IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MUGASHA, J.A., KIHWELO, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL No. 225 OF 2019

THE REGISTERED TRUSTEES
OF ST. ANITA'S GREENLAND SCHOOLS (T) .....1ST APPELLANT
ANDREW PETER MASABILE MUNAZI.....2ND APPELLANT
ANNA MWAKOSYA .....3RD APPELLANT
PETER RUTAIHWA .....4TH APPELLANT
ABEL MWESIGWA.....5TH APPELLANT
ALEX MWEMEZI.....6TH APPELLANT
ANITA KISASEMBE..... 7TH APPELLANT

VERSUS

AZANIA BANK LIMITED .....RESPONDENT

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

(Mruma, J.)

dated the 27th day of March, 2019
in
Commercial Case No. 177 OF 2017
.....

JUDGMENT OF THE COURT

14th & 24th February, 2023

KIHWELO, J.A.:

The appellants herein, seek to reverse the decision of the High Court of Tanzania, Commercial Division dated 27th March, 2019 which upheld the respondent's claim and decided Commercial Case No. 177 of 2017 in

favour of the respondent. Aggrieved by the impugned decision the appellants have come before this Court by way of appeal.

The factual background to the appeal is fully set out as can be gleaned from the record. The respondent, on different occasions between 20th October, 2006 up to and including 24th April, 2009 extended an overdraft facility to the first appellant to the tune of Tanzanian Shillings One Hundred Sixty Million (Tshs. 160,000,000.00) subject to the terms and conditions described in the respective letters of offer. The first facility of Tanzanian Shillings Thirty- Eight Million (TZS. 38,000,000.00) was issued on 20th October, 2006, the second facility of Tanzanian Shillings Forty- Two Million (TZS. 42,000,000.00) was extended on 10th January, 2007 and the third additional facility of Tanzanian Shillings Eighty Million (TZS. 80,000,000.00) was issued on 24th April, 2009.

Subsequently, and in compliance with the terms of the loan facilities extended to the first appellant, the second, third, fourth, fifth, sixth and seventh appellants guaranteed to indemnify the respondent in full the entire outstanding loan together with interest, in the event that the first appellant defaulted to pay.

According to the agreed terms of the loan facilities, the loan was to be repaid in full not later than May, 2010. Quite unfortunate, and contrary to the terms and conditions of the loan facilities, the first appellant failed

to repay as agreed, and as a result, by 31st October, 2015 the outstanding loan facility stood at Tanzanian Shillings One Hundred and Five Million Thirty-Six Thousand Four Hundred and Four Eighty-Three Cents (TZS. 105,036,404.83) remained unpaid. Even worse, the second, third, fourth, fifth, sixth and seventh appellants did not honour part of their bargain, for they did not indemnify the respondent as agreed.

Consequently, the respondent made several attempts to recover the outstanding loan facility and the attendant interest, however, all the efforts were barren of result and therefore, the respondent was compelled to institute Civil Case No. 34 of 2014 before the High Court of Tanzania Dar es Salaam District Registry at Dar es Salaam which was however, struck out for want of jurisdiction. Later on, the respondent instituted Commercial Case No. 177 of 2017 before the High Court of Tanzania (Commercial Division) (the trial court).

In the ensuing case for the respondent two (2) witnesses, Joseph Zeno Suwi (PW1) and Diana Nyabatuli Mwimanzi (PW2) plus a host of documentary exhibits were tendered in support of the claim namely, exhibit P1 (Loan offer letters, Guarantee agreements, statement of account and correspondence between the parties), exhibit P2 (copy of a Plaint in Civil Case No. 34 of 2014) and exhibit P3 (Letters of Offer for Mortgage Loan). On the adversary side, the appellants featured two

witnesses Anna Mwakosya (DW1) and Andrew Peter Masabile Munazi (DW2) plus two (2) documentary exhibits, namely exhibit D1 (Letter from the respondent to Savings and Finance Commercial Bank Ltd) and exhibit D2 (Telegraphic Transfer Remittance Advise) to support the denial of the appellant's claim.

At the height of the trial on 27th March 2019 the High Court (Mruma, J.) to whom the case was assigned decided the matter in favour of the respondent as hinted above.

In their quest for justice, the appellants seek to overturn the decision of the High Court through a memorandum which is comprised of eighteen points of grievance, nonetheless, we think that it will only be pretentiously academic for us to reproduce all of them. For the sake of clarity and convenience, we have divided the points of grievance into four clusters in the pattern that they were argued by the learned trained minds, as will be indicated below, but in due course we will also paraphrase them accordingly. Looking critically to all the grounds of grievance they boil down to the follows issues:

1. *Whether Commercial Case No. 177 of 2017 was time-barred.*
2. *Whether the appellants had an outstanding liability of TZS. 105,036,404.83 or at all.*

3. *Whether the trial court wrongly awarded the respondent special damages at the rate of above 7 per cent per annum from the date of judgment to the date of full satisfaction.*
4. *Whether the trial court wrongly admitted and determined a suit without there being a board resolution to sue.*

When, eventually, the matter was placed before us for hearing on 14th February, 2023 the appellants had the services of Mr. Audax Kahendaguza Vedasto, learned counsel whereas the respondent was represented by Mr. Jovinson Kagirwa, learned counsel. Both learned counsel lodged written submissions either in support or in opposition to the appeal which they, respectively, fully adopted during the hearing. However, it will not be possible to recite each and every fact comprised in the submissions but we can only allude to those which are conveniently relevant for the determination of the matter before us. In the upshot, Mr. Kahendaguza invited us to allow the appeal with costs, whereas Mr. Kagirwa urged us to dismiss the appeal with costs.

Mr. Kahendaguza prefaced his submission by clustering the grounds of appeal as hinted above. First cluster, covering grounds 1, 2, 3, 4, 5 and 6 which relates to time limit, second cluster, covering grounds 7, 8, 9,10, 11, 12, 13, 14 and 15 which relates to liability of the appellants, third cluster, covering ground 17 on the wrong awarding of more than 7 per cent interest per annum on special damages and the fourth cluster,

covering ground 18 in relation to entertaining and determining the suit without a company resolution to that effect. Otherwise, Mr. Kahendaguza abandoned ground 16.

Arguing in support of the first cluster, Mr. Kahendaguza contended that the learned trial Judge was wrong to hold and find that it was proper to exclude the initial two loan facilities whose expiry dates were 20th October, 2007 and 10th January, 2008 along with the third loan facility in terms of section 21 of the Law of Limitation Act, [Cap 89 R.E. 2019] (the Act). He argued that, a suit founded on contract has to be lodged within six (6) years from the date the cause of action arose and that is according to paragraph 7 clause 1 of the First Schedule to the Act and therefore, exclusion of time spent in prosecuting Civil Case No. 34 of 2014 is applicable only to the third loan facility and not the first two loan facilities whose repayment period had long expired as each facility ought to be considered separately when it comes to determination of time limitation. To facilitate appreciation of his proposition, the learned counsel cited to us our unreported cases of **Hashim Madongo and Others v. Minister for Industry and Trade and Others** and **Zaidi Baraka and Others v. Exim Bank (Tanzania) Limited**, Civil Case No. 194 of 2016. In the latter case, we emphasized that, where there are two agreements with

separate terms and conditions, breach of each of the terms and conditions of any of the two agreements could constitute a separate cause of action.

In further, arguing the appeal, the learned counsel submitted that, ordinarily, time limit for the third facility would have qualified exemption under section 21(1) of the Act, provided that, the respondent met the criteria stated in that provision. However, the learned counsel was of the considered opinion that, the criteria for invoking section 21(1) of the Act, were not met in that the respondent did not state in the plaint such matters as required by Order VII rule 6 of the Civil Procedure Code, [Cap. 33 R.E. 2019] (CPC) to qualify for exception and also the respondent was not diligent in pursuing Civil Case No. 34 of 2014. In his opinion, the counsel for the respondent conceded that the High Court of Tanzania, Dar es Salaam District Registry lacked jurisdiction to entertain the matter while indeed, the High Court Dar es Salaam District Registry had that jurisdiction.

On the adversary, Mr. Kagirwa, learned counsel for the respondent was very adamant and clearly commenced with a brief and focused reply supporting the decision of the High Court. The learned counsel for the respondent prefaced his reply submission by arguing that, the point of limitation was raised as an issue in the substantive claim on 6th March, 2019 and was argued in the final submission referring to pages 771 to

773 of the record of appeal, and the trial court in deciding the matter relied upon the provision of section 21 (1) of the Act as the respondent argued, and came to the conclusion that, Commercial Case No. 177 of 2017 was not time barred making reference to paragraph 17 of the Plaint at page 13 of the record of appeal as well as, the order of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam in Civil Case No. 34 of 2014 (exhibit P2) at pages 720 and 721 of the record of appeal.

Illustrating further, Mr. Kagirwa contended that, for the exemption to be relied upon, under section 21 of the Act, Order VII rule 6 of the CPC, it requires that, the Plaintiff has to plead it in the Plaint. Reliance was placed on the case of **Norascus Christopher Ntaherezo v. Clara John Ngila**, Civil Revision No. 2 of 2017 (unreported) and argued that, since the respondent expressly pleaded exemption in the Plaint the trial court rightly and correctly found that the suit was time barred. Elaborating further, Mr. Kagirwa referred us to page 576 of the record of appeal and contended that, the loan facility of Tanzanian Shillings Eighty Million (TZS. 80,000,000.00) issued on 10th January, 2007 was an additional loan facility to that of Tanzanian Shillings Forty- Two Million (TZS. 42,000,000.00) extended on 26th October, 2006 and therefore, these were not separate and distinct facilities. He therefore, argued that the case of

Zaidi Baraka and Others (supra) was distinguishable and beseeched us to dismiss this ground of appeal.

Our starting point in this deliberation is by appreciating that in terms of item 7 of Part 1 of the First Schedule to the Act, the period of limitation for filing suits based on contracts is six (6) years, counted from the date of accrual of the cause of action. The respondent placed reliance on the provisions of section 21 (1) of the Act which the learned trial Judge relied to, in the determination of the case. Section 21 (1) of the Act provides:

> *"(1) In computing the period of limitation prescribed for any suit,* ***the time during which the plaintiff has been prosecuting, with due diligence, another civil proceedings,*** *whether in a court of first instance or in a court of appeai, against the defendant, shall be excluded, where the proceedings is founded upon the same cause of action* ***and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is incompetent to entertain it.****"* [Emphasis supplied]

Reading closely the above provision, it becomes quite clear, to us that, in order for one to benefit from it, has to show, among other things, that he was prosecuting the previous proceedings in good faith and with due diligence. There is a considerable body of case law which has discussed at length these two conditions. See, for instance, **Christopher**

Gaspar and Others v. Tanzania Harbours Authority Civil Appeal No. 43 of 1999 and **Eshikaeli Makere v. Tanzania Telecommunications Co. Ltd and Another**, Civil Appeal No. 57 of 2014 (both unreported).

We think, with respect, that, the High Court was therefore, correct in holding as it did that, the suit was not time barred in view of the exclusion of time spent in prosecuting Civil Case No. 34 of 2014 in the High Court of Tanzania at Dar es Salaam Registry in terms of section 21 of the Act, as the respondent expressly pleaded exemption in the Plaint particularly, paragraph 17 at page 13 of the record of appeal and bearing in mind that the respondent was prosecuting the previous proceedings in good faith and with due diligence with a view to recover the amount which was outstanding against the appellants.

We find considerable merit in Mr. Kagirwa's submission that, the case of **Zaidi Baraka and Others** (supra) is distinguishable from the circumstances obtained in the matter before us because, in the latter case there were two distinct loan facilities, one for United Dollars Six Hundred Thousand (USD 600,000.00) and the other one, for Tanzanian Shillings Two Hundred Million (TZS. 200,000,000.00) with separate terms and conditions while in the matter before us, the three loan facilities though they were disbursed differently, but from their nature of transactions, they were not distinct facilities and this is evident from the wording of the three

letters of offer at pages 17, 22 and 27 of the record of appeal. While the first letter of offer for the first loan facility referred to TZS. 38,000,000.00 and 12 months from the date of disbursement of funds as the tenor, the second letter of offer for the second loan facility referred to additional TZS. 42,000,000.00 to make the new limit of TZS. 80,000,000.00 and 12 months from the date of disbursement of funds as the tenor and the third loan facility referred to enhanced limit of TZS. 160,000,000.00 from the existing overdraft limit of TZS. 80,000,000.00. With due respect, we don't agree with Mr. Kahendaguza's submissions that, each facility in the case before us ought to be considered separately when it comes to determination of time limitation for the reasons we have just explained. We wish to reaffirm the peremptory principle of law, which is embraced in the sanctity of contracts that, the intention of the parties to an agreement is to be determined from the words used in the agreement. That said, grounds 1, 2, 3, 4, 5, and 6 have no merit and therefore they stand dismissed.

Arguing in support of the second cluster in relation to the liability of the appellant to pay Tanzanian Shillings One Hundred and Five Million Thirty-Six Thousand Four Hundred and Four Eighty-Three Cents (TZS. 105,036,404.83), Mr. Kahendaguza submitted at a very considerable length on this point arguing that, specific damages like the one at issue

has to be specifically pleaded and proved citing the case of **Masolele General Agencies v. African In-Land Church Tanzania** (1994) T.L.R. 192. In his considered opinion, Mr. Kahendaguza contended that, the appellants, in their defence through DW1 and DW2 as well as exhibits D1 and D2, a letter from the respondent to Savings and Finance Commercial Bank Ltd and the Telegraphic Transfer remittance advise respectively, ably demonstrated that, the amount of Tanzanian Shillings Seven Hundred Fifty-Six Million (TZS. 756,000,000.00) which was paid by Savings and Finance Commercial Bank Ltd in favour of the first appellant, was the full and final settlement of all the liabilities of the appellants to the respondent which entitled the appellants to the discharge of their respective securities. In his account, the liability of TZS. 105,036,404.83 does not arise in the circumstances of this case, since the amount of TZS. 756,000,000.00 discharged both the mortgage facility and the overdraft facility and therefore, the learned trial Judge was erroneous to hold that the appellants were liable to pay TZS. 105,036,404.83, Mr. Kahendaguza submitted.

In response Mr. Kagirwa was very focused and to the point. He categorically made it clear that, the amount of TZS. 756,000,000.00 which the appellants paid through loan take over by Savings and Finance Commercial Bank Ltd was to clear an outstanding mortgage loan facility

and the outstanding balance of TZS. 105,036,404.83 was in respect of the overdraft facility. He went on to submit that, the claim of TZS. 105,036,404.83 was specifically pleaded and proved as being unpaid amount arising from the three loan facilities and interest thereof, and that the bank statement tendered by the respondent proved it. Reliance was placed on our unreported case of **Stanbic Bank Tanzania Limited v. Abercrombie & Kent Limited**, Civil Appeal No. 21 of 2001 in which we reaffirmed that specific claim should strictly be pleaded and proved. Illustrating further, the learned counsel argued that, the contention by the appellants' counsel that exhibit D1 referred to facilities, meaning both the mortgage loan facility and the overdraft facility has no merit because, the amount of TZS. 756,000,000.00 was settled by April, 2010 but the appellants still issued a number of letters after that date proposing for reschedule of loan repayment. He referred us to the letters dated 11th August, 2010, 16th December, 2011 and 4th July, 2012, part of exhibit P1 found at pages 716, 717 and 718 of the record of appeal respectively to facilitate his proposition and rounded of that, this ground too should be dismissed for being devoid of merit.

We wish to begin by restating the cardinal principle of law that, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in this view by the provisions of sections 110

and 111 of the Tanzania Evidence Act, [Cap. 6 R.E. 2019] which among others state:

> *"110-(1) Whoever, desires any court to give judgment as to any iegal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*
>
> *111. The burden of proof in any suit lies on that person who would fail if no evidence were given on either side."*

Ordinarily, in civil proceedings a party who alleges anything in his favour also bears the evidential burden and the standard of proof is on the balance of probabilities, which means that, the court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved. There is, in this regard a long line of authorities to that effect, if we may just cite few, **Peters v Sunday Post Ltd** [1958] EA 424 and **Stanslaus Rugaba Kasusura and Another v. Phares Kabuye** [1982] T.L.R. 338.

We have carefully, examined the evidence on record, and as rightly submitted by Mr. Kagirwa we have no any flicker of doubt that the trial

Judge properly found that the appellants were liable to pay the outstanding amount of TZS. 105,036,404.83. We shall, at a later stage of our judgment, revert to explain this further.

Admittedly, time without number, we have held that specific damages have to be specifically pleaded and strictly proved. This was stated in the case of **Zuberi Augustino v Anicet Mugabe** [1992] T.L.R 137, **Stanbic Bank Tanzania Ltd v Abercrombie & Kent (T) Ltd** (supra) and **Nyakato Soap Industries Ltd v. Consolidated Holding Corporation**, Civil Appeal No. 54 of 2009 (unreported). In the latter case, we quoted with approval a passage in **Bolag v. Hutchson** [1950] AC 515 in the judgment of Lord Naughten:

> *"Special damages are...such as the law will not infer from the nature of the act. They do not flow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly..."*

In the appeal before us, arguing that the respondent did not prove its case to the required standard as the learned counsel for the appellants has made such an enduring impression, is like trying to swim against the tide. We find considerable merit in Mr. Kagirwa's submission that, the respondent ably proved that the appellants are liable to pay TZS. 105,036,404.83 as an outstanding loan facility for the overdraft and

therefore, we are of the considered opinion that, the trial Judge was undeniably right to arrive at the conclusion he made, considering the fact that, there was overwhelming evidence on record indicating that the appellants are liable to pay the outstanding loan for the overdraft facility because; **One**, the bank statement which was produced and admitted in evidence as part of exhibit P1 clearly indicates at page 713 of the record of appeal that, by 31st October, 2015 the amount of TZS. 105,036,404.83 remained unpaid and interest continued to accrue. This was also expressly pleaded under paragraph 14 of the Plaint where the bank statement was attached as annexture "ABL 1". **Two**, the appellants made several attempts to propose reschedule of payment of the outstanding loan, long after payment of the amount of TZS. 756,000,000.00 by the appellants through loan take over by Savings and Finance Commercial Bank Ltd. This is evident from the correspondence between the first appellant and the respondent dated 16th December, 2011 and 4th July, 2012 part of exhibit P1. **Three**, no explanation, leave alone reasonable explanation, has been offered by the learned counsel for the appellants why the bank statement exhibit P1 indicates that TZS. 105,036,404.83 remains unpaid on 31st October, 2015 while the said TZS. 756,000,000.00 was settled by April, 2010. It is, therefore, inconceivable, that, the respondent would demand something which was fully paid. In view of the foregoing position, grounds

7, 8, 9, 10, 11, 12, 13, 14 and 15 are misconceived and therefore we dismiss them.

In support of the third cluster of appeal, Mr. Kahendaguza was brief, he faulted the learned trial Judge for what he termed wrongly awarding interest to the tune not acceptable in law. In particular, he complained that, the learned trial Judge awarded 20 per cent per annum till payment in full which according to him by necessary implications, it would appear that the learned trial Judge awarded interest of 23 per cent per annum which is legally wrong since section 29 and Order XXI rule 21 (1) of the CPC allows interest rate at 7 per cent interest rate per annum after judgment, save where there is agreement in which case the court can award beyond 7 per cent but not more than 12 per cent per annum. He paid homage to the case of **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co Ltd** [1995] T.L.R. 205 to buttress his line of argument.

In reply Mr. Kagirwa valiantly submitted that the learned trial Judge was right in awarding the interest rate he decreed in the sense that the amount of 20 per cent was not awarded as a discretion of the court but rather it was a contractual arrangement between the parties themselves and invited us to page 572 of the record of appeal where parties expressly agreed that interest shall be charged at the rate of 20 per cent per annum

calculated on the outstanding balances and to be debited to the Borrower's account at the end of each calendar month. Upon our prompting, Mr. Kagirwa submitted that, interest rates for commercial banks are set by the Bank of Tanzania and therefore, the appellants cannot fault the learned trial Judge. The learned counsel distinguished the case of **Njoro Furniture Mart Ltd** (supra) which related to general contracts and not commercial contracts like the one in the instant case. He therefore, prayed that this ground should be dismissed.

Our reading of the record of appeal reveals clearly that, the complaint in relation to the learned trial Judge awarding 20 per cent per annum till payment in full, is based upon the judgment and decree of the court. For the sake of clarity, we wish to let record of appeal at page 824 speak itself;

> *"Considering that indeed the Plaintiff has shown the reasons why it should be granted interest in this matter.* ***I would therefore grant the prayer the special damages at the agreed rate of 20% interest per annum from the date of filing the suit till payment in full*** *and 3% court's interest from the date of this judgment till payment in full."* [Emphasis supplied]

Furthermore, page 828A of the record of appeal, particularly, item 2 of the Amended Decree reads:

"2. The Defendants shall jointly and severally pay to the Plaintiff an interest on special damages ***at the agreed rate of 20% interest per annum from the date of filing the suit tiil payment in full."*** [Emphasis supplied]

The issue before us is whether or not the learned trial Judge was legally wrong to award interest rate in the manner he awarded. We find it appropriate, to digress albeit briefly, the provision of Order XXI rule 21 (1) which provides that:

"The rate of interest on every judgment debt ***from the date of delivery of judgment until satisfaction shall be seven per centum per annum or such other rate not exceeding twelve per centum per annum, as the parties may expressly agree in writing before or after the delivery of the judgment*** *or as may be adjudged by consent."* [Emphasis supplied]

We should interpose here and observe that the function of the courts is to enforce and give effect to the intention of the parties as expressed in their agreement. Contracts belong to the parties who are free to negotiate and even vary the terms as and when they choose. See, for instance, the case of **Simon Chacha v. Aveline M. Kilawe,** Civil Appeal No. 160 of 2018 (unreported). In that case, the Court of Appeal of Tanzania was faced with an analogous situation of determining whether

parties were bound to what they agreed or not and the Court religiously held:

> *"Parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is there should be a sanctity of the contract as lucidly stated in* ***Abualy Alibhai Azizi v. Bhatia Brothers Ltd*** *[2000] T.L.R. 288, thus; 'The principle of sanctity of contact is consistently reluctant to admit excuses for non- performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."*

In the case before us, as rightly submitted by Mr. Kagirwa, parties agreed that interest shall be charged at the rate of 20 per cent per annum calculated on the outstanding balances, and to be debited to the Borrower's account at the end of each calendar month, and the learned trial Judge granted the prayer for special damages at the agreed rate of 20 per cent interest per annum from the date of filing the suit till payment in full. The one million dollars question is whether the learned trial Judge erroneously granted that prayer.

Clearly, Order XXI rule 21 (1) of the CPC which Mr. Kahendaguza cited and argued with commendable efforts, sets the rate of interest on every judgment debt from the date of delivery of judgment until satisfaction and the limit is 7 per cent where there is no agreement but

not more than 12 per cent where parties have agreed. Going by purposive approach of interpretation, Order XXI rule 21 (1) of the CPC is permissive, in that parties are free to agree any interest rate as they find appropriate, and, that interest rate will be applicable before judgment is pronounced unless that interest rate does not exceed 12 per cent per annum which is within the limit set by the law.

In our respectful opinion, and as rightly argued by Mr. Kahendaguza, it was erroneous and wrong for the learned trial Judge to have granted the prayer for special damages at the agreed rate of 20 per cent interest per annum from the date of filing the suit till payment in full as the period after delivery of judgment is governed by Order XXI rule 21 of the CPC. We thus, set aside that order and in lieu thereof, we award the claim of special damages at the agreed rate of 20 per cent interest per annum from the date of filing the suit till the date of judgment. To conclude ground 17 of appeal has merit and therefore it is upheld to the extent explained.

Arguing in support of the fourth cluster, Mr. Kahendaguza submitted very briefly that, the respondent, a limited liability company instituted the suit before the trial court without there being a board resolution of its directors or any other governing body contrary to the law citing the case of **Bugerere Coffee Growers v. Sebaduka and Another** (1970) EA

147 and **Ursino Palms Estate Limited v. Kyela Valley Foods Ltd,** Civil Application No. 28 of 2014 (unreported) to support his proposition.

Responding to the submission by the counsel for the appellants, Mr. Kagirwa contended that, this is an appeal against the decision of the trial court. However, the issue of board resolution was neither raised nor argued and thereby putting in the hand of the trial court for determination. Thus, before us it is a new complaint. He paid homage to the case of **Tanzania Cotton Marketing Board v. Cogecot Cotton Company S.A** [2004] T.L.R. 132 in which we restated the principle that this Court cannot judge on an issue which the High Court had never had an opportunity to consider and express an opinion. The learned counsel argued in the alternative but without prejudice to the foregoing that, even if the Court will find that this point deserves a day in this Court, he was of the considered opinion that, failure to attach board resolution authorizing institution of the suit is not fatal. He was further of the view that the case of **Ursino Palms Estate Limited** (supra) is distinguishable. He finally submitted that this ground be dismissed.

This issue should not detain us much, and we think, it will only be pretentiously academic to deal with it, in greater detail as we fully subscribe to the submission by Mr. Kagirwa that this Court cannot judge on an issue which the High Court had never had an opportunity to

consider and make decision on it. This is because the mandate of this Court is, in terms of sections 4, 5 and 6 of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] limited to matters raised and adjudicated by the High Court and subordinate courts with extended jurisdiction or tribunals as the law permits. The logic is simple, we cannot therefore, completely render a decision on any issue which was never decided by the High Court. On that account this complaint has no merit and therefore ground 18 stands dismissed.

In view of the foregoing position, and save for the interest rate which we have interfered as indicated above, we find no merit in the appeal. Consequently, we dismiss it in its entirety with costs.

DATED at **DAR ES SALAAM** this 23rd day of February, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2023 in the presence of Mr. Mvano Mlekano holding brief for Mr. Audax Vedesto, learned counsel for the Appellants and Mr. Mvano Mlekano, 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