

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

**CIVIL APPEAL NO.302 OF 2001
CONS WITH CIVIL APPEAL NO.291/2001**

**TANZANIA TRACTORS MANUFACTURING
CO LTD./P S R C..... APPELLANT**

VERSUS

**GRACIOUS MWANGUYA..... RESPONDENT
C.R.D.B. LTD..... 3RD PARTY**

JUDGEMENT

LUANDA, J.:

Before me are two civil appeals. The two appeals namely Civil Appeal No.291/2001 and Civil Appeal No.302/2001 are arising from Civil Case No.186/1992 filed and adjudicated by D'Salaam Resident Magistrate Court sitting at Kisutu. In Civil Appeal Case No.291/2001 the appellant is Cooperative and Rural Development Bank Ltd; whereas the Respondents are Tanzania Tractors Manufacturing co. Ltd; Gracious Mwanguya and the Presidential Sector Reform Commission. In Civil Appeal No.320/2001 the Appellant is Tanzania Tractors Manufacturing Co. Ltd. The Respondents are Gracious Mwanguya and Cooperative and Rural Development Bank.

As the two appeals emanate from one civil case, the two appeals were consolidated. And as it is not easy to refer the parties as appellant and/or respondent, I would use their respective names when they had sued or been sued.

Briefly the facts of the case are to this effect: On 17th March, 1992 Gracious Mwanguya

entered into a loan agreement with the Cooperative and Rural Development Bank (hereinafter referred to as CRDB). Gracious Mwanguya was advanced a loan of Tshs.6,823,000/= to buy a tractor. He fulfilled all conditions stipulated therein in the agreement. Gracious Mwanguya was to repay the loan by instalment. But he was required to settle the debt by 31/2/1995.

Having been satisfied, the CRDB wrote a letter to Tanzania Tractors Manufacturing Co. Ltd (hereinafter referred to as TRAMA), manufacturer of Valmet tractors to release one unit to Gracious Mwanguya. Gracious Mwanguya collected the said tractor from TRAMA. The CRDB remained with the original registration card registered in the name of Gracious Mwanguya. Gracious Mwanguya was given a photocopy of that card. The registration number of the tractor is TZC 4002.

Upon acquiring possession, Gracious Mwanguya hired the tractor to the Kilombero Sugar Company. An agreement was entered whereby Gracious Mwanguya undertook to transport sugar cane from out growers fields to the Company factors referred to as KI and KII; of course on payment. The contract was reduced into writing and it was executed on 23/7/1992. As to when will the contract come to amend, the agreement indicate that the contract will come to an end at the end of the Milling Season, whatever that means.

On 8/10/1992 the CRDB wrote a letter instructing TRAMA to seize the tractor. The tractor was seized on 13/10/1992 with the assistance of Police. And around the same time TRAMA filed a Civil Case No.186/1992 against Gracious Mwanguya. I said so because I was unable to trace the Exchequer Revenue Voucher (ERV). Whatever the position, the claim was for the balance due of Tshs.1,432,830/= in respect of the purchased tractor, costs and interest. Gracious Mwanguya was able to defend the claim by filing his written statement of defence. He also counter claimed for Tshs.120,000/= per day being loss of earning for unlawful seizure

of the tractor, costs and interests.

On 13/4/1994 when the case came for hearing, TRAMA who were aware of the hearing date did not appear. The suit was dismissed and the prayers of Gracious Mwanguya contained in his counter claim was granted. TRAMA made several attempts to set aside that judgment entered in favour of Gracious Mwanguya but to no avail. The matter was referred to this court (Nsekela, J) by way of revision. Nsekela, J. directed the court to abide with O.8 r.9(2) of the Civil Procedure Code, 1966 and ordered the case i.e. Counter Claim be heard in accordance with the Law and be tried by another magistrate. That Order was complied with. The Ruling was delivered on 12/8/98 in the presence of Mr. Shiyo for the Applicant and Mr. Msirikali for the Respondent.

On 10/11/98 TRAMA made an application - third party notice be issued against CRDB. The application was granted. The CRDB was joined in the proceedings. The order was made on 13/11/98.

On 14/6/1999 The Presidential Sector Reform Commission (hereinafter referred to as PSRC) was joined as party to the proceedings. For reasons I will explain at a later stage, I prefer to reproduce the Court proceedings dated 14/6/99.

“ 14.6.99

Coram: A. Kabuta, Rm

For Plaintiff - Maira

For defendant - Mkoba

Mwakipesile for the 3rd party.

Maira: We have agreed that the pleadings be amended because the defendant is liquidating we have agreed that the parties be:

Gracious Mwanguya

Versus

PSRC and Third party

Mkoba will proceed to defend PSRC

Order; Hearing 20/7/99

Kabuta

Sgd.

14/6/99"

But the trial court did not make any decision or order whether it agreed with the proposal. However, what follows thereafter shows very clearly that PSRC were joined as a party to the proceedings. One wonders whether that was proper. Be that as it may Mr. Mkoba who is advocating for TRAMA and who was present when Mr. Maira made the prayer raised a preliminary point in that the PSRC was wrongly substituted as defendant for want of leave under the Bankruptcy Ordinance. And two the suit was subjudice. The objection was filed on 20/8/1999 vide ERV 09220771. The objections were overruled. Let me comment on the first point raised.

On 14/6/99 Mr. Maira informed the Court that they had agreed that pleadings be amended so that parties to the suit be Gracious Mwanguya

Vs.

PSRC and

Third Party (CRDB)

When Mr. Maira was informing the court Mr. Mkoba was around. Common sense dictates that if Mr. Mkoba was not in agreement, with what Mr. Maira had said or proposed, he

would have said so. Mr. Mkoba kept silence. Mr. Mkoba is not entitled to raise it at a later date. He was estopped. But the important thing is that the trial court was not allowed to reopen the issue. The court was *functus officio*. Be that as it may, the trial court dismissed both objections. The case court then proceeded with trial. At the end of the day Gracious Mwanguya emerged as the winner. Judgment was entered against TRAMA/PSRC who were to be indemnified by CRDB. It is this judgment which is the subject matter of appeals mentioned earlier.

Mr. Kisusi and Mr. Mkoba who are advocating for the CRDB and TRAMA/PSRC respectively argued their appeals with force. Mr. Maira who is advocating for Gracious Mwanguya supported the finding of the trial court.

I have given the details of the case as I believe there are legal issues which were not seriously considered or not considered at all. However, I will refrain myself and discuss the issue of jurisdiction.

When Gracious Mwanguya filed his written Statement of defence in which he counter claimed, and therefore that is a suit against TRAMA, TRAMA was not a Specified Public Corporation. On 14/6/1999 PSRC was joined as a party to the proceedings because TRAMA was a Specified Public Corporation. But Mr. Maira did not cite the relevant Government Notice and the operative date. And Mr. Mkoba when raising the objection did not cite the Government Notice either. Now where did they get that information, that TRAMA is a specified Public Corporation? But all the same the trial court did not demand evidence to that effect; it included PSRC as a party to the proceedings.

I took the trouble and make a research. My research bear fruits in that TRAMA is a Specified Public Corporation as evidenced by GN 321 published on 25/10/1996. And the GN

is deemed to have come into operation on 1st January, 1996. So from that date TRAMA was a Specified Public Corporation.

By virtue of Section 43(1) of the Public Corporation Act, 1993 once a corporation is declared to be a Specified Public Corporation, the PSRC is vested with power to act as an official receiver of that Specified Public Corporation. Section 43(1) of the said Act provides:

43(1) Notwithstanding any other law to the contrary, with effect from the date of publication of an order declaring a public corporation to be a Specified Public Corporation the Commission shall

- (a) Without further assurance on appointment have power to act as official receiver of the Specified Public Corporation, and
- (b) have the power and all the right of a receiver appointed in accordance to the Bankruptcy Ordinance.

The PSRC is established under S.49 of the Act a amended. It provides:

49(1) There is hereby established a Commission to be known as the Presidential Sector Reform Commission which shall be an autonomous organ of the Government

(2) The Commission shall be a body Corporate with perpetual succession and common Seal and shall be capable in its corporate name of:-

- (a) Suing and being sued.
- (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of both movable and immovable

property.

- (c) borrowing and lending money
- (d) entering into contracts
- (e) doing or performing all such other things or acts necessary
for the proper performance of its functions under this Act
which may lawfully be done by a body corporate.

But what are the functions or duties of an official receiver; these have been stated under S.75 of the Bankruptcy Ordinance, Cap. 25 Section 75 reads:

- 75(1) The duties of the official receiver shall have relation both to the
conduct of the debtor and the administration of his estate.
- (2) The official receiver may, for the purposes of affidavits, verifying proofs;
petitions, or other proceedings under this Ordinance administer oath.
- (3) All provisions in this or any other Ordinance, referring to the trustee in a
bankruptcy shall, under the context otherwise requires or the Ordinance otherwise
provides, include the official receiver when acting as trustee.

If one reads the above quoted sections, he will no doubt form an opinion that once a corporation has been declared a Specified Public Corporation which is taken to undergo liquidation, it ceases to be a body Corporate and as such it cannot sue and be sued. Further, it cease from owning properties. Properties of such Specified Public Corporation are vested with the PSRC which has powers of alienating them, inter alia.

And it is no wonder that any civil litigation filed against a Specified Public Corporation ought to include the PSRC after obtaining leave of court to sue. And such suit is taken or treated to fall under bankruptcy. That is my understanding. However, I am very much aware with the

decision of CAT in Kampuni ya Uchukuzi Tabora Ltd V. Praxed Paulo & another Civil Application No.43/99 (unreported) which decision is binding upon this court. The CAT held that a specified Public Corporation does not cease to own properties.

My concern is whether the trial court was competent to adjudicate bankruptcy matter while it knew TRAMA was a Specified Public Corporation. But before we go further we have to ask ourselves this question. Is it property to raise the issue of jurisdiction at this stage?

In Michael Leseni Kweka V. John Eliafe Civil Appeal No.51/1991 CAT(unreported) the Court of Appeal of Tanzania held, inter alia, that matters of jurisdiction may be raised at any stage and any time as they go to the root of justice.

Now back as to whether the trial court had jurisdiction.

Strictly speaking a competent court which has power to adjudicate bankruptcy matters is the High Court save in same incidences where the Chief Justice by an Order delegate to any subordinate court either generally or for purpose of any particular case or class of cases. This is provided for under S.97 of the Bankruptcy Ordinance, Cap. 25. The section reads:

97. The court having jurisdiction in bankruptcy shall be the High Court provided that the Chief Justice may by order delegate all or any part of the jurisdiction of the High Court in bankruptcy to any subordinate court either generally or for the purpose of any particular case or class of cases.

The record of the trial court does not indicate or show to have been conferred with such powers. To my best recollection so far no resident magistrate as resident magistrate has been appointed to handle bankruptcy cases. It is only the District Registrar of Tanga, Mwanza and Arusha who have such powers. But the powers are limited to the examination of debtors

in bankruptcy case filed in High Court (See GN 15 and 88 of 1931; and GN 440/1957). Taking the free market economy prevailing at the moment whereby commercial activities are been carried out, probably it is high time to confer with such powers to some or all resident magistrates.

However, one may pose this question. Upon discovery that the tried court had no jurisdiction what action or step one should take? The answers to this question is found under S.21 of the Civil Procedure code, 1966 and 07.r.10(1)(2) of the code which is all about transfer withdrawal and return of plaint before the conclusion of the trial. Section 21 provides:-

21(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage -

- (a) N/A
- (b) Withdrawal any suit or other proceeding pending in any court subordinate to it, and
 - (I) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court...
 - (iii) N/A

Order VII, r.10(1) & (2) reads

10(1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

(2) On returning a plaint the Judge or Magistrate, shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the

reasons for returning it.

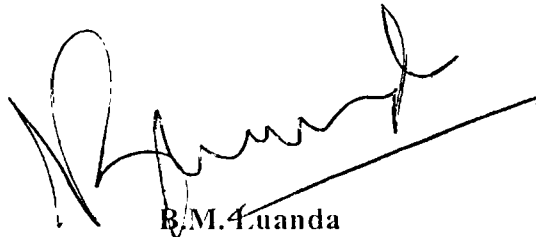
The two situations do not apply in our case as the trial was concluded.

All in all the trial court had no jurisdiction to entertain this case. It follows therefore that the trial is a nullity. The proceedings are quashed, the Judgment and decree set aside.

Gracious Mwanguya is at liberty to take any action he deems it fit.

As the issue was not raised by any party to the appeals, I award no costs. Each party to bear its costs.

Order accordingly.



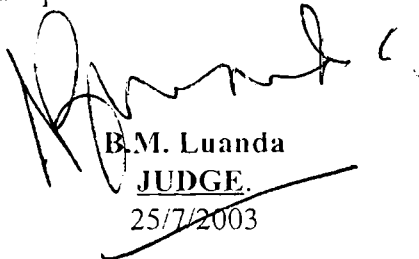
B.M. Luanda

JUDGE.

23/7/2003

Judgement read over in the presence of Mr Kisusi and Mr. Mkoba and holding brief of

Mr. Maira.



B.M. Luanda

JUDGE.

25/7/2003