IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWANDAMBO, J.A, MAIGE, J.A. And MGEYEKWA, J.A.)

CIVIL APPEAL NO. 137 OF 2022

CUTHBERT ROBERT KAJUNA
T/A C.R. KAJUNA AND COMPANY.....APPELLANT

VERSUS

EQUITY BANK TANZANIA LIMITED .....RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania at Moshi)

(Mwenempazi, J.)

dated the 8th day of November, 2021

in

Civil Case No. 100 of 2018

JUDGMENT OF THE COURT

11th & 20th March, 2024

MWANDAMBO, J.A.:

The High Court (Mwenempazi, J.), sitting at Moshi dismissed the appellant's suit founded on breach of a loan agreement entered between him and the respondent, Equity Bank Tanzania Limited. Aggrieved, the appellant has preferred the instant appeal.

The facts from which the appeal has emanated run as follows: Sometime in April, 2018, the appellant, a businessman in Moshi Municipality, approached the respondent at its Moshi branch for a loan facility for two purposes; working capital and for the purchase of a Tata

truck to facilitate his business operations. By a letter of offer dated 29 May, 2018, the respondent approved the loan application in the form of a business loan facility of TZS 200,000,000.00 subject to terms and conditions prescribed therein. The appellant accepted the offer and from that moment, it constituted the agreement between the parties. That letter of offer was admitted in evidence before the trial court as exhibit P2. Amongst the terms of the agreement was that the purpose of the loan was to enable the appellant purchase a motor vehicle Tata tipper and to facilitate his working capital. The approved loan was repayable within 36 months in equal monthly instalments comprising, both the principal and interest recoverable directly from the appellant's account. Further, the grant of the loan was conditional upon the appellant executing and providing securities in that regard, namely; a mortgage over the appellant's right of occupancy on a landed property, corporate and personal guarantees before the disbursement of the loan proceeds into his business account Number 3012211438991.

After fulfilling the conditions, on 3 August, 2018, the respondent credited a sum of TZS 192,245,950.00 into the appellant's business account after deducting TZS 7,754050.00 towards loan processing fees, insurance and commission. No sooner had the respondent credited the

appellant's account with the loan proceeds than he withdrew cash TZS 6,000,000.00 by cheque simultaneous with transfer of TZS 80,000,000.00 to Kipesile's Phone Accessories Ltd (hereinafter to be referred to as Kipesile or the third party). It is common ground that, the third party was a guarantor of the loan vide Corporate Guarantee (exh. P3 (d)) executed on 23 June, 2018. It is common ground too that, on the same day, the appellant applied for transfer of TZS 102,000,000.00 to Kipesile's Account No. 300121118971 with the respondent's Quality Centre branch vide application for transfer of funds (exhibit P5 (a). The purpose of the funds transfer is stated to be for purchase of Truck-machineries and materials.

Apprehensive that the transfers to the third party were a diversion of funds outside the purpose of the loan, the respondent withheld the transfer of TZS 102,000,000.00 as requested and advised the appellant accordingly by phone. As the appellant stuck to his guns, on 29 August, 2018, the respondent transferred that sum plus TZS 400,000.00 from the business account to the appellant's loan account (No. 3012511500216) treating as loan recovery. That made it impossible for the appellant to acquire the truck he had wanted to purchase from the proceeds of the loan.

After some protracted correspondence and disagreement on the way forward, on 17 December 2018, the appellant instituted the suit before the trial court founded on breach of the loan agreement. He prayed, amongst other reliefs, a declaration that the respondent was in breach of the loan agreement, an order for the refund of TZS 102,641,096.00 and specific and general damages. Not surprisingly, the respondent denied that it breached the agreement.

It was the appellant's case before the trial court that the respondent's act was unjustified and detrimental to his business causing loss and damage for which he prayed for judgment on the reliefs set out above. On the other hand, the case for the respondent was that the appellant reneged from the arrangement to purchase a Tata tipper from the only supplier and pay the purchase price directly. Instead, it sought to pay that amount to a third party. It was her further case that, since the appellant reneged from the arrangement to purchase a Tata tipper which would have been registered in the joint names of appellant and respondent as part of the securities against the loan, it had to debit TZS 102,000,000.00 from the appellant's business account to the loan account as part of loan recovery measures.

The issues on which the High Court disposed itself to determine the suit were basically two plus the reliefs. As it will become apparent later, one of the complaints by the appellant's counsel in her oral submissions was that the trial court decided the suit based on wrong issues. Page 326 of the record reflects the following as the issues framed by the trial court:

> *"1. Whether the Defendant breached the loan facility and mortgage agreement by withdrawing funds from the plaintiff's account.*
> *2. Whether the plaintiff breached the loan facility agreement by writing a letter [for] request to hire a truck.*
> *3. What remedies are [the parties entitled to] in this suit."*

At the end of the trial involving two witnesses from the appellant's side who tendered several documentary exhibits and an equivalent number of respondent's witnesses, the trial court found the appellant having failed to prove his case on the required standard. This it did after making a finding that the appellant's act of transferring TZS 102,000,000.00 to Kipesile instead of Tata Africa Holding (Tanzania) Ltd, amounted to diversion of funds from the agreed purpose constituting a breach of the loan agreement. The trial court observed that, the act

exposed the respondent to a financial risk making it difficult for her to recover the loan. That was so since, the motor vehicle to be purchased and come be part of the securities could no longer be available. On the other hand, the trial court found the respondent justified in refusing the appellant's application for transfer of funds to the third party having taken the view that it amounted to breach of the loan agreement. Having answered issue number 1 and 2 against the appellant, it dismissed the suit with costs.

Resenting the trial court's decision, the appellant preferred a 13-point memorandum of appeal. Earlier on, the appellant's advocates had lodged written submissions in support of the appeal. So did the respondent's advocate in reply. At the hearing of the appeal, Ms. Fatuma Amiri and Mr. Edwin Lyaro, learned counsel appeared for the appellant and respondent respectively. It will be recalled that, grounds 13 and 14 in the memorandum of appeal relate to alleged procedural irregularities in the departure from the scheduling order without an application to that effect and failing to conduct mediation after the amendment of the written statement of defence. However, the two grounds were marked abandoned at the instance of the appellant's advocate in the written and oral submissions.

The appellant's written submissions on each of the remaining grounds were, largely a repeat of the complaints against the trial court's findings which the appellant claims to have been erroneous and against the weight of the evidence on record. The predominant issue from both written and oral submissions is whether the trial court correctly found that the respondent was not in breach of it and the appellant in breach of the loan agreement by transferring money to Kipesile. The appellant's main complaint is that, it was wrong for the trial court to hold that the transfer was an act of diversion of the funds regardless of the fact that the transaction never matured following the respondent's withdrawal of the whole amount of (ground 3, 4, 7 and 8). In our view, the rest of the complaints in the memorandum of appeal are just offshoots of the main issue. These include complaints such as, failure by the trial court to find that the respondent breached the banker customer relationship by withdrawing money from the appellant's account without his consent (ground 2), misinterpretation of the loan agreement contrary to the terms therein (ground 9), reliance on contradictory and hearsay evidence and failure to analyse evidence properly (grounds 11 and 12).

In her oral submissions, Ms. Amiri approached the appeal by criticising the trial court for determining the suit on issues outside those

it framed before the commencement of the trial to which we shall turn our attention later in this judgment. On the merits of the appeal, counsel began with the contention that, the loan agreement (exhibit P2) contained no term on the manner of withdrawing funds from the appellant's account. Neither did it authorise the respondent withdrawing money or freezing the account in the manner it did. According to the learned advocate, had there been any default, the respondent was bound to issue a notice of default under clause 11 of exh. P2. And, since the appellant was not in default, the respondent could not have issued any notice to that effect. It was her further submission that, as there was no term in the loan agreement requiring the appellant to purchase the Tata truck from Tata African Holdings Tanzania Limited, henceforth, Tata the supplier named in the proforma invoice (exhibit P 5(b) and, since the loan was a business facility loan as opposed to asset financing loan, the appellant was free to purchase the truck through the third party as his procurement agent. That was so, she argued, neither did the respondent have concerns with the application for funds transfer of TZS 102,000,000.00 vide exhibit P5 (a) made on 3 August, 2008 to Kipesile nor did it give any reason for its refusal. It was her further argument that, the trial court misapprehended the appellant's

uncontroverted evidence which showed that the third party was his supplier entrusted to procure material on his behalf. It was thus contended that, there was nothing wrong for the appellant to transfer the money as he did for the purpose of purchasing the truck considering that, according to exh. P5 (b), payment was to be made in cash.

At any rate, the learned advocate argued, exh. P5 (b) was not a tax invoice and so, since there was no express term in it, the appellant was not bound to pay the purchase price directly to the supplier. Accordingly, the learned advocate contended that, it was wrong for the trial court to have accepted oral evidence from the respondent's witnesses to the effect that the appellant was required to pay for the truck to Tata African Holdings (Tanzania) Limited directly excluding payment through a third party as a result of which it wrongly found that the transfer of funds to Kipesile was a breach of the loan agreement. Counsel argued that, such a finding was made relying on extraneous matters such as, a letter from the appellant seeking to restructure the loan which was not admitted in evidence. On the basis of the foregoing, the learned advocate invited the Court to quash the trial court's findings on both issues which will result in the determination of the appeal in and

judgment in favour of the appellant and ultimately allowing the appeal with costs.

Mr. Lyaro stood by written submissions but addressed the Court orally to highlight on a few aspects. The essence of the learned advocate's submissions both written and oral was in support of the trial court's findings on both issues. The main stay of his submissions was that, the transfer of funds to Kipesile was a breach of the loan agreement considering that, without such invoice, transfer could have been made to Tata African Holdings Tanzania Ltd who had submitted a proforma invoice on 22 May 2018 vide exhibit P5(b). On the other hand, it was submitted that, the respondent never withdrew any money from the appellant's account but made a transfer from the business account to the loan account towards repayment of the loan which was to his advantage. That was so, he argued, despite the appellant's insistence, his move, particularly asking the respondent to change from purchasing the motor vehicle to hiring, it was a deviation from the purpose of the loan agreement. His further argument was that, the attack against the trial court's findings on both issues is unfounded because, not only the third party to whom a large chunk of the loan was transferred was

stranger to exhibit P2 but also it was neither an alternative supplier of the Tata tipper for which part of the loan was to be utilized.

Under the circumstances, it was argued that the respondent could not sit by and watch the large part of the loan amount being transferred to a third party in the absence of an assurance of such third party being able to supply the motor vehicle. It was argued further that had the appellant been true to his move, there was no reason behind his failure to make a fresh application for transfer of funds for the purchase of the much-sought truck from the actual supplier per exh. P5 (b) after being advised by phone that his application through exh. P5 (a) could not be honoured. In the premises, the respondent's counsel urged the Court to find the appeal wanting in merit and dismiss it with costs.

Having considered the counsel's submissions in the light of the pleadings and evidence on record, it is our firm view that the determination of the appeal revolves around a very narrow compass as shall become apparent shortly. Before doing that, we wish to address the complaint by the appellant's advocate that the trial court determined the suit on wrong issues.

The appellant's learned advocate criticized the findings contending that they were influenced by the trial court framing an issue which was not one of the issues for its determination. The issue claimed to be wrong appeared to be the one appearing at page 338 of the record running: *whether the plaintiff breached the loan facility agreement by writing a letter being a request to hire a truck.* It was contended by the learned advocate that in addressing that issue, the trial court relied on a letter from the appellant asking for hiring a vehicle as an alternative to purchase of the truck from Tata African Holdings (Tanzania) Ltd.

The answer to the learned counsel's criticism can be found from no other than the record. From our perusal of the record, in particular at page 56, reveals what transpired on 14 July 2021 before the commencement of the trial. It indicates clearly that the trial judge adopted issues filed by the appellant's counsel on 13 July 2021 said to be similar to the issues proposed on the 17/08/2020 since there was no objection from the respondent's advocate. Soon thereafter, the trial took off. The record lodged by the appellant does not contain such issues. However, the original record reflects the issues filed by the plaintiff's counsel on 13 July, 2021 similar to the issues we reproduced earlier in this judgment. These are the issues the trial court framed for the

determination of the suit and reflected at page 3 of the judgment (page 326 of the record) regardless of the fact that they are not necessarily similar to the proposed issues appearing at page 27 of the record of appeal. Indeed, both counsel made their closing submissions before the trial court on the said issues as evident at page 152 and 160 of the record. Accordingly, the learned advocate's criticism is, with respect, unfounded.

The foregoing notwithstanding, we hold the view that the issues adopted by the trial court is not free from difficulties which we have no doubt was attributed to the trial court abdicating its function of framing issues as mandated by Order XIV of the Civil Procedure Code (the CPC) and relegating it to counsel as it were. We say so mindful of the dictates of Order XIV rule 1 the Civil Procedure Code which says unambiguously that, issues are to be drawn from material propositions of fact or law affirmed by one party and denied by the other in their respective pleadings.

An examination of the plaint reveals that the appellant's suit was premised on two related material propositions; **one**, the respondent's act withholding TZS 102,000,000.00 part of the loan proceeds for the purchase of the truck and; **two**, unauthorized transfer of TZS 102,

641,096.00 from the business account to the loan account. The respondent for its part denied the appellant's allegations and stated in defence that, the withholding of the loan proceeds was a result of the appellant's act transferring the same to a third party in breach of the loan agreement. The respondent denied that it withdrew the appellant's money rather, it transferred it to the loan account as part of loan recovery measurers after the appellant's breach of the loan agreement. Indeed, para 6 of the amended plaint at page 136 of the record gives particulars of the breach including the alleged letter dated 6 August, 2018 withdrawing from the arrangement with Tata Africa Holdings (T) Ltd. Under the circumstances, the framing of the second issue was problematic in so far as the trial court singled out just one instance of the alleged breach by the appellant as representing the rest of the breaches particularized in para 6 of the plaint. In our view, that formulation was too narrow to arrive at an objective finding. That aside, as the mortgage is a deed executed as security for the loan, it could not have been capable of any breach by the respondent.

In our considered view, since the appellant alleged breach of the agreement and denied by the respondent, the main issue would have been; plaintiff whether the defendant was in breach of the loan

agreement. The appellant had to discharge his burden of proof on the particularized instances of breach upon which the trial court would make its findings.

Be that as it may, aside the impugned finding on the second issue narrow as it is, we are satisfied that the learned trial judge properly determined the main issue before him. We shall now turn our attention to the consideration of the rival arguments by the learned advocates on the merits and demerits of the appeal.

We have found it imperative to begin our discussion with the law on pleadings. Notwithstanding the fact that the trial court did not address itself to this aspect, we consider it to be directly relevant to the issues for the determination of the appeal. It is trite law that, parties are bound by their own pleadings and that that no one should be allowed to go outside his pleadings. In **James Funke Ngwagilo v. Attorney General** [2004] T.L.R. 161, the Court underscored the function of pleadings in the following terms:

> *"...The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ*

and the points on which they agree, thereby identify with clarity the issues on which the court will be called upon adjudicate to determine the matters in dispute...." [at page 166]

Paragraph 9 of the plaint is directly relevant to the above principle and we find it inevitable to reproduce it as under:

"9. That having premediated arrangements and plans for the funds and being a business person, the Plaintiff had an arrangement with TATA Africa Holdings (Tanzania) Limited for the purchase of the TATA Truck which was a vehicle intended to be used for business activities of the Plaintiff. On 3rd August, 2018. The Plaintiff went ahead to request the defendant to transfer funds totalling Tanzania shillings one Hundred and Two Million (Tsh. 102,000,000/= to the guarantor of the facility Kipesile's Phones Accessories Limited who will later on pay, on behalf of the Plaintiff, a total of Tanzania Shilling One Hundred Million (Tshs. 100,000,000/=) to TATA Africa Holdings (Tanzania) Limited and Tanzania Shilling Two million (Tshs. 2,000,000/=) was for payment of the raw materials ordered which the defendant refused without any grounds or justification. Attached herewith are the copies of the Profoma Invoice and An Application for Funds Transfer

Form referred collectively here as ANNEXTURE "Kajuna -05" and the Plaintiff craves for the court leave to refer to it as Part of this Plaint".

It is plain from the reproduced paragraph that, the appellant had an arrangement with the supplier for the purchase of Tata tipper with Tata African Holdings (Tanzania) Limited. It is common ground that, in terms of that arrangement, the appellant obtained a proforma invoice (exh. P5(b)) from the supplier prior to the approval of the loan. It is logical that that must have been the basis upon which the respondent issued exhibit P2. That means, despite the fact that Kipesile is mentioned in exhibit P2 and it indeed executed a corporate guarantee (exh. P3) as security for the loan, that in itself did not make it a party to the loan agreement thereby justifying the appellant transferring loan proceeds to it in the manner he did.

It is our view, contrary to the appellant's contention, in the normal course things, the proforma invoice obtained by the appellant from the supplier of Tata tipper for its purchase is too clear to permit the interpretation employed by the appellant. It speaks loud on the existence of an arrangement for the purchase on the conditions set out therein confirmed by the appellant's own averment in para 9 of the

plaint. We are thus satisfied that, the appellant's claim that it was necessary for to transfer the money to Kipesile who would in turn pay the purchase price in cash to the supplier defeats logic and common sense. We say so because we think the appellant appears to have misunderstood the words: **Terms and Conditions:** CASH in exhibit P5(b) to mean physical cash paid to the supplier regardless of the alleged arrangement for a discount if the appellant made the payment in cash. On the contrary, it is plain upon looking at item 6 in the exhibit that all payments were to be made by way of cheques, T.T. or Bankers Cheque in favour of Tata or Bankers Cheque in favour of African Holdings (Tanzania) Ltd expressly excluding payment in cash. We are surprised that, instead of sticking to the terms and conditions in exhibit P5 (b) by making the payment to the supplier who submitted an invoice by the means expressed therein which excluded cash, the appellant opted to invent his own by routing payment to the third party. On the authorities, including **James Funke Ngwagilo** (supra), the appellant could not renege from his own pleading in para 9 of the plaint and argue as he did that, he was not bound to pay the purchase price to the supplier directly. We agree with Mr. Lyaro that the trial court was right

in holding that the appellant breached the loan agreement and find no justification disturbing that finding.

The next issue for our consideration is whether the trial court's finding on the second issue was correct. We heard Ms. Amiri's argument that the respondent had no right to withdraw the appellant's money from the business account and freezing that account as she put it. Instead, if there was any default, it was argued, the respondent was bound to issue a notice of default in terms of clause 11 of exhibit P2.

Admittedly, this argument did not feature before the trial court because, the appellant's case was not, strictly speaking, anchored on that aspect. At best, there was casual reference to default but not in the manner. Ms. Amiri submitted. Neither was it an issue left to the trial court for its determination. All the same, we are bound to address it mindful of Ms. Amiri's contention that the respondent's act was unwarranted as there was neither default by the appellant nor any notice of default to justify the loan recovery in the manner the respondent did; blocking the amount meant for purchase of the truck and transferring it to the loan account.

In addressing this aspect, the trial court made an observation at page 334 of the record which we find to be very pertinent and we shall let the trial court speak for itself:

> *"Ä clearly testified by DW1 and DW2, the Bank has a duty to oversee the [disbursements] of loan/funds and make sure they comply with the terms and conditions of that facility.*
>
> *...Allowing the transfer would be tantamount to divergence of funds which would lead to inability to pay hence exposing the defendant into a financial risk."*

Later at page 338, after referring to a quotation from **Agency Cargo International v. Eurafrican Bank (T) Ltd,** Civil Case No. 44 of 1998 (unreported), the learned judge stated:

> *"I am of the settled view therefore that the bank was simply trying to protect its interest against divergence of funds when withholding the said amount to be transferred to a third-party contrary to the loan facility agreement. Her action was justified and she cannot be held liable for the breach...."*

A meaningful discussion on this compels us to consult the law and practice of lending which we think cannot be better explained than

looking at the works of the learned authors of *Sheldon and Fidler's Practice and Law of Banking*, 11th edition, P.J.M. Fidler. Chapter 12 which is directly relevant for our purpose is dedicated to bank lending. The authors begin with the principle that the money that banks lend to borrowers belongs to their depositors entrusted to them to use it in their business of lending it but in doing so, banks must exercise great care that there is adequate assurance of the use of that money for the intended purpose and be able to repay it. We find it compelled to reproduce some extracts from the book for easy reference:

> *".. as a lender to other people's money, he should ideally be assured that those to whom he lends will be able to repay it at the time and on the terms agreed at the outset... Thus, he can guarantee to the depositors of the funds, he can satisfy the liquidity requirements of his borrowers, and he can generate from the process sufficient profit both to maintain and expand his bank's position within the community..." [at page 269]*

The authors continue:

> *"Clearly, no banker will lend money on a proposition on which manifestly does not satisfy the above criterion or on which* ***he entertains***

> ***the most serious doubts. It has never been regarded as the duty of a branch banker to provide venture or risk capital."*** [emphasis supplied at page 269]

Regarding the purpose of the lending, the learned authors have the following to say:

> *"A banker will want to know exactly what the money he lends is to be used for. There are two main reasons for this, he must assure himself first that the purpose is legal (e.g. no improper company funding of purchases of its own shares), and secondly that the intended use is reasonably likely to produce the sort of profitable result which both parties desire. Bankers are, in general, reluctant to provide "standby" facilities to any except the most reliable and important customers, in view of the lack of control which such provision involved ...."* [At page 271].

We respectfully subscribe to the foregoing excerpts as reflecting correct principles on the issue under our consideration. Subjecting the excerpts to the instant appeal, there is no doubt, as the learned trial judge found that, the transfer of the funds to the third party was a deviation from the purpose for which the respondent approved the loan. Similarly, the trial court correctly found that the deviation had the effect

of exposing the respondent to a financial risk of losing its depositors' money. Like the trial court, we are satisfied that, the appellant's transfer of money to the third party in such amounts in a span of hours immediately after the disbursement of the proceeds of the loan to the business account justified the respondent's reaction. The respondent was no longer bound to release the money, hence its decision to block the transfer and ultimately credit the said amount to the loan account.

Unlike the appellant's learned advocate, the purpose of the loan, be it asset financing or otherwise, was not material to what the respondent did to insulate itself from the risk associated with the doubtful transfer of funds to his guarantor. As rightly observed by the trial court, no prudent banker would wait and watch his customer's money finding its way to a third parties in deviation from the agreed purpose and without any guarantee of security from the asset as agreed.

Before concluding, to be fair to the learned advocate for the appellant, we agree with her that the trial court's finding that the appellant was in breach of the agreement by withdrawing from the arrangement relying on a letter not admitted in evidence was, with respect, erroneous. As observed earlier on, that was a result of improper

framing of the issues. However, as far as we are concerned, on the overall, the impugned letter was not the only reason for the respondent's act which triggered the suit. It could not have influenced the trial court's findings against the appellant as contended by Ms. Amiri and so we find little substance in her complaint and reject it.

The above said, we find no merit in the appeal which we hereby dismiss with costs.

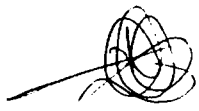
DATED at **MOSHI** this 19th day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of March, 2024 in the presence of Mr. Edwin Lyaro, learned advocate for the respondent also holdings brief for Ms. Fatuma Amiri, learned advocate for the appellant is hereby certified as a true copy of the original.



W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL