IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., GALEBA, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 376 OF 2019

PATRICK EDWARD MOSHI ..... APPELLANT

VERSUS

COMMERCIAL BANK OF AFRICA (T) LTD ..... RESPONDENT

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

(Mutungi, J)

Dated the 12th day of May, 2016
in
Land Case No. 49 of 2011

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JUDGMENT OF THE COURT

28th September, 2022 & 4th April, 2023

KAIRO, J.A.:

This appeal emanates from the judgment and decree of the High Court of Tanzania, Land Division at Dar es salaam dated 12th May, 2016 in Land Case No. 49 of 2011. At the High Court, the respondent sued the appellant claiming to be paid TZS. 1,100,896,328.49 being an amount due and owing to the respondent on account of the credit facilities extended to the appellant's company registered as PATCO Enterprises (T) Ltd (the Company) together with its accrued interest and other charges. The respondent also prayed for judgment and decree

against the appellant for declaration that the appellant was in breach of credit facility agreements as constituted under the credit facility letters dated 4th October, 2007 and 22nd October, 2008. It was thus prayed for a declaratory order that the respondent was entitled to realize the mortgaged properties offered as securities against the loan facilities among other orders. The factual background culminating to this appeal is as follows.

The respondent and the appellant's company entered into a loan agreement whereby the respondent agreed to advance credit facilities of TZS. 230,000,000 and TZS. 400,000,000/=to the Company being a term loan and overdraft facilities respectively. The said facilities were secured by a debenture over the entire assets of the Company and guaranteed by the appellant who is the company's director who mortgaged his landed properties including (a) Plot No. 588 Block "D" Mbezi Beach area, Kinondoni Municipality Dar es Salaam, with Certificate of Title No. 46366, (b) Plot No. 589 Block "D" Mbezi Beach area, Kinondoni Municipality with Certificate of Title No. 113955, and (c) Plot No. 590 Block "D" Mbezi Beach area, Kinondoni Municipality, with Certificate of Title No. 56016. Copies of the mortgage deeds were admitted as exhibit P2 collectively. At some point the respondent had also paid TZS.

160,000,000/= which was an existing loan that the appellant had with another bank.

It was alleged that the loan was to be repaid by 5th June, 2010. However, the borrower defaulted in repaying such that the same kept accruing to the tune of TZS. 1,100,896,328.49/= as at 17th March, 2011.

The respondent issued statutory notices (exhibits P4 and P5) requiring the breach to be remedied, but in vain. Thus, in November, 2010 the respondent appointed Silvanus Benedict Mlola and Seni Songwe Malimi of K. and M. Advocates to be Receivers/Managers, to manage the business of the Company and repay the loan. Upon the appointment of the Receivers/Managers, the appellant's company ceased to be operated by the appellant as the appointees took over the business operations including; Supermarket at Benjamin Mkapa Building, a Supermarket at Mbezi Tangi Bovu, BP Petrol Station at Sinza Kijiweni as well as a Supermarket at the Airport. At some point the Receivers/Managers permitted the appellant to proceed with the management of the company's business, under their control. According to the respondent, the situation did not improve due to failure of the appellant to deposit the proceeds of the business in the account as directed by Receivers/Managers. The failure prompted them to take full

control of the business. It was the respondent's assertion that the outstanding debt was TZS. 914,547,908.4 as per the statutory notice issued in August 2010 and that following accumulation of interests, the amount kept increasing as time went by. As the measures taken by the respondent did not solve the problem, the respondent decided to institute Land Case No. 49 of 2011 against the appellant claiming for, among others; the payment of TZS. 1,100,896,328.49 being the loan balance and for a declaration that the borrower was in breach of the facilities agreement, order for the sale and attachment of the mortgaged properties, interest and cost as earlier intimated.

Together with the written statement of defence, the appellant raised a counter claim contending that the stock left in the borrower's projects which was found by the Receivers/Managers was sufficient to service the loan balance and fully liquidate it. The appellant pleaded that the loan was fully paid and claimed for a balance out of the sold stock. However, the counter claim was struck out for want of merits and upon hearing of the suit, the trial court held in favour of the respondent.

Discontented, the appellant lodged this appeal armed with nine grounds of appeal. In his written submission, the appellant clustered them into four complaints: grounds 1 and 7, addressing the issue of

jurisdiction; grounds 2, 8 and 9 concerning the propriety of the issues framed at the trial, burden of proof of the parties and contradicting testimonies of the witnesses; ground 3 attacking unprocedural admission of exhibit P3 (company's account bank statement); and lastly grounds 4, 5 and 6 challenging the findings of the trial court on points of law and facts, particularly issues of guarantee and receivership. We wish to state from the outset that we shall determine them as clustered by the appellant except grounds 1 and 7 on jurisdiction which were later abandoned.

When the appeal was called on for hearing, the appellant and the respondent were represented by Messrs. K. M. Nyangarika and Alex Mlanga respectively, both learned counsel.

Mr. Nyangarika adopted the appellant's written submissions in support of the appeal before addressing us orally on some of the aspects of the appeal. However, on reflection, he decided to abandon the complaint centred on the jurisdiction of the trial court.

With regard to grounds 2, 8 and 9 of appeal, the complaint is three folds: one, on the framing of issues for determination of the suit at the trial; two, shifting of the burden of proof, and three, conflicting testimonies of witnesses.

Mr. Nyangarika started by faulting the trial court for failing to discharge its duty under Order XIV of the Civil Procedure Code, Cap 33 R.E. 2002 (now 2019) (the CPC) of framing proper issues. He contended that the trial Judge did not frame issues no. 1 and 2 in accordance with the pleadings filed in the trial court. He took us through pages 119 and 80 of volumes 2 and 3 respectively of the record of appeal where the issues which guided the trial court in determination of the case were framed.

In elaboration, Mr. Nyangarika submitted that in the case at hand, the claim of TZS 1,100,896,328.49 by the respondent before the trial court on account of the credit facilities extended to the company was denied by the appellant for being baseless. Further the pleadings established that the appellant guaranteed the credit facilities extended to the Company by the responded through executing legal mortgages over the properties to secure the loan extended to the Company. Also, that the Company failed to service the loan facilities as agreed and the respondent decided to recover the debt by appointing the joint Receivers/Managers who put the Company under receivership. He also stated that, following the said process, the assets and stocks of the Company which were valued at TZS. 4,653,361,163.00 were sold

through the joint Receivers/Managers but they did not account for the exercise conducted, instead, embarked on another recovery measures by suing the appellant/guarantor. Mr. Nyangarika argued that, the trial court was supposed to frame issues based on the above narrated facts which were apparent on the face of the pleadings. He argued that the framed issues misdirected the trial court and made it to reach an erroneous decision against the appellant. In further elaboration, he contended that being a guarantor, the appellant is aware of the extent of his liability with the Company. However, in his opinion, it was crucial for the trial court to determine the issue as to whether the guarantor's liability in this case had crystalized so as to have a clear and conclusive proof regarding the receivership exercise conducted on the Company's business. He added that the trial court had also a duty to determine whether the respondent was justified in law to file an action against the guarantor without first revealing or accounting for what was obtained in the first recovery measure through receivership against the principal debtor.

He concluded that failure by the trial court to frame proper and correct issues made the parties to go to the trial without knowing what were the issues between them and therefore failed to adduce evidence

on the points in controversy. According to the appellant's counsel, two recovery measures would not have been taken simultaneously.

In rebuttal, Mr. Mlanga who had not lodged written submission in challenging the appeal, submitted that it is on record that, the trial court and the parties participated in framing of the issues which eventually were properly determined. According to him, there was no contravention of Order XIV of the CPC as argued by Mr. Nyangarika. He went on arguing that since the appellant was fully involved in framing of the issues, he is estopped from challenging the issues or the manner they were framed.

Mr. Mlanga went on to elaborate that, after failing to realize the default amount from the borrower's properties, the respondent had a right to dispose the guarantor's assets pledged as security. He thus concluded that the trial court properly framed the issues and correctly determined the dispute before it.

Having heard the rival arguments by the parties, we first wish to acknowledge that, it is the trial court's obligation under Order XIV Rule 5 of the CPC to frame issues as rightly submitted by Mr. Nyangarika. According to the record of appeal, both parties were represented during the trial whereby Messrs. Frank Milanzi and Majura Magafu, both learned

counsel, represented the respondent and the appellant respectively. In the circumstances, we join hands with Mr. Mlanga that the parties participated in the framing of the issues through their advocates before the court formally recorded them.

Mr. Nyangarika has faulted the framed issues to be irrelevant for what he called non corresponding with the pleadings. Having gone through the issues, we agree that the first issue framed by the trial court was irrelevant as it stated the obvious. We are saying so because the fact that the appellant breached the terms of the credit facilities received from the respondent was never denied by the appellant. Nevertheless, we still hold the view that the second and third issues were relevant and the parties adduced evidence for and against and the trial court finally determined them. In this regard, though we agree that the first issue was irrelevant, the pertinent question out of the said finding is whether there was miscarriage of justice that prejudiced the appellant. In our considered view, no prejudice to the appellant was caused as the appellant never denied what was intended to be determined in the said first issue. The law is now settled that procedural irregularities cannot vitiate proceedings unless it has an effect of occasioning miscarriage of justice. Having found none, the argument is

without merit and we dismiss the complaint of improper framing of issues.

The grievance regarding the second and third folds which were argued together was hinged on the alleged contradictions between PW1 and PW2 in their testimonies. According to Mr. Nyangarika, their testimonies depict contradictions as regards the account of receivership when the duo were cross examined by Mr. Magafu. He referred us to pages 124 to 126 and 130 to 132 of the record of appeal for reference. It was Mr. Nyangarika's contention that the said contradictions were not resolved by the trial court contrary to the law. He cited the case of **Mohamed Said Matula vs. Republic** [1995] T.L.R. 3 to back up his argument. According to him, failure of the trial court to resolve the inconsistencies rendered the case unproven to the standard required by law.

We have gone through the testimonies of PW1 and PW2 and observed that PW1 who introduced himself as recovery and collection officer of the respondent bank testified on what transpired from the moment when the respondent extended the credit facilities to the appellant to the time when the appellant failed to repay and the actions

taken by the respondent to recover the loan including appointing the Receivers/Managers to take over the business of the Company.

On the other side, PW2 was one of the appointed Receivers/Managers of the company following the default. In his testimony, he explained the nature and extent of his duties as Receiver/Manager and tasks he performed as well as the amount he alleged to have been deposited into the account of receivership. It is our view that each of them was testifying on the tasks he performed and what he knew in his respective capacity. In this regard, PW1 testified on banking processes while PW2 testified on receivership matters. We thus find, with respect to the appellant's counsel that, the argument of the presence of contradictions between PW1 and PW2 to be unfounded. Consequently, the cited case of **Mohamed Said Matula** (supra) is not relevant in the circumstances of this case. In our view, the denial by PW1 that he had not seen any reviewing report from the Receivers/Managers does not mean that the said report was not supplied to the respondent.

That apart, even if the testimonies at issue were contradictory to each other as Mr. Nyangarika argued, the same, in our view would not have gone to the root of the matter [see: **Dickson Elia Nsamba**

Shapwata and Another vs. Republic, Criminal Appeal No. 92 of 2007 (unreported). We say so because, both parties are at one that the Company was extended with credit facilities by the respondent but defaulted to pay back the loans which is the root cause of the suit that culminated to this appeal. We must emphasize that though the contradictions and inconsistencies in the evidence of witnesses may corrode the evidence, but they must go to the root of an issue being adjudicated to warrant an adverse finding as was decided in **Mohamed Said Matula vs. Republic** (supra) cited by Mr. Nyangarika**.** In the event, we find that the complained of contradictions and inconsistencies do not go to the root of the matter in the circumstances of the case at hand. From the foregoing, we dismiss grounds 2, 8 and 9 of appeal.

The thrust of the complaint in ground 3 is that, exhibit P3 (the bank statement of the Company's bank account) was admitted by the trial court in contravention of section 78 of the Law of Evidence Act No. 6 R. E. 2002 (now R.E 2022) (the Evidence Act). In elaboration, Mr. Nyangarika argued that, the statement neither bore the name nor signature of the person who retrieved it from the computer, and that it is not certain if PW1 who tendered it was an eligible witness to do so.

He argued further that, it was an error on the part of the trial court to admit it as an exhibit despite the objection from the appellant.

Responding, Mr. Mlanga contested Mr. Nyangarika's argument insisting that section 78 of the Evidence Act was not contravened. He contended that, the provision stipulates that a competent witness to tender the document can be any officer of the bank, which was the position in the case at hand. He further argued that the statement tendered had the name of PW1 which showed that he was the one who retrieved it from the system and later tendered it at the trial. He concluded that the argument has no basis and urged the Court to dismiss it.

On our part, we join hands with Mr. Mlanga that section 78 of the Evidence Act was not contravened. Further, we have gone through the statement in contention and found that, it contains the names of the officer of the bank who retrieved it. A closer scrutiny of the indicated names reveals that, the same belonged to the person who tendered exhibit P3. On that account, the question as to whether or not PW1 was the proper witness to tender it does not arise. After all, the appellant's advocate did not impeach him when he sought to tender it nor cross examined him on his eligibility. This shows that, the appellant's advocate

had no reservation with the eligibility of PW1 to tender it. In the circumstances therefore, we find ground No. 3 of the appeal without merit and we dismiss it as well.

Regarding the 4th, 5th and 6th grounds, the appellant's complaints revolve around the findings of the trial court on what he contended to be point of law and fact, specifically touching on the issues of guarantee and receivership.

The appellant contended that, the trial Judge erroneously treated contigent liability of the guarantor as current liability. In his view, the guarantor's liability cannot be deemed to have been crystalized in favour of the respondent bank in the absence of a clear and conclusive proof on the account of receivership process conducted to all interested parties including the appellant.

We gather from the appellant's submission that, he is generally questioning the respondent's action to go against his assets as guarantor while there is no report from the Receivers/Managers regarding the account of the principal debtor so as to establish how much was fetched from the receivership process and what was the balance after the said process.

Mr. Mlanga rebutted the appellant's arguments contending that the respondent had a right to go for the guarantor's assets so as to recover the extended facilities with interest accrued because the sum obtained from the receivership process was not sufficient to discharge the Company's liability.

It is on record that the appellant had charged his landed properties as security through a contract of guarantee in favour of the respondent bank. By guaranteeing, the appellant agreed to discharge the liability of the Company which was the principal debtor in case of default as per section 78 of the Law of Contract Act, Cap 345, R.E 2019 (the Contract Act) as it happened in the case at hand, since the Company defaulted to pay.

One of the core principles governing the guarantor's liability is that of co-extensiveness of the guarantor's liability with that of the principal debtor. The word co–extensive means "of the same limits or extent." The principle is provided in section 80 of the Contract Act which stipulates that "*the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract".* It is noteworthy that we found nothing to the contrary in the personal guarantees or in the mortgages in the case at hand, which means the

principle applies. This principle was well elaborated by the Supreme Court of India in **Bank of Bihar Ltd vs Daniodar Prased,** IR 1969 SC 279 quoted with approval in **Evarist John Kawishe vs CRDB Bank Ltd**, Civil Appeal No. 123 of 2015 (unreported) at page 11 when interpreting section 128 of the India Contract Act, 1978 which is *in pari materia* with section 80 of our Contract Act. The Supreme Court of India stated that under the 1978 Act, the liability of the surety or guarantor is co-extensive with that of the principal debtor. It went further and stated that, the surety thus becomes immediately liable to pay the entire amount in case of default of the principal obligor. It also observed that the liability is not deferred until the creditor exhausts his remedies against the principal debtor. The Court also emphasized on the stated principle in **Exim Bank (Tanzania) Limited vs DASCAR Limited and Another,** Civil Appeal No. 92 of 2009 (unreported).

As earlier stated, there is no dispute that, the Company defaulted to discharge the liability with the respondent bank. The appellant has consistently argued that his liability as a guarantor was contingent and not current. In other words, it is not a liability until something which was uncertain happens.

However, we do not subscribe to his contention. Basing on the above stipulated legal position, it is clear that, his liability is of the same limit and extent as that of the defaulting Company. In our view, the only contingency state of the guarantor's liability lies with the default of the Company, which in the case at hand was not disputed by the appellant either. On that account, we find his argument to be baseless following the default by the Company. This is because of the legal stance that once the principal debtor fails to pay, the duty of the guarantor to pay becomes immediately due as he/she steps into the principal debtor's shoes and he/she is placed into equal footing with that of the principal debtor under *co-extensive* principle.

In the same breath, the appellant's liability through the guarantee in favour of the respondent crystalized in this case when the Company defaulted to pay the loan as agreed and not to become so upon receiving final report on the receivership process conducted by the Receivers/Managers. It follows therefore that, the respondent was right to go for the legal mortgage charged as securities to recover the loan as she did.

The appellant has also faulted the trial Judge for the alleged failure to make clear and conclusive findings of fact and law as regards

the receivership process. According to him, the Receivers/Managers failed to produce report of the account of the Company. He contended that the report would have established how much was obtained from the receivership process and what was the outstanding debt before enforcing the personal guarantee in favour of the respondent. However, it is on record that the Receivers/Managers produced the periodical reports to the respondent bank. We wish to quote the excerpt to that effect for ease of reference when PW2 was cross examined by Mr. Magafu as reflected at page 132 of the record of appeal whereby he stated as follows: -

> *"... we performed our duties diligently and we submitted reports to the Bank which show the creditors claim and supplier's claims and what we realized from the receivership and even the stock valuations".*

PW2 further stated:-

> *"... we were in constant communication with the Bank. We wounded up the business in November, 2011"*

Gauging from the excerpt, we are convinced that the reports concerning the affairs of the Company during the receivership process were being produced by the Receivers/Managers and received by the respondent.

We therefore find the contention of failure to produce reports by the Receivers/Managers to have no basis.

It should be noted that the Receivers/Managers in this circumstance were answerable to the respondent who appointed them. In the circumstances, we dismiss grounds 4, 5 and 6 of the appeal for lack of merit.

In the final analysis, we are of the firm view that, this appeal has no merit. We thus proceed to dismiss it in its entirety with costs.

DATED at **DAR ES SALAAM** this 1st day of April, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of April, 2023 in the presence of the Appellant in person and Mr. Luka Elingaya, learned Counsel for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL