IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., LEVIRA, J.A. AND MWAMPASHI, J.A.:)

CONSOLIDATED CIVIL APPEALS Nos. 385 "A" & 339 OF 2021

NATIONAL MICROFINANCE BANK PLC.....1ST APPELLANT

RELIANCE INSURANCE COMPANY (T) LIMITED.....2ND APPELLANT

VERSUS

LELLO LAURENT SAWE.....RESPONDENT

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

(Mansoor, J.)

dated the 23rd day of July, 2021

in

Civil Case No. 2 of 2019

JUDGMENT OF THE COURT

19th August, 2023 & 6th February, 2024

LILA, J.A.:

In Civil Case No. 2 of 2019, the respondent, Lello Laurent Sawe instituted, in the High Court of Tanzania sitting at Dodoma, a suit against National Microfinance Bank PLC (the 1st appellant) and Reliance Insurance Company (Tanzania) Limited (the 2nd appellant) claiming for payment of TZS 124,111,500.00 being indemnity for properties destroyed by fire, payment of TZS 90,000,000.00 being loss of expected income from 24/6/2018 to 24/12/2018, payment of TZS 15,000,000.00 per month as

expected income from 25/12/2018 until the date of paying the amount stated in the two prayers, payment of compound interest at the rate of 22% per annum on the above prayers from 25/12/2018 until the date of judgment, payment of compound interest at the rate of 22% per annum on the expected income, payment of damages as determined by court, interest at court rate of 7% per annum from the date of judgment to the date of full satisfaction of the decree, costs and other reliefs as the court would deem fit and just. The claims were gallantly disputed by the appellants. The High Court (the trial court) tried the suit and found in favour of the respondent ordering him to be paid TZS 124,111,500.00 as claimed above, TZS 50,000,000.00 as damages, compound interest as claimed from 25/12/2018 until the date of judgment and costs. Aggrieved by that decision, each of the appellants preferred an appeal to this Court. The 1st appellant preferred Civil Appeal No. 385"A" of 2021 and the 2nd appellant preferred Civil Appeal No 339 of 2021 which are now consolidated in Consolidated Civil Appeals Nos. 385"A" and 339 of 2021.

According to the respondent's plaint, these brief facts present the essence of the appeal before us. The 1st appellant, a banking institution, has a branch at Makole within Dodoma City where the respondent, a businessman, was running a business of selling beverages at a place called Sabasaba. To boost his working capital, sometimes in January,

2018, the respondent applied and was granted a loan facility from the 1st appellant amounting to TZS 250,000,000.00. Out of that amount, TZS 100,000,000.00 was in the form of overdraft facility and TZS 150,000,000/= was in the form of a term loan which were to be repaid, respectively, within twelve (12) and eighteen (18) months from the date of disbursements.

It was a condition in the loan offer letter (Exh. P2) that in order for the respondent to be granted the facility he should pay to the first appellant, among others, life insurance premium, fire and burglary insurance premium against risk resulting from loss of business and stock to which the respondent obliged and paid. The 1st appellant promised to process insurance policies and submit the same to the respondent.

Unfortunately, on 24th June, 2018 fire broke out at the respondent's business and destroyed the respondent's stock which according to the stock taken on closing the business in the evening of 23rd June, 2018 before the fire break out, the value of the stock was TZS 255, 007, 050/= and the stock taken on 25th June, 2018 after outbreak of fire, the value of stock was TZS 143, 575,500/=, implying that the value of the destroyed stock was TZS 111,431,500/=. Also, the fire destroyed other fixed assets namely CCTV valued at TZS 8,000,000/=, two EFD machines valued at TZS 1,500,000/=, one flat screen TV Samsung 32 inches valued at TZS

680,000/=, one "chogo" TV Hitachi-21 inches valued at TZS 450,000/=, one Radio Wane FYEFA impendence 40 HMS valued at TZS 1, 500,000/=, one decoder-(Kingámuzi) valued at TZS 150,000/= and one main switch (TANESCO) valued at 300,000/=. The total value of fixed assets destroyed was TZS 12,680,000.00 making, allegedly, a total loss of TZS 124, 111,500.00. On the same night of 24th June, 2018, the respondent reported the incident to Fire and Rescue Force who appeared and successfully put down the said fire. Also, the respondent reported the incident to the 1st appellant's branch situated at Makole within Dodoma City whose officers promised to inform the insurer for indemnification. Despite the 2nd appellant admitting ensuring the respondent's business, nothing was, however, forthcoming despite several demands from the appellant, hence the suit.

On the adversary side, the 1st appellant admitted extending loan facility to the respondent as claimed and that fire broke up at the respondent's business but denied all the respondent's claims maintaining that the respondent, before being advanced the loan facility, was required to have insurance policy for the loan facility advanced to him by the 1st appellant for the purpose of indemnifying the 1st appellant in case of business loss caused by either risks covered under insurance policy and not to indemnify the respondent. That, under the insurance policy for

which the respondent paid premium, the 1st appellant was the loss payee and that the 2nd appellant had already indemnified the 1st appellant to the extent of the loss suffered according to the assessment made by the Oriental Surveyors and Assessors. So, the respondent had nothing to claim against the appellants.

Having heard the parties' witnesses and considered their respective documentary exhibits, the trial court entered judgment for the respondent granting the prayers as earlier shown. The decision aggrieved the appellants hence this appeal before the Court.

In Civil Appeal No. 385 "A" of 2021, the 1st appellant advanced three grounds:

> *"1. That the Honourable High Court Judge erred in law and fact for ordering the appellant to pay general damages to the tune of Tanzania shillings fifty million only (Say TZS 50,000,000.00).*
> 2. *That, the Honourable High Court Judge erred in law and* fact for ordering the Appellant to bear the costs of the suit.
> 3. *That, the Honourable High Court Judge erred in law and facts when she considered the issue which was neither framed by the court nor tabled to the parties and erroneously proceeded to hold that the respondent is loss payee without affording the parties thereto a right to be heard on the said new issues."*

And, in Civil Appeal No. 339 of 2021, the 2nd appellant preferred the following eight (8) grounds.

"1. *That the Honourable judge erred in law and facts when she considered the issue which was not among of the issues framed by the parties and proceeded to hold that the respondent is the loss payee despite the fact that the parties were not afforded an opportunity to be heard on the new issues raised.*
2. *That the trial judge erred in law and fact by holding in favour of the respondent despite the fact that the respondent failed to call material witness without reasons.*
3. *That the trail judge erred in law and facts for failure to evaluate properly the evidence tendered before it hence arrived in a wrong conclusion.*
4. *That the trial judge erred in law and fact for holding in favour of the respondent despite the fact that the respondent failed to prove existence of the goods prior to the occurrence of the fire accident.*
5. *That the trial judge erred in law and fact for holding in favour of the respondent by awarding compensation to the respondent of the goods which were not covered by the loan.*
6. *That the trial judge erred in law to award the compound interest at the rate of 22% without giving any reason.*
7. *That the trial judge erred in law and fact for awarding the respondent with general damages to the tune of TZS 50,000,000.00 without any justifiable reason.*

8. *That the trial judge erred in law and fact in deciding in favour of the respondent despite the fact that the respondent failed to prove the case on balance of probabilities."*

It is vivid that the above grounds raise a common complaint that the learned trial judge raised a new issue when composing a judgment and determined it without according the parties a hearing on it hence denying them their fundamental right to be heard. And, after dispassionately studying the entire evidence on record, the trial court judgment and the grounds of complaints in this appeal, we are settled in our minds that the determination of this appeal rests entirely on the determination of this sole issue.

At the hearing of the appeal, Mr. Robert Wilson appeared for the 1st appellant, Mr. Dickson Sanga and Mr. Ronyoro Adolf, learned counsel appeared representing the 2nd appellant. For the respondent, Mr. George Vedasto, learned counsel appeared. Only the 2nd appellant and the respondent, in compliance with rules 106(1) and 34 of the Tanzania Court of Appeal Rules, 2009, lodged written submissions and list of authorities, respectively, in support and in opposition to the appeal.

Addressing the Court in respect of the above issue, Mr. Wilson was brief and focused that, while during the Final Pre-Trial Conference (the

FPTC) only three issues were framed and agreed by the parties as reflected at page 208 of the record of appeal, when composing the judgment, the learned trial judge framed and determined an issue not part of the framed issues as reflected at page 469 of the record of appeal. He was firm that parties to the case were not accorded an opportunity to address the court on that new issue hence, denying them the right to be heard which is one of the fundamental rights. He relied in the Court's decisions in **Charles Christopher Humphrey vs Kinondoni Municipal Council**, Civil Appeal No. 81 of 2017 where the Court referred to its earlier decisions in **Deo Shirima and Two Others vs Scandinavia Express, Civil application No. 34 of 2008** and also the case of **Alisum Properties Limited vs Salum Selenda Msangi**, Civil Appeal No. 39 of 2018 in which the case of **Scan-Tan Ltd vs The Registered Trustees of Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (all unreported) was referred to cement his arguments and the legal position that such omission is fatal occasioning a miscarriage of justice rendering the finding of the trial court a nullity.

On his part, Mr. Sanga adopted the written submissions he had earlier on lodged. The submissions are at one with those of Mr. Wilson but went further to recite the issues framed during the FPTC as being: -

"1. Whether the plaintiff complied with the terms in the

loan agreement which requires him to cover the risks by an insurance cover,

2. *Whether the products destroyed were all covered by an insurance cover.*
3. *to what reliefs are the parties entitled."*

To substantiate the complaint that the issue raised by the learned trial judge in the judgment was new, the submissions quoted the said new issue to be: -

> *"Before I answer the first issue as to whether the goods destroyed by fire were all covered by the insurance cover, I shall discuss the issue whether the Bank and the Plaintiff, who is insured."*

Mr. Vedasto, who had also lodged written submissions, adopted them and was, in his oral arguments, completely opposed to the two learned advocates' view contending that no new issue was raised by the learned trail judge in the composed judgment. While traversing through the submission at pages 4 to 8 and the record of appeal at pages 233 and 234 when DW2 testified, Mr. Vedasto sought to move the Court to agree with him that the evidence proved that the respondent insured his properties and the premium paid to the 1st appellant was for purposes of insuring his properties although no policy was issued to him to prove so. He sought support in the case of **Norman vs Oversea Motor**

Transport (Tanganyika) Limited [1959] 1 EA 131 which, he argued, had identical circumstances to the ones obtaining in the instant appeal.

We have dispassionately considered the rival arguments by the parties. It now behooves us to determine the issue we are invited to resolve in this appeal. It is both common knowledge and trite law, in terms of rule 3 of Order XV of the Civil Procedure Code (the CPC) that upon the pleadings being completed and it is realized that the parties are at issue on some question of law or fact, a trial court is obligated to draw or frame issues which will guide it and the parties in presenting evidence to enable the court determine the dispute between them fairly and justly. It is in this regard that, in the case of **Scan-Tan Tours Ltd vs The Registered Trustees of the Catholic Diocese of Mbulu,** (supra) the Court stated that: -

> *"It is a well-established practice that a decision of the court should be based on the issues which are framed by the court and agreed upon by the parties, and failure to do so results in a miscarriage of justice."*

On our part, we agree with Mr. Wilson and Mr. Sanga that, it is evident from the record of appeal that at page 208 of the record of appeal, the trial court framed three issues to guide the parties and the court during the hearing of the suit. However, in her decision, the learned

trial judge prefaced her judgement by raising another issue she found pertinent in the determination of the dispute as quoted above. She considered and determined it. The issue for our determination is whether or not that was proper and it was really a new issue.

A serious examination of the three issues framed and agreed by the parties shows that neither of them addressed on the issue as to who was the beneficiary or the loss payee in the event of fire in the respondents' business premises and therefore who was the insured person, the bank loan or the respondent's properties. The pleadings are clear that the parties were not in agreement on the terms and conditions of the policy for which the respondent paid premium. The pleadings revealed uncertainties as for what purpose the respondent had paid the premium to the 1st appellant and not to the 2nd appellant. That is vivid in paragraphs 8, 13 and 14 of the respondent's plaint on the one part and paragraphs 5, 9, 10, 13 and 15 of the 1st appellant's written statement of defence (then 1st defendant) and paragraphs 11, 12 and 17 of the 2nd appellant's written statement of defence (then 2nd defendant) on the other hand. We painstakingly recite the said paragraphs for clarity.

As per the respondent's (then plaintiff) plaint, he alleged as follows:-

> *"8. That it was a condition of the offer letter that in order for the plaintiff to be granted the facilities should pay to the*

1st Defendant, among others, life insurance premium and fire and burglary insurance premium against risks resulting from loss of business and stocks. And the plaintiff paid the said premium to the 1st Defendant to insure the risks resulting from loss of business and stocks and the 1st Defendant promised the Plaintiff that she would process insurance policies and submit the same to the Plaintiff, but until to date, the 1st Defendant has never issued the said insurance policies to the Plaintiff...

13. That the 1st Defendant's Officers at Makole Branch told the Plaintiff that because his loan was insured against fire, the 1st Defendant would communicate with the insurer and indemnify the plaintiff immediately but the 1st Defendant did not do as promised. Three days after the incident, that is 27th June 2018 a person who introduced himself that he comes from the insurer but who did not disclose who is the insurer, met the Plaintiff and interviewed the Plaintiff then disappeared.

14.That from 25th June 2018, the Plaintiff has been making a follow up at the 1st Defendant's office at Makole Branch asking for indemnification in order to resume business but all in vain. That despite consistent physical follow up for indemnification and disclosure of the insurer, all efforts were turned to nothing by the 1st Defendant. Then, the Plaintiff decided to seek a service of a lawyer."

The 1st appellant's (then 1st Defendant) reply averments in the written statement of defence in paragraphs 5, 9, 10, 13 and 15 are: -

"5. The contents of paragraphs 8 of the Plaintiff's Plaint are partly admitted, it is admitted only to the extent that the Plaintiff being a borrower was required by 1st Defendant to have an insurance policy (life assurance and burglary insurance) on his business so as to assure repayment of loan advanced to him, the rest of the contents are gallantly disputed otherwise the Plaintiff is put into strict proof thereof...

9.That the contents of paragraph 13 of the Plaintiff's plaint are strongly disputed and the Plaintiff is put to strict proof thereof. The 1st Defendant further avers that the Plaintiff was required to have insurance policy for the loan facılity advanced to him by the 1st Defendant for the purpose of indemnifying the 1st Defendant in case of business loss caused by either of the risks covered under insurance policy and not to indemnify the Plaintiff as he claims

10. In addition to what is stated in paragraph 9 above, the 1st Defendant avers that the Plaintiff has admitted that what was insured under the insurance policy was loan and nothing else. This infers that the Plaintiff's business was insured only to the repayment of loan to the 1st Defendant being a loss payee and if the said loan is not affected by risk occurred such right does not transfer to the Plaintiff. This means that the Plaintiff has no any right to be indemnified as he claims.

13. That, the contents of paragraph 16 of the Plaintiff's Plaint are noted and the 1st Defendant states further that the Plaintiff has misdirected himself by claiming to be

indemnified by defendants while the risk covered were subject to the loan advanced to the plaintiff by 1st Defendant and not business loss which has no effect to the loan. The 1st Defendant avers further that the arrangement under the insurance policy is that in case of any loss on the Plaintiff's assets pledged as a security to the loan it is a 1st Defendant who is entitled to be indemnified by the 2nd Defendant.

15. That, the contents of paragraph 19, 20 and 21 of the plaintiff's Plaint are vehemently disputed and the Plaintiff is put to strict proof. The 1st Defendant avers that under the insurance policy executed by the 1st and 2nd Defendants in respect to a loan advanced to the Plaintiff clearly states that in case of any loss of the Plaintiff's assets pledged as a collateral to the said loan it is the 1st Defendant who will be entitled to be indemnified by the 2nd Defendant and not otherwise..."

As for the 2nd appellant's (then 2nd Defendant) written statement of defence, she averred in paragraphs 11, 12 and 17 that: -

"11. That, the contents of paragraph 13 are disputed in total. The 1st Defendant informed the insurer who in this case is the 2nd Defendant and thereafter the insurer send a registered, qualified and totally independent Surveyor and assessor to conduct loss assessment and come up with a detailed report on regard to the extent of loss. The report was then supplied to the insurer who then made payment

as advised. Pictures of the plaintiff were taken something that indicates that he was involved in the assessment of the loss and that he totally conjoined in reaching the final report. The plaintiff shall be required to strictly prove the allegations...

12. That, contents of paragraph 14 are disputed in total. The plaintiff was informed of the amount of money the second defendant had settled and was informed of the outstanding sum he is supposed to pay. The plaintiff will be put to strict proof thereof.

17. That the contents of paragraph 19 are disputed in total. The 2nd defendant sent a private loss assessor and adjuster who came up with a report of the total property that was destroyed. The report showed the extent of damage and advised amount to be paid to the 1st defendant as to the insurance policy and the said amount was paid directly to the 1st defendant. The plaintiff shall be put to strict proof thereof..."

From these pleadings, it would plainly be noted that the parties were at issue as to what was insured between the 1st appellant's loan and the respondent's properties (assets) and hence who was to be indemnified in the event of fire. It is trite law, in terms of the provisions of Order XIV rule 1 of the CPC, that existence of material propositions of facts or law affirmed by one party and denied by the other, necessitates a specific issue be framed by the court in that respect for the parties to

lead evidence in the course of hearing the suit for the matter to be exhaustively determined by the court. Unfortunately, that controversy between the parties, in particular between the 1st appellant and the respondent, did not draw the attention of both the trial court and the parties' advocates as a result of which no issue was framed for the parties to lead evidence so that the court could resolve it. Instead, it came to the learned trial judge's mind when composing a judgment hence raised the issue a subject of this appeal as between the 1st appellant and the respondent. Definitely, that was a pertinent issue which ought to have been framed and evidence led by parties during the trial. Now the learned trial judge is being faulted for taking that course without allowing the parties opportunity to be heard.

We are alive to the legal position that courts are clothed with mandate to frame new issues or strike out an issue at any time for the effective and conclusive determination of the parties' dispute even if the same was not formally framed at the commencement of the hearing of the suit. This is permissible under rule 5(1)(2) of Order XIV of the CPC which categorically states that: -

> *"5. -(1) The court may at any time before passing a decree amend the issues or frame additional issue on such terms as it thinks fit; and all such amendments or additional issues as may be necessary for determining the matters in*

controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced."

In both situations, the trial court is enjoined to allow opportunity for the parties to lead evidence in respect of the amended or added issue as was insisted in the Court's decision in **The Registered Trustees of Arusha Muslim union vs The Registered Trustees of National Muslim Council of Tanzania alias BAKWATA** (supra), citing an observation of the Court in **Scan-Tan Tours Ltd vs The Registered Trustees of The Catholic Diocese of Mbulu** (supra) that: -

"If the court amends an issue or raises an additional issue, it should allow a reasonable opportunity to the parties to produce documents and lead evidence pertaining to such amended or additional issue. Amendment of issue is the discretion of the trial court. No right of obligation of a party is determined, either by the court refusing to delete the issues, or by the court adding more of them. It is only a procedural matter. The trial court is required to determine the controversy between the parties."

In the instant case, the trial court did not abide to the above requirement. Consequently, there was scanty evidence in respect of the

new issue raised by the trial judge, which in our decided view, was insufficient to enable the trial court to fairly and justly determine such a crucial issue. For instance, the respondent (then plaintiff or PW1) had only this to state to the trial court at page 211 of the record: -

> *"... The term of the loan is that I was required to have a collateral, I mortgaged my 3 houses. Also, I was required to pay for insurance cover. I paid for the insurance cover. The bank statement shows that they debited my account for paying for insurance. I paid for life insurance, fire and theft and to cover the loan itself...I allowed the bank to deduct the premiums from my account and they did...*

At pages 211 and 213 he said: -

> *"On 24/6/2018 at night I received a call from my neighbour. He was told by his watchman that there was fire at my shop. I ran into the shop...I also informed NMB, I called NMB the same night, in the morning they visited the shop but they assured me that I was covered by an insurance cover. I made follow up with NMB, but I was never given any meaningful answer. They never referred me to the insurance people...*

And, at page 215, he is on record stating that: -

> *"The insurance was to cover the stock and loss of business (clause 7 of the loan Agreement). The insurance responded and told me that I was not insured, they insured the NMB."*

On the part of the 2nd appellant (DW2) had very little to say as he is recorded to have said: -

> *"Insurance policy was taken as part of Loan terms of NMB, he was obliged to get insurance for fire and theft. We covered beverage business for fire and theft. NMB is the loss payee in case of risk. The Insurance Policy was in favour of the bank and so the insured was the bank and Lelo Laurent Sawe, but the payee was the bank..."*

Later on, being cross-examined by Mr. Vedasto, the same witness is recoded to have said, at page 234, that: -

> *"Lelo had a policy, insurance policy with us. It covered TZS 250,000,000. The shop was gutted. Lelo Suffered loss.*
> *We have paid Lelo through the Bank, TZS 15,647,200. The bank will prove these payments.*
> *Lelo was never given his policy. The policy was given to bank. We received premium from Lelo. This is the operation of our policies with the bank. Insurance policies requires us to give policies to the insured."*

Definitely, in view of the above portions of the parties' testimonies, it was necessary for the trial court to determine the nature of insurance contract the respondent entered into and his rights. As it was not one of

the issues framed and agreed by the parties, even the insurance policy which constituted the contract of insurance was not tendered in court.

The learned trial judge, having noted the above necessity, raised *suo motu* the issue, as demonstrated above, in the judgment. She, however, acknowledged the deficiency of the policy not having been produced at the trial at page 469 in these words: -

> *"Although the insurance policy was not presented as an exhibit, the policy schedule was attached to the defence of the 1st defendant as annexure 2. The insured under the policy schedule are Lello Laurent Sawe/N.M.B. Bank PLC. There is only policy schedule availed to the court, but policy itself is not known. As to which business or premises the insurance policy covered, this could be gathered from the policy schedule, so what exactly was covered or insured by the policy is unknown..."*

Despite such an acknowledgement the trial judge, at pages 472 and 473 of the record of appeal, made this finding: -

> *"The policy at hand created a right in favour of N.M.B. Bank to receive money under the policy without the knowledge of the insured, the policy holder. The insurance policy is the policy holder's property, the debtor, and it is not open to a creditor (the Bank) to be the insured in the policy because the Bank did not pay premiums. The Bank can only be*

nominated by the insured as the beneficiary, and the nomination must be express by the insured. The Bank cannot be nominated as the loss payee by the insurer without involving the insured."

At least two things come out clearly from the above extract. **First** and foremost, the learned trial judge acted on the contents of a document not tendered and admitted as exhibit, the annexure to the defence. Trite law is that, a document which is not admitted in evidence does not form part of the evidence and cannot be acted on to determine the rights of the parties even if it is in the record or annexed to the pleadings, a position well elaborated in Court's decision in the case of **Shemsa Khalifa & Two Others v. Suleiman Hamed Abdallah,** Civil Appeal No. 82 of 2012 (unreported), where the Court observed thus: -

"We out-rightly are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in this case to have relied on a document which was neither tendered nor admitted in court as exhibit. We hold this led to a grave miscarriage of justice."

Two, absence of the policy disenabled the trial court to know the contents thereof hence the finding by the learned trial judge misses legs to stand on for want of sufficient material evidence which could have been availed to the court had the parties been accorded opportunity to

lead evidence on the same by framing it as one of the issues before trial commenced. Obviously, had the evidence on record by the parties been sufficient enough to dispose of the new issue, the trial court would have been justified to determine it even without calling upon the parties to tender documents and lead evidence (See **Bahari Oilfields Services Ltd vs Peter Wilson, Civil Appeal No. 157 of 2020** and reiterated in the case of **CRDB Bank PLC vs Symbion Power Tanzania Limited**, Civil Appeal No. 371 of 2022 (unreported).

In the absence of the insurance policy which could be made available had the parties been accorded an opportunity to be heard, in our firm view, it could certainly not be justly determined who were the parties to the insurance contract and which were the terms and conditions binding the parties thereof hence their respective rights. This needed further evidence; hence parties should have been availed an opportunity to lead evidence on that issue.

The Court's decision in **Scan-Tan Tours Ltd vs The Registered Trustees of The Catholic Diocese of Mbulu** (supra) insists on affording parties a right to be heard whenever a new issue is raised by a trial court which is the cornerstone of article 13(6)(a) of the Constitution of Tanzania the violation of which is a fundamental breach which vitiates

a decision. (See **Mbeya-Rukwa Auto Parts & Transport Limited vs Jestina George Mwakyoma**, Civil Appeal 45 of 2000 and **Abbas Sherally & Another vs Abdul S. H. M. Fazalboy**, Civil Appeal No. 33 of 2002 (Both unreported). In another case of **Margwe Erro and 2 others v. Moshi Bahalulu**, Civil Appeal No.111 of 2014 (unreported) the Court held that;

> *"...The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that in the circumstances of this case the denial of the right to be heard on the question of time bar vitiated the whole judgment and decree of the High Court..."*

As aptly demonstrated above, in the instant case, the learned trial judge raised a new issue *suo motu* in the course of composing her judgment and determined it without affording the parties the right to be heard. On the authorities above cited, the learned trial judge's judgment cannot be left to stand. It is a nullity. This finding renders consideration of other grounds of appeal wholly unnecessary.

In all, we allow the appeal. The High Court judgment is quashed and the decree is set aside. We direct the record be remitted to the High Court for it to try the suit afresh including the new issue raised by the learned trial judge in her judgment and compose a fresh judgment

according to law. In the circumstances of this case, we order each party to bear its own costs.

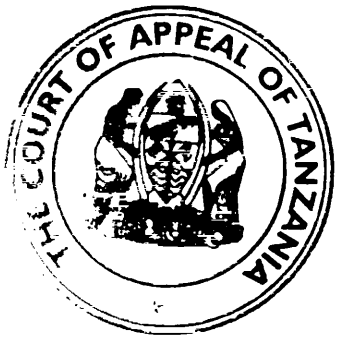
DATED at **DODOMA** this 31st day of January, 2024.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of February, 2024 in the presence of Mr. Robert Owino holding brief for Mr. Wilson Robert, learned counsel for the 1st Appellant, also, holding brief for Mr. Dickson Sanga, learned counsel for the 2nd Appellant and Mr. Gorge Vedasto, learned counsel for the Respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL