 (1) and 106 (7) of the Tanzania Court of Rules, 2009 (the Rules). On 10th June, 2022, when this appeal came on for hearing, Mr. Majura Magafu, assisted by Mr. Hosea Chamba, both learned advocates appeared on behalf of the appellant. The respondent had the services of Mr. Gabriel Simon Mnyele, learned advocate.

Mr. Magafu started by adopting the appellant's written submissions filed on 10th December, 2019. He then proceeded to submit on the second ground of appeal that the appellant was denied the right to be heard, as after expunging paragraphs 7, 9, 10, and 11 from the appellant's witness statement, the statement was admitted without the witness tendering a lease agreement a document featured in paragraph 8 of the witness statement. Mr. Magafu referred us to page 142 of the record of appeal.

The counsel extended his submission on the struck out paragraphs, which also covered the third ground, arguing that the trial judge misdirected herself and incorrectly struck out paragraphs from the appellant's witness statement, which explained the documentary evidence involved, such as financial statements and receipts of payments, which were listed in the list of documents filed on 12th September, 2018 and adopted to form part of the evidence before the trial court. Probed by us on the reason by the trial judge in expunging those paragraphs, he alluded to the fact that the documents were not pleaded, even though at the time, the list of additional documents to be relied on had already been filed since 12th September, 2018. According

to him, the trial judge wrongly applied Rule 53 of the High Court (Commercial Division), Procedure Rules, GN. No. 250 of 2012 as amended (the Commercial Court Rules), and her decision was erroneous. From there, the matter proceeded with the hearing without allowing the appellant's witness to be heard, subjecting the witness to cross-examination while it is presumed that the Court knows the law. He then referred us to page 272 of the record of appeal, when eventually, the appellant closed his case.

We explored from him if the appellant had another witness to call, and there was none was his response.

Mr. Magafu also touched on the first and fifth grounds, contending that the trial judge did not evaluate and analyze the evidence, including exhibit P1 (the Lease Agreement). He ended by praying for the appeal to be allowed with costs.

On his part, Mr. Mnyele, who was present at the trial, had this to submit addressing the second, third, first, and fifth grounds, that at the commencement of the trial, two issues, as reflected on pages 245-246, were raised: one, application to produce statement of accounts of the

appellant made under Order XIII Rule (1) of the Civil Procedure Code, Cap 33 R.E. 2002 [now 2019] (the CPC), and two, that the witness statement had facts not pleaded, citing paragraphs 7.0, 8.0, 9.0, 10.0 and 11.0. Mr. Mnyele prayed for those paragraphs of which paragraphs 10.0 and 11.0 were not contested by the appellant as indicated on page 247 to be struck out. In her ruling, the trial judge dismissed Mr. Mnyele's application, simultaneously striking out paragraphs 7.0, 9.0, 10.0, and 11.0 of the witness statement and the list of documents filed by the appellant on 12th September, 2018. According to Mr. Mnyele, the trial judge did not base her decision on striking out the paragraphs from the appellant's witness statement on Rule 53 of the Commercial Court Rules.

Mr. Mnyele further contesting there being any documentary evidence calling for tendering and admission from paragraph 8 of the witness statement, contended that the referred document annexed as EADB 1 to the plaint was the respondent's document later admitted into evidence as exhibit P1 and that the appellant simply referred to it.

Dismissing Mr. Magafu's assertion that the appellant was denied the right to be heard as to having no legs to stand on, Mr. Mnyele contended that, first and foremost, it was incorrect contention by Mr. Magafu that the witness statement should have been admitted first and dealt with later, since, after admission, the witness statement, becomes part of the record, thence tricky to do anything. Secondly, inadmissibility is one ground that can lead to striking out paragraphs from the witness statement. And this can occur at any stage of the hearing upon the party's moving the Court or by the Court *suo motu*, stressed Mr. Mnyele.

Canvassing on the first ground, Mr. Mnyele emphatically contended that the complaint that the respondent did not exercise their right of repossession as per the contract was never raised before the High Court, nor was it part of the appellant's amended written statement or one of the framed issues, addressed by the trial judge. Instead, the issue cropped up during cross-examination, and even the trial judge did not address herself on the issue, warranting it to be a ground of appeal. He urged us to ignore the ground.

In the alternative, he argued that exhibit P1 should be read as a whole, particularly on default, that it was not a must for the agreement to be terminated in writing first, and repossession had to precede the filing of a suit mandatorily. He referred us to clauses 14. 0 (a), 15 (c) and 16.0 of exhibit P1. In his view, clause 15 (c) never came into play since the respondent opted to maintain the Lease Agreement to the end and sue the appellant after the agreement ended.

Responding to the application of the principles *pancta sunt servanda* and *abuntu* referred in the case of **Mohamed's Leisure Holdings (Pty) Ltd v. Southern Sun Hotel Interests (Pty) Ltd** (183/17) [2017] ZASCA 176 (1 December, 2017), that was relied upon by the appellant, Mr. Mnyele acknowledged the principles, but disputed their applicability for being foreign to our jurisdiction in the enforcement and interpretation of contracts, them being handily applicable internationally and not at the municipal level. Based on his submission, he urged us to dismiss the appeal for lacking in merit with costs.

We inquired if the appellant's counsel had an opportunity to address the court after striking out the paragraphs from the witness

statement. His response was, after pronouncing its ruling and before the hearing commenced, what followed was thus cross-examination. The procedure is after the witness statement is admitted and there are no documents to tender; the witness is, therefore, ready for cross-examination, elaborated Mr. Mnyele.

Rejoining, Mr. Magafu disputed the submission that the respondent had an option of waiting for the agreement to end instead of repossession right after default in payments. The basis of his proposal was pegged on clause 15 (b) of the Lease Agreement, which he construed to mean repossession first and then other options, including instituting a suit after that, and not as suggested by Mr. Mnyele that the respondent had the choice.

Prompted by us on his position that repossession is not part of the pleadings, Mr. Magafu vehemently contended that parties were bound by their agreement, which has to be read and interpreted as it is. He further submitted that even though there was no document to be tendered, the court should still have checked with the witness. He forcefully contended that under paragraph 8, there was a document to

be tendered, let alone the striking out of paragraphs erroneously. Emphasizing the dispensation of justice, he contended that the Court's interest has always been to ensure justice is served. In the appellant's case, some documents indicated the debt to the tune of Tzs. 2 Billion has already been paid, whereas the respondent's claim stood at Tzs. 1 Billion.

On the importance of the list of additional documents filed and the erroneous action of striking out paragraphs from the witness statement, Mr. Magafu maintained that had the documents been admitted or paragraphs not struck out, the Court would have a clear picture of what transpired, which it could not get after striking out those paragraphs and consequently arrived at the erroneous decision.

After examining the entire record of appeal and sieving through the counsel for the parties' submissions, our task is to determine whether the appeal before us is of merit.

During his submission, Mr. Magafu abandoned the fourth ground of appeal that the trial court proceedings were tainted with irregularities. We are thus left with the remaining grounds for a

determination as follows: the second and third shall be examined together, followed by the first and fifth.

The procedure under the Commercial Court Rules, particularly Rule 49 (1) and (2) as amended by GN No. 107 of 2019, examination in chief is by way of a witness statement which must be filed fourteen days after the final pre-trial conference and before the hearing commences. The witness statement is processed for admission during the hearing, and this precedes tendering and admission of documents. It is after this then the witness is passed over for cross-examination.

In the present appeal, what is availed to us from the record of appeal is that prior to the commencement of the plaintiff's case, Mr. Mnyele made an application and raised an objection: one, seeking of Court's leave for production of documentary evidence under Order XIII Rule (1) of the CPC, that day being the first hearing day, and two, complained to the Court that the appellant's witness statement comprised of unpleaded facts contrary to the dictates of Rule 53 of the Commercial Court Rules. He thus invited the Court to strike out the pointed out paragraphs, which were 7.0, 8.0, 9.0, 10.0, and 11.0. The

appellant conceded that paragraphs 10.0 and 11.0 carried new facts and accepted for the two paragraphs to be struck out as indicated on page 246 of the record of appeal. In the ruling dated 19th October, 2018, the trial judge declined the first limb of the application that the plaintiff be allowed to produce documents under Order XIII Rule (1) of the CPC. She upheld Mr. Mnyele's objection and struck out paragraphs 7.0, 9.0, 10.0, and 11.0 from the appellant's witness statement for not being part of the amended written statement of defence. Automatically this impacted all the documents referred to in those paragraphs. The trial judge acknowledged that the facts contained in paragraph 8.0 were not in dispute and did form part of the plaintiff's evidence.

By the time the hearing commenced and the appellant's witness statement is admitted to form part of the records, as shown on page 271 of the record of appeal, the contested paragraphs had already been struck out, together with the documents referred therein. The remaining paragraph 8 of the witness statement, made reference to the Lease Agreement attached to the plaint as EADB 1, but not as its intended to be tendered document. Instead the said EADB 1 was tendered and admitted as exhibit P1. Therefore going by the above

narrative there were no documents to be processed further from the remaining paragraphs, it was thus correct for the witness to be passed over for cross-examination. Subsequently, the appellant's case was closed since no more witness statements were filed, and the defence case was closed. The claim by Mr. Magafu that the appellant's rights to prosecute and close his case were hindered, hence interfering with the right to be heard, is unsupported. Similarly, his argument that the expunging of paragraphs should have come after the witness statement's admission rather than before has no basis. This is because the witness statement becomes and forms part of the records upon admission, thus could not be challenged after its admission.

Furthermore, objections of this nature can be raised by parties or even the court *suo motu* at any stage of the proceedings. There is a myriad of reasons which can lead to objection, including inadmissibility of the documentary evidence.

At this juncture, we find it crucial to discuss more on the trial court's role in the admission of documentary evidence. The admissibility of documentary evidence is mainly the domain of the trial court and not

necessarily parties to the proceedings. In the case of **A. A. Insurance (T) Ltd v. Beatus Kisusi,** Civil Appeal No. 67 of 2015 (unreported), faced with the scenario, the Court had this to say:

> *"It is the trial judge or magistrate who will have to apply the governing law of admissibility of exhibits like whether the document is a primary or secondary evidence....."*

Reverting to the appeal before us, we find the trial judge acted accordingly after being satisfied with the status of the intended to be relied-on documentary evidence, as are inadmissible. It is our firm view that the appellant was neither denied the right to be heard nor did the trial judge misdirected herself when she expunged those controverted paragraphs. We find these two grounds lacking in merit and accordingly dismiss them.

We now turn to the first and fifth grounds, which revolve around pleadings. In principle, when the Court is invited to determine an issue, the same must be featured in the pleadings, hence the famous and well settled legal position that parties are bound by their pleadings whose proof is cemented by the evidence adduced. This Court has come

across such situations on several occasions, including in the following cases while trying to illustrate the purpose of pleadings in civil suits: **Girdhari Lal Vidyarthi v. Ram Rakha** [1975] E. A. 527 C. A, **James Funke Gwagilo v. Attorney General** [2004] T. L. R. 163, **NHC v. Property Bureau (T) Ltd**, Civil Appeal No. 91 of 2007, **Ex-B. 8356/Sgt Sylivester S. Nyanda v. The IGP & AG**, Civil Appeal No. 64 of 2014, **NBC Limited v. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019, and **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357 of 2019 (all unreported). In the case of **NHC** (supra), the Court elaborating on the principle, had this to say:

> *"It cannot be overstated that for an issue to be determined by the Court it must have been specifically raised in the pleadings. The rationale to this is not hard to discern; pleadings are designed to facilitate the setting out of the plaintiff's claim sufficient particularity to enable the defendant to respond. Accordingly, a party may not be permitted to raise a ground which is not pleaded because the respondent will not have had an opportunity to rebut it."*

There are, of course, exceptional circumstances where the court can base its decision on un-pleaded facts, but there are conditions to be met. Faced with the challenge in the case of **Astepro Investment Co. Ltd v. Jawinga Company Limited**, in which the Court referred to the case of **Odds Jobs v. Mubira** [1970] E.A. 476, the then Court of Appeal of East Africa, the Court observed that:

> *"A court may base its decision on un-pleaded issues; it appears from the course followed at the trial that the issue had been left to the Court for decision. And this could only arise if, on the facts, the issue had been left for decision by the Court as there was led evidence of issue and an address made to the Court."*

There was no such occurrence whereby there was an issue left for the court to decide aside from those framed. What transpired, as gathered from the record of appeal, is after the pleadings were complete and issues framed, each party had an opportunity to file witness statements pursuant to Rule 49 (2) of the Commercial Court Rules. Each filed one witness statement, and four issues framed, which were:

1. *Whether there was a breach of the Lease Agreement by the defendant.*

2. *If the above question is answered in the affirmative,*

3. *Whether the said breach was remediated by the defendant.*

4. *What are the reliefs the parties herein are entitled to?*

Starting with the pleadings, in their amended written statement of defence found on page 131 of the record of appeal, the defence that repossession should have come first before the institution of the suit subject of this appeal, was never raised. As submitted by Mr. Mnyele, the position we align ourselves to, raising the issue of repossession at this stage was an afterthought. Similarly, repossession was not one of the framed issues upon which the court was invited to determine. The least we can say is that the claim cropped up during the cross-examination of the respondent's witness, as shown on page 267 of the record of appeal, but it was not taken any further.

Even if we were to go with the condition provided in **Astepro Investment Co. Ltd** (supra), that the court may base its decision on un-pleaded issues if it appears from the course followed at the trial that

the issue had been left to the court for decision, yet, we find no such situation arose in the appeal before us, and the exception can thus not apply. We, more so, maintain the well established practice that a decision of the court should be based on the issues framed by the court and agreed upon by the parties, and failure to do so could result in a miscarriage of justice.

Another issue we pondered on is the role of this Court on appeal. So far, it is a well settled legal position that this Court cannot, on appeal, determine the issue not dealt with by the trial court unless it involves a point of law such as jurisdiction or limitation of time. See: **Sebastian Rukiza Kinyondo v. Dr. Medard Mutalemwa Mutungi** [1999] T. L. R. 479 and **Hotel Travetine Limited and 2 Others v. National Bank of Commerce Limited** [2006] T. L. R. 133. In the **Hotel Travertine and 2 Others** (supra), the Court underscores the position by stating:

> *"..... available should have been pleaded and argued before the learned trial judge. As a matter of general principle, an Appellate Court cannot allow matters not taken or pleaded in the court below to be raised on appeal."*

In the present appeal, likewise, we cannot deal with issues not pleaded or dealt with by the trial court.

With the discussion above, we are convinced that this appeal is lacking in merit and consequently dismiss it with costs.

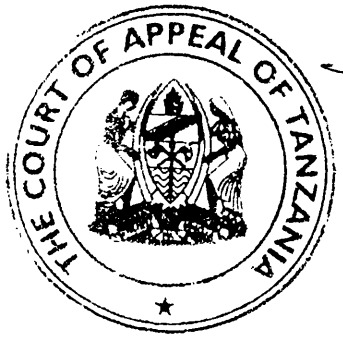
DATED at **DAR ES SALAAM** this 17th day of June, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered on this 21st day June, 2022, in the presence of Mr. Hosea Chamba, learned counsel for the appellant and Mr. Gabriel Mnyele, learned counsel for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL