IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 309 OF 2019

YARA TANZANIA LIMITED ....APPELLANT

VERSUS.

IKUWO GENERAL ENTERPRISES LIMITED ....RESPONDENT

(Appeal from the decision of the High Court of Tanzania,

Commercial Division at Dar es salaam)

(Makani, J.)

dated the 6th day of August, 2019
in
Commercial Case No. 154 of 2017

....

JUDGMENT OF THE COURT

26th September & 5th October, 2022

MAIGE, J.A.:

At the High Court of Tanzania, Commercial Division at Dar es Salaam (the trial court), the appellant herein instituted a suit against the respondent claiming for the following reliefs. **First**, declaration that the respondent is in breach of the Fertilizers Supply Agreement existing between her and the appellant. **Second**, payment of TZS 822,291,913.20 as an outstanding purchase price for fertilizers supplied to her pursuant to the said agreement. **Third**, interest on the outstanding amount at the rate of 25% per annum from the date of accrual of the cause of action to the date of judgment. **Fourth**,

interest at the court's rate of 12% from the date of judgment to the date of full payment. **Fifth**, payment of general damages.

It is common ground that, the appellant's claims at the trial court was based on two kinds of contracts. The first contract was between the appellant and the respondents personally. It was essentially a sale of goods contract implied, by conduct, in terms of section 5(1) of the Sale of Goods Act [Cap. 214 R.E. 2002, now R.E. 2019], (the Act). The determination of the trial court on the quantum of the outstanding in respect of this contract has never been doubted but the determination of the issue of interests accruing therefrom is what is in dispute. The second contract which is the subject of this appeal, was between the respondent and the appellant as an agent of the National Food Reserve Agency (NFRA). It was admitted into evidence as exhibit P1.

As the record speaks, the trial proceeded *ex parte* for the reason of non appearance of the respondent. In deciding the case, the trial court was guided by the following issues:

(1) Whether the defendant breached Fertilizers Supply Agreement with the plaintiff.

(2) Whether the defendant was supplied with the fertilizers worth TZS 1,508,741,913.00.

(3) Whether the defendant paid for all the supplied fertilizers.

(4) *Whether the plaintiff is entitled to any payments to the supplied fertilizer.*

(5) *Whether the plaintiff suffered any loss.*

(6) *To what reliefs are the parties entitled.*

The trial Judge having examined the pleadings, the oral account of PW1, the invoice in exhibit P4 and receipts from the respondent acknowledging delivery of the goods by the appellant, established of there being an agreement under section 5(1) of the Act by conduct. Having so established, the trial court considered the first and second issues in relation to the respective agreement and observed that, the respondent was in breach of the agreement for nonpayment of the partial purchase price of TZS 226,611,913.00. In particular, the trial Judge stated at page 583 of the record as hereunder:

> *"I have gone through the testimony of PW1 and I am satisfied that based on the direct transactions, the plaintiff supplied to the defendant fertilizers valued at TZS 773,061,913/=. Out of this, the defendant managed to pay TZS 546,450,000/= only leaving an outstanding balance of TZS 226,611,913/=. This is proved by the emails sent to the defendant concerning the orders and demand for payments (**Exhibit P2**), delivery notes (**Exhibit P3**), invoices (**Exhibit P4**) and statement of account (**Exhibit P5**). In view thereof, I agree with the plaintiff that the supplied fertilizers was worth TZS*

773,061,913.00 which amount the defendant has partly paid leaving an outstanding sum of TZS 226,611,913.00".

In relation to the claim arising from exhibit P1, the trial Judge, it would appear, entertained doubt as she was composing the judgment, whether the same was properly before the court. The concern being clause 9 of the said exhibit which provides for three stages of the dispute settlement procedure namely; reconciliation, mediation and arbitration. Therefore, on 29th July, 2029, the counsel for the appellant, upon being requested by the trial court, submitted on the issue in details. Having considered the submissions in line with the pleadings and evidence, the trial court declined to determine the first two issues in relation to exhibit P1 for being premature. In her own words, the trial Judge observed at page 581 of the record of appeal as follows:

> " *Since the Agreement* ***(Exhibit P1)*** *provides for terms and conditions for dispute resolution, then it was the duty of the plaintiff to first exhaust the mechanism to resolve the disputes provided for in the said Agreement* ***(Exhibit P1)*** *before engaging the court. As the dispute resolution machinery was not exhausted and/ or there is no such proof, then the Agreement* ***(Exhibit P1)*** *cannot be relied upon to be the basis of the plaintiff's claim in relation to the transactions covered by the said Agreement. Counsel raised the issue that clause 9 of the Agreement may have been an arbitration clause, but even if that was the case, still the second stage*

*that required the parties to go to the Mediation Committee for reconciliation was not complied with. In other words, the case was before this court prematurely in terms of the transactions between the plaintiff and the defendant covered by the Agreement (**Exhibit P1**). Unless otherwise the machinery of dispute resolution as agreed upon by the parties were exhausted, the court is seized of its power at this stage to consider whether or not there was breach of the Agreement".*

In the alternative, the trial Judge declined to place reliance on the Agreement in exhibit P1 for the reason that, it was neither pleaded nor attached in pleadings. That, the trial Judge opined, violated the rule against departure from pleadings and thus making it unsafe for the trial court to base its decision thereon. With that in mind, it would appear, the trial court considered the issue of damages to the extent of the first contract and established that; as a direct consequence of the respondent's breach of the said agreement, the appellant suffered loss and was entitled to, as it was awarded, the sum of TZS 30,000,000.00 as general damages.

On the interest at the commercial rate of 25%, the trial court relying on the authority in **Yara Tanzania Limited v. Charles Aloyce Msemwa t/a Msemwa Junior Agrovet** [2005] 2 E.A. at 290 refused to grant for the reason that though pleaded, the appellant did not lead any evidence on how she arrived at the rate pleaded and whether the said rate was the one which was

prevailing in the marked at that particular time. It however, granted the interest at the decretal sum at the rate of 12% per annum from the date of judgment to the date of full settlement. In the memorandum of appeal, the appellant has raised the following grounds:

1. *By holding that the parties were bound to exhaust dispute resolution mechanism provided under the contract, the Trial Court erred in law and fact for failure to grasp the legal position where there is a mediation/reconciliation clause in an agreement and thereby failed to exercise its jurisdiction.*
2. *The trial court erred in law in holding that the appellant's claims under NFRA agreement were premature for not exhausting the mediation/reconciliation clause.*
3. *The trial court erred in law in holding that the mediation/reconciliation clause in an agreement can oust the jurisdiction of the High Court.*
4. *The trial court erred in law in holding that the NFRA agreement was never pleaded by the appellant herein and thereby ignoring the appellant's documents filed in support of the case and the evidence on the record.*
5. *The trial court erred in law and fact in holding that the appellant is entitled to TZS 226,611,913.00 as specific damages and ignoring the claim of TZS 546,450,000.00 which was sufficiently proved.*

6. *The Trial Court grossly erred in law and fact by refusing to grant an order for interest as from the date of breach of the agreement to the date of Judgment.*

In the conduct of this appeal, the appellant had the service of Messrs. Ruben Robert and Ally Hamza, both learned advocates. The respondent enjoyed the service of Mr. Amin M. Mshana, also learned advocate.

Mr. Robert, having abandoned the first and third grounds of appeal, adopted the substance of his written submissions and clarified briefly on the second and fifth grounds of appeal jointly and the sixth ground separately.

On his part, Mr. Mshana entirely relied on his written submissions in reply without any further arguments.

From the counsel's submissions, three issues have to be addressed in determining this appeal. The first issue which arises from the second and fifth grounds of appeal is *whether the trial court was right in dismissing the claim under exhibit P1 for being premature*. The second issue which arises from the fourth ground of appeal is *whether it was correct for the trial court to refuse placing reliance on exhibit P1 for the reason of it being neither pleaded nor attached in pleadings*. The last one which arises from the sixth ground being *whether the trial court was right in refusing the appellant's claim for interest on the principal sum.*

For the reasons which shall be apparent as we go along, we find it important to start our deliberation with the second issue which is whether it was correct for the trial court to refuse placing reliance on exhibit P1 for the reason of it being neither pleaded nor attached in pleadings.

In his submissions on this issue, Mr. Robert while admitting that exhibit P1 was not expressly pleaded, he was of the contention that the same was implied in pleadings. The counsel submitted further or in the alternative that; for the reason of being entered in the list of additional documents filed in the pre-trial stages, exhibit P1 was, under O. VII R. 14 (2) and O. XIII R. 1 (1) of the Civil Procedure Code, [Cap. 33 R.E. 2019], (the CPC), admissible and thus reliable. The counsel has urged the Court to treat the entry of the document in the list of documents as tantamount to the same being pleaded.

Mr. Mshana on his part, did not agree with the proposition by the counsel for the appellant that the phrase "pleading" includes a list of additional documents. To him, pleading, as defined in O. VI R. 1 of the CPC means a plaint, written statement of defence and subsequent pleadings. The mere fact that a document was admitted in an *ex-parte* hearing without being objected, the counsel submitted, does not render it reliable or capable of making out evidence. He placed reliance on the decision of the Supreme Court of Nigeria in **Musa Abubakar v. E.I. Chulks**, S.C. 184/2003.

We shall start our discussion by considering if exhibit P1 was pleaded. We understand that, the counsel for the appellant is admitting that the document was not expressly pleaded. He is however claiming in the first place that, the same was implicitly pleaded. On our part, we have taken time to read the plaint and we could not find any fact therein where the existence of exhibit P1 can be implied. The nature of the agreement entered into between the parties was, in our reading, pleaded in paragraphs 5 of the plaint as follows:

> *"5. That, on diverse dates between November 2014 and July 2015 the defendant through various emails correspondences ordered from the plaintiff fertilizers vide Local Purchasing Orders (LPOs) on credit worth Tshs. 1, 508,741,913.00 of which was to be paid within 30 days from the date of the dispatch of the goods. Copies of the Local Purchasing Orders (LPOs) and its associated e-mails for supply of the said fertilizers are collectively attached herewith and marked as "YARA" and leave of this Honourable Court is craved to deem them as forming part of this plaint".*

The above facts clear as they are, do not, in our view, plead whether expressly or by implication the existence of the agreement in exhibit P1. There is no any other factual allegation in the plaint mentioning or implying the existence of the said document either. Therefore, in as much as the document in exhibit P1 was not pleaded, we agree with the counsel for the respondent

that, it could not be relied upon to determine the appellant's claim. This is in accordance with the rule against departure from pleadings set out in O. VI R. 7 of the CPC which provides as follows:

> *"7. No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same".*

Under the above provision, it is settled that parties are not allowed to depart from their pleadings by raising new claim which is not founded in pleadings or inconsistent to what is pleaded. In line with the above principle, the Court has, from time to time, refused to place reliance on evidence not founded on pleadings. For instance, **Barclays Bank (T) Ltd vs. Jacob Muro**, Civil Appeal No. 357 of 2019 (unreported), this Court made the following observation:

> *"We feel compelled, at this point, to restate the time-honored principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at the variance with the pleaded facts must be ignored- See **James Funke Ngwagilo v. Attorney General** [2004] T.L.R. 161. See also **Lawrence Surumbu Tara v. Hon. Attorney General and 2 Others**, Civil Appeal No. 56 of 2012; and **Charles Richard***

Kombe t/a Building v. Evarani Mtungi and 3 Others, *Civil Appeal No. 38 of 2012 (both unreported)".*

Similarly, in **National Insurance Corporation vs. Sekulu Construction Company** [1986] T.L.R. 157, it was stated that; parties to dispute are not, during trial, allowed to depart from pleadings by adducing evidence which is extraneous to the pleadings.

We have been invited to treat the entry of the document in the list of documents as tantamount to the same being pleaded. We are unable to buy this contention. The reason being that, the rule as to the pre-trial disclosure of documents under O. VII R. 14 (2) of the CPC and the rule against departure from pleadings under O. VII R. 7 of the same law are there to serve different purposes. Whereas the former seeks to protect a party in the proceedings from being taken by surprise, during trial, by there being produced some documents not in his or her knowledge, the latter seeks to safeguard the parties from being taken by surprise as to the nature of the case against them. On this, the following remarks by Sir Jack I.H. Jacob in his Article entitled, "*the Present Importance of Pleadings*" first published in **Current Legal Problems** (1960) at page 174 as quoted in our decision in **Barclays Bank (T) LTD** (supra) may be pertinent:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings .... For sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any enquiry into case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon realm of speculation."

It was also submitted in the alternative that, exhibit P1 not being a document under O. VII R. 14 (1) of the CPC, it was not necessary for it to be pleaded and attached in pleadings. It was enough for the document to be entered in a list of additional documents as per O. VII R. 14 (2) of the CPC, argued the counsel. To put the matter clear, we reproduce hereunder the respective provisions:

"14-(1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in court when the

plaint is presented and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

(2) Where the plaintiff relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint".

Three things are important to be noted before we proceed on this issue. **One**, while O. VII R. 14 of the CPC requires that documents to be relied upon by the plaintiff be attached to the plaint or entered in the list of documents as the case may be, O. VI R. 7 of the CPC requires that all material facts constituting the claim should be founded on pleadings and that new facts not pleaded cannot, unless by way of amendment of pleadings, be relied upon in determining the case. **Two**, while O. VII R. 14 (1) of the CPC applies to the documents sued upon and which are in the possession of the plaintiff, O. VI R. (2) of the same applies to any other documents whether they are in the possession of the plaintiff or not. These, in our view, are those evidential documents which though not constituting the plaintiff's cause of action, are relevant in proving the claim. **Three**, since the documents under O. VII R. 14 (1) constitute the plaintiff's cause of action, they cannot be attached in pleadings unless they are expressly pleaded.

Having said so, we shall consider first where, between the two provisions, does exhibit P1 lie. As we said above, the respective exhibit contains an agreement between the appellant as an agent and the respondent. The claim of the appellant was based on breach of the said agreement. It would follow, therefore, that, exhibit P1 constituted the cause of action between the appellant and the respondent in respect thereof. Hence, the exhibit should have been expressly pleaded in the plaint and its copy attached thereto so as to afford the defendant opportunity to rebut by way of written statement of defence and preparing himself for the actual trial. On this, was are persuaded by the commentary of the learned jurist Mogha, at page 267 in his **Mogha's Law of Pleadings in India with Precedents**, 15th Edition, where he remarked:

> "*Generally speaking, the plaintiff's right or title which has been infringed must be stated first, and then the fact of infringement. Thus, in a suit brought on a contract, the contract must first be alleged, and then its breach, and then damages".*

We understand that under O. VII R. 18 (3) of the CPC, documents under any of the provisions, if not attached in pleadings or listed in the list of documents can, with the leave of the court, be received in evidence. The provision reads as follows:

"18 (1) A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not without the leave of the court, be received in evidence on his behalf at the hearing of the suit."

It is our firm view, however, that; as the existence of exhibit P1 was not pleaded, it could not have been produced and relied upon under the above provision without denying the respondent (defendant) opportunity to make a factual rebuttal on the existence of the same by way of written statement of defence. The position could perhaps have been different had exhibit P1 been a document under O. VII R. 14 (2) of the CPC.

It is for the foregoing reasons that, we answer the second issue against the appellant and hold that, for the reason of the document not being pleaded, the trial Judge was right in refusing to place reliance on it in determining the suit.

This now takes us back to the first issue as to the correctness of the trial Judge's finding that the claim was premature. Before we dwell on the parties' submissions on the issue, it is imperative to consider if, in view of our determination of the second issue, the trial court was entitled to go into the contents of exhibit P1 and determine whether the claim was premature. This

issue cannot consume the precious time of the Court. We think, the question must be answered negatively for the reasons which we shall assign henceforward. Since the trial Judge had it in her mind when composing the judgment that; exhibit P1 was neither pleaded nor attached in pleadings, as a matter of procedure, she should have considered the issue of departure from pleadings first. Having held, as she did, that, the rule was offended, the trial Judge would not be entitled to go into the contents of exhibit P1 and hold that the claim was premature for want of exhaustion of the remedies thereunder. This is because, by holding that exhibit P1 was not pleaded and therefore irrelevant, the trial Judge was saying that the claim thereunder was not before her. She was, therefore, not expected, as she did, to consider whether the remedies in clause 9 of the exhibit were exhausted. For those reasons, and to the extent as afore stated, we are settled that the trial Judge wrongly dealt with exhibit P1 and dismissed the claim arising therefrom for want of exhaustion of available remedies. To that extent, we answer the first issue in favour of the appellant and allow the second ground of appeal.

We proceed with the third issue as to refusal to award the claim for interest. We shall determine this in relation to the undisputed claim arising from the agreement by conduct. In the plaint, the claim of interest at the commercial rate of 25% per annum was pleaded in paragraph 3 of the plaint

and sought in item (c) of the prayers' clause therein. The submissions for the appellant on that issue was that, as the claim arose from commercial transactions, the appellant was, under mercantile practice, entitled to interests. Reliance was placed on the decision of the Supreme Court of Uganda in **Shenoi and Another** (supra).

Mr. Mshana on his part, entirely agreed with the findings of the trial court and blamed the appellant for failure to adduce evidence establishing the said rate of interests. For that reason, the counsel contended that, the authority in **Shenoi and Another** *(supra)* was inapplicable.

We have considered the counsel's submissions on the issue. It is not in dispute that though pleaded, the interests at the rate of 25% on the principal outstanding purchase price was not actually proved in evidence. The contention by the counsel for the appellant, is that it was implied under the mercantile practice. The counsel placed heavy reliance on the authority of the Supreme Court of Uganda in **Shenoi and Another** (supra) to the effect that, commercial debts usually attract, under mercantile practice, interest. In Tanzania, the above principle was given judicial recognition in **Engen Petroleum (T) Limited v. Tanganyika Investment Oil and Transport Limited**, Civil Appeal No. 103 of 2003, (unreported) where it was stated:

"We take judicial notice of the mercantile practice of paying interest on debts. We think interest on petroleum product sale debts, the subject of the present case, ordinarily attracted interest under mercantile practice. Our view is fortified by the provision of 29 of the Civil Procedure Code 1966 reflected above".

The principle has since then been consistently followed in the subsequent decisions of the Court. For instance, in **Mollel Electrical Contractors Limited v. MANTRAC Tanzania Limited**, Civil Appeal No. 394 of 2019 (unreported), it was observed that:

*"In the instant case, it was undoubted that the unpaid balance is a debt arising in a commercial transaction and therefore we are decidedly of the view that the principle in **Engen Petroleum (T) Limited v. Tanganyika Investment Oil and Transport Limited** (*supra*) would apply in this case. Accordingly, we uphold the trial court's view that the debt in issue would attract interest as a matter of mercantile practice".*

We accordingly answer the third issue in the affirmative. The obvious question which comes is what should be the rate of interests. The appellant pleaded 25% rate. It was not however substantiated in evidence. However, since the claim is based on commercial transactions, which under mercantile practice attracts interests, it is fair and just if the appellant is awarded the

court rate of 12% per annum from the date when the debt became due to the date of judgment. We hold so.

In the final result, the appeal partly succeeds to the extent of the second and sixth grounds of appeal. The rest of the grounds of appeal are dismissed. In the circumstances, we make no order as to costs.

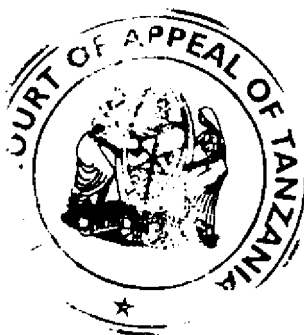
DATED at **DAR ES SALAAM** this 04th day of October, 2022.

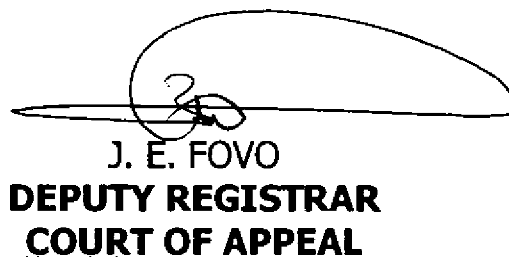
M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 5th day of October, 2022 in the presence of Mr. Ally Hamza, learned advocate for the appellant and holding brief for Mr. Amin M. Mshana, learned counsel for the respondent, is hereby certified as a true copy of the original.





J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL