IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., GALEBA, J.A, And KENTE, J.A.)

CIVIL APPEAL NO. 340 OF 2020

NIC BANK TANZANIA LIMITED.....1ST APPELLANT

FLAMINGO AUCTION MART.....2ND APPELLANT

VERSUS

SAMORA MCHUMA SAMORA CO. LIMITED.....RESPONDENT

(Appeal from the Judgment and decree of the High Court of Tanzania, District Registry at Mwanza)

(Matupa, J.)

dated the 30th day of November, 2017
in
Civil Case No. 26 of 2015

JUDGMENT OF THE COURT

20th & 28th February, 2023

MWARIJA, JA.:

This appeal is against the decision of the High Court of Tanzania at Mwanza (Matupa, J.) in Civil Case No. 26 of 2015 handed down on 30th November, 2017. The suit was instituted by the respondent, Samora Mchuma Samora Co. Limited against the appellants, NIC Bank Tanzania Limited and Flamingo Auction Mart (the 1st and 2nd appellants respectively). The dispute leading to the filing of the suit arose from a loan contract in which, the 1st appellant advanced to the respondent a loan amounting to a total

of TZS 1,088,000.000.00. The loan was secured by eight registered legal mortgages and a debenture over fixed and floating assets. As it turned out, the parties disagreed on the performance of the loan agreement. Whereas the 1st appellant blamed the respondent for defaulting to repay the loan and therefore, through the 2nd appellant, initiated the process of selling the respondent's mortgaged properties. On its part, the respondent complained *inter alia,* that the amount of loan was unjustifiably increased. It thus filed the suit against the appellants seeking the following reliefs:

> *a) A declaration that the action by the Defendant to increase the amount of loan taken by the plaintiff is unlawful.*
> *b) In the alternative the Defendant be ordered to compute the actual loan and interest yet to be repaid by the plaintiff.*
> *c) The plaintiff be allowed to sell some of his properties to repay the agreed loan and interests.*
> *d) General Damages.*
> *e) Costs of this suit be provided for.*
> *f) Any other relief(s) as the Court deems fit and just to grant."*

The appellants filed separate written statements of defence disputing the respondent's claim. In addition, the 1st appellant filed a counterclaim seeking the following reliefs:

"(i) *That the plaintiff should pay the First Defendant Tshs 2,891,038,023.20 as a Principal amount due as on 26th August 2015.*

(ii) *That the plaintiff should pay the First Defendant interest at the rate of 20% per annum on the principal amount as shall accrue from 26th August 2015 up to the date of judgment.*

(iii) *That the Plaintiff should pay the First Defendant interest on the decretal sum at the Court rate from the date of Judgment up to the date of payment.*

(iv) *That the Plaintiff should pay the First Defendant costs of this suit.*

(v) *Any other relief(s) as the Court my deem fit under the circumstances of this case to grant*

From the pleadings, the following issues were framed for determination:

> *"1. Whether there was unjustifiable unilateral increase of the loan extended to the plaintiff by the 1st defendant.*

2. Whether the plaintiff is indebted to the first defendant the amount claimed in the counter claim.

3. To what reliefs are the parties entitled."

At the trial, which commenced on 23/3/2017, the court heard the evidence of Samora Mchuma Samora (PW1) who was the only witness for the respondent and four witnesses for the appellants. For reasons which will be apparent herein, we do not find it apposite to preface this judgment by outlining the substance of the evidence. Suffice to state that, whereas the respondent led evidence to the effect that, at the time when the dispute arose, it had an outstanding balance of TZS 400,000,000.00, the first appellant claimed that, as a result of the respondent's default, the outstanding amount of the loan was TZS 2,891,038,023.20.

Having considered the evidence, the learned trial Judge was of the view that the outstanding amount which the respondent owed the 1st appellant may not have reflected the actual amount claimed. He directed the 1st appellant to make a fresh calculation by involving its Collateral Manager who was in the position to know the value of the goods collected in performance of the Collateral

Management Agreement. On the counterclaim, the learned trial Judge dismissed it on account of the 1st appellant's failure to reconcile the amount of the loan, as per the trial court's finding in the first issue. The learned Judge delivered his judgment on 30 November, 2017 and the decree was issued. It was decreed as follows:

> "*1. The defendant be ordered to compute the actual loan and interest ... yet to be repaid by the plaintiff.*
>
> *2. The defendant shall recalculate the debt due to the plaintiff by taking into consideration the agree reports of the collateral manager in relation to the modus operandi, in relation to the goods actually received by the collateral manager, the outturn report and the goods which were paid for and collected by the plaintiff.*
>
> *3. The recalculation will further be adjusted by any goods which might have been sold by the collateral manger in terms of paragraphs 14 of the said Appendix.*
>
> *4. In making the calculation, the parties shall be guided by the inventories of the collateral manager and also they shall be guided by rule 17 of the CPC.*
>
> *5. Parties shall bear own costs."*

The appellants were aggrieved by the decision of the trial court and therefore, on 19th December 2017, they lodged a notice of appeal and on the next day, on 20 December 2017, they applied to be supplied with copies of the proceedings, judgment and decree. On 25/6/2020 they were informed that the same were ready for collection.

When they received the copies, the appellants discovered that the decree was defective because it did not cite the parties properly as reflected in the judgment. The judgment made reference to two plaintiffs Samora Mchuma and Samora Co. Ltd (although in the title, Samora Co. Ltd was, again, erroneously referred to as the 2nd defendant). By a letter written by their advocate, dated 29/6/2020, the appellants requested to be supplied with a rectified decree. The prayer was acted upon by the trial court and by a letter of Ref No. HC. Civil Case No. 26 of 2015 dated 25th June 2020, they were informed that, what was to be rectified was the judgment and were thus informed that the amended judgment was ready for collection. Having received the certified copies and the amended judgment, the appellants instituted this appeal which is predicated on the twelve grounds of

appeal. For reasons which will be apparent in this judgment. We will consider the first and second grounds only, in which the appellants contended that:

> *"1. The Honourable Court erred in law by delivering two different judgments on the case.*
> *2. The honourable Court erred in law and in fact by relying on facts which were not part of the pleadings or evidence on record by introducing a new party to the case."*

At the hearing of the appeal, the appellants were represented by Mr. Adronicus Byamungu assisted by Mr. Mwema Obeid Mella, learned advocates. On its part, the respondent was represented by Mr. Charles Kiteja, also learned advocate. The learned counsel for the appellants had earlier on 26th October 2020, filed his written submissions in support of the appeal in compliance with Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Mr. Byamungu adopted the submissions and thereafter, in terms of Rule 106 (10) (a) of the Rules, he proceeded to clarify the points which he found to be pertinent.

Submitting in support of the two grounds, the learned counsel faulted the trial court (Mugeyekwa, J. the successor in

office) contending that it erred in the manner in which it amended the judgments. He argued that the amendment resulted into existence of two judgments in one case. He referred us to 0. XX r.3 of the Civil Procedure Code Cap. 33 of the Revised Laws (the CPC) which provides that, once a judgment is pronounced and signed, it cannot thereafter be altered or added to except as provided by s. 96 of the CPC. The said section permits rectifications but restricts such correction to clerical or arithmetical mistakes in a judgment, decree or order arising from accidental slip or omission.

According to the learned counsel, the amended judgment (the second judgment), was composed under neither s. 96 of the CPC, nor in an application for review. As such, Mr. Byamungu went on to argue, by introducing a new party to the first judgment and removing him in the second judgment, the act caused confusion in the proceedings. He added that by adding a party in first judgment, the court relied on the facts which were neither pleaded nor was evidence tendered to that effect. On those arguments, Mr. Byamungu urged us to allow the appeal with costs, quash the proceedings, set aside the judgment and as a

consequence, order that the suit be heard *de novo* from the stage immediately after the framing of issues.

In response, Mr. Kiteja supported the arguments made by the learned counsel for the appellants on those grounds of appeal. He conceded that the trial court erred in formulating the second judgment. He however, prayed that the respondent be exempted from payment of costs.

Having considered the submissions made by the counsel for the appellants, we are at one with him that the procedure which was adopted by the trial court to rectify the defect of variance between the judgment and the decree was, with respect, erroneous. The rectification should not have been done by formulating the second judgment as by so doing, the effect was to have two judgments in one case; the original and the amended version of the judgment. Under s. 96 of the CPC, cited by the counsel for the appellants, a judgment may only be corrected if it contains clerical or arithmetical mistakes.

The section provides as follows:

> *"96. Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising*

therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or on the application of any of the parties."

Such correction may be done by way of a separate order, not by formulating a corrected version of the judgment.

As argued by Mr. Byamungu, the amendment has resulted into confusion as regards the decree because of existence of two judgments having the effect of making the decree incapable of being executed. This is because of uncertainty of the parties. In the circumstances, we agree with both counsel for the parties and find that this ground of appeal suffices to dispose of the appeal. The need for considering the other grounds does not, in the circumstances, arise. We also agree that from the nature of the errors committed by the trial court, the proceedings should not be left to stand because the judgment from which the decree arose, involved additional parties different from those who were cited in the pleadings.

On the basis of the foregoing reasons, the appeal is hereby allowed. The proceedings of the trial court are quashed, and the

judgments and decree are all set aside. On the way forward, we order that the suit be heard *de novo* from the stage immediately after the framing of the issues.

Given the nature of the errors leading to the disposal of the appeal, we make no order as to costs.

DATED at **MWANZA** this 24th day of February, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 28th February, 2023 in the presence of Mr. Mwema Mella, learned Counsel for the Appellants and Mr. Charles Kiteja, learned Counsel for the Respondent, via virtual link from Mwanza is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL