

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL APPEAL NO. 53 OF 2014

(Original Civil Case No. 110 of 2013 in the RMS Court at Dar es Salaam)

NATIONAL BANK OF COMMERCE LTD.....APPELLANT

V.

SKYES TRAVEL AGENTS LIMITED.....RESPONDENT

JUDGMENT

Date of last Order: 7/12/2015

Date of Judgment: 18/12/2015

A. Shangwa, J.

The Appellant National Bank of Commerce (NBC) Ltd was not satisfied with the decision of Mirumbe, PRM dated

16th April, 2014. Acting on the advice of IMMMA Advocates, the Appellant preferred an appeal to this court against the said decision. In its Memorandum of Appeal dated 9th May, 2014, the Appellant listed eight grounds of appeal. In my view, the 1st, 2nd and 3rd grounds of appeal are sufficient to dispose of this appeal. Therefore, I will consider these grounds only. They read as follows:-

1. *The trial Magistrate erred in law and fact in entertaining a commercial case of which she had no pecuniary jurisdiction to determine.*
2. *The trial Magistrate erred in law by writing an incomprehensible judgment.*
3. *The trial Magistrate erred in law and fact by writing a judgment that does not contain reasons for the decision reached.*

The three grounds of appeal advanced by the Appellant raises very important points of law to be determined by this court. The 2nd and 3rd grounds of appeal are interrelated. Therefore, I will combine them and resolve them together.

On the 1st ground of appeal, the court is called upon to determine as to whether or not the trial court had pecuniary jurisdiction to determine the case considered to be of a commercial nature. First of all, let me resolve the question as to whether or not the case between the parties is a commercial case.

Whereas counsel for the Respondent Mr. Mgare is of the view that the case between the parties had no commercial significance because it arose from a simple

contract of Principal-Agent relationship, counsel for the Appellant Messrs IMMMA, Advocates are of a different view that the case between the parties is a commercial case which arose out of breach of banker – customer relationship in which the Respondent accused the Appellant of negligence in effecting its monthly remittance of bills to BSP/IATA account at Standard Chartered Bank.

Now did the case between the parties arise out of a simple contract of Principal - Agent –relationship as submitted by Mr. Mgare or out of Banker – customer relationship as submitted by IMMMA Advocates. In my opinion, the case between the parties did not arise out of a contract of Principal – Agent relationship as submitted by Mr. Mgare. As a matter of fact, the relationship which

existed between the parties is not that of Principal – Agent as submitted by Mr. Mgare.

By instructing the Appellant to remit money on a monthly basis from his account to BSP/IATA account at Standard Chartered Bank, the Respondent did not do so as principal of the Appellant and the Appellant did not fail to do so as agent of the Respondent. It is not in dispute that the Respondent had his account with the Appellant Bank. It is also not in dispute that the Respondent had instructed the Appellant to remit his monthly bills from his bank account to BSP/IATA account at Standard Chartered International House Branch Dar es Salaam.

This means that the relationship between the Appellant and the Respondent was that of Banker-

customer relationship. It means also that the transaction which was supposed to be carried out by the Appellant on behalf of the Respondent was a commercial transaction and the dispute arising from the said transaction was nothing but a commercial case as submitted by IMMMA Advocates and not a normal Civil Case as submitted by Mr. Mgare for the Respondent.

As correctly pointed out by counsel for the Appellant, S. 2 of the Magistrates Courts Act Cap. 11 R.E. 2002 as amended by Act No. 4 of 2004, a commercial case is defined to be a contractual relationship of a business / commercial Organization with other bodies or persons outside it. In this case, there was a contractual relationship between the parties. The Appellant is a banker and the Respondent is a customer. The

relationship between Banker and customer is contractual. The Banker keeps the customer's account in utmost good faith.

The Appellant's activity of remitting money from the Respondent's account to BSP/IATA account at Standard Chartered Bank is of a commercial nature. This activity was a commercial activity. Therefore, the dispute that arose between the parties from the said activity is a commercial dispute.

Let me now resolve the question as to whether or not the trial court had pecuniary jurisdiction to determine the commercial dispute between the parties.

Whereas counsel for the Respondent is of the view that the trial court had pecuniary jurisdiction to hear and

determine the dispute between the parties, counsel for the Appellant are of a different view that the trial court had no pecuniary jurisdiction to do so.

Counsel for the Appellant submitted that the amount claimed by the Respondent against the Appellant before the trial court of whose break down is Tshs. 11,000,000 and USD 55,000 (see paragraph 3 of the plaint) is beyond the pecuniary jurisdiction of the Resident Magistrate's Court in Commercial Cases. In support of their submission, they cited S.40 (3) of the Magistrates Courts Act. Cap. 11 R.E. 2002 as amended by Act. No. 4 of 2004 which provides as follows:-

"...in proceedings for the recovery of possession of immovable property to

proceedings in which the value of the property does not exceed fifty Million and in the proceedings where the subject matter is capable of being estimated at a money value to proceedings in which the value of the subject matter does not exceed thirty Million shillings."

On his part Mr. Mgare for the Respondent submitted that this is a normal Civil Case and that as the subject matter of the suit does not exceed Tshs. 100,000/= then the trial Court had pecuniary jurisdiction to hear and determine it. In support of his argument, he cited S. 40 (2) (b) of the Magistrates Courts Act. Cap. R.E. 2002 as amended by Act. No. 25 of 2002.

Furthermore, Mr. Mgare submitted that in its claim, the Respondent prayed for compensation of Tshs. 11,000,000/= and USD 55,000, being loss of business earnings, credibility and incidentals. He said save for the claim of compensation for loss of business, the rest of the claims are general damages which do not determine the jurisdiction of the Court. He added to say that going by S. 13 of the Civil Procedure Code Cap. 33 R.E. 2002, the trial court was the Court of the lowest grade to the High Court competent to try the case.

As I have already established, the dispute between the parties is not a normal Civil Case. It is a commercial case. As we have already seen, the value of the subject matter exceeds thirty million shillings. This being the position, the trial court had no jurisdiction to try it and its

proceedings are a nullity for lack of jurisdiction. This completely disposes of the first ground of appeal which succeeds.

On the 2nd and 3rd grounds of appeal which are interrelated, the court is asked to determine as to whether or not the judgment of the trial Court / Magistrate is comprehensible and whether it contains reasons for the decision.

I have gone through the trial Magistrate's judgment and I totally agree with counsel for the Appellant Messrs IMMMA, Advocates that the judgment delivered by the trial Magistrate is unintelligible and incomprehensible. For instance at page 4 to 5 starting from page 4 below of his

typed judgment, the trial Magistrate wrote as follows and I quote:-

"From the foreign submissions and activities the Plaintiff claimed that the three defendants of resists in the present case and though oral testimonies of P.W.1, D.W. 1 and exhibits P1 to P9 inclusive the answer to the first issue is affirmative."

Another clear example of incomprehensibility of the trial Magistrate's Judgment is at page 9 paragraph 3 of his typed judgment where he wrote as follows and I quote:

"Because we have answered issue one in affirmative he invites is Court

and I am so invited to answer issue 2 in affirmative to support this affirmation of exhibit P6 plus P.W.1 oral testimony."

I repeat to say that I agree with Messrs IMMMA, Advocates that the judgment of the trial Magistrate is unintelligible and incomprehensible. This disposes of the 2nd and 3rd grounds of appeal which succeeds as well.

For the reasons I have given, I quash the trial court's judgment and I allow this appeal.

Each party to bear its own costs.

A. Shangwa

JUDGE

18/12/2015

Delivered in open Court this 18th day of December, 2015
in the presence of the Respondent's officer and in the
absence of the Appellant's Advocate/Officer.

A. Shangwa

JUDGE

18/12/2015

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL CASE NO. 116 OF 2001

NATHAN KAFANABO & OTHERS.....PLAINTIFFS

V

TANZANIA PORTLAND CEMENT...1ST DEFENDANT

**NATIONAL INSURANCE
CORPORATION.....2ND DEFENDANT**

JUDGMENT

Date of last Order 20 / 3 / 2015
Date of Judgment 28 / 5 / 2015

Shangwa, J.

The plaintiffs in this case are former employees of Tanzania Portland Cement Company Limited. They are 102 in number. The list of their names is attached to the amended plaint presented for filing

on 25th November, 2003. However, according to P.W.1 Zephania Marema 36 of them out of the list have already passed away. On 26th October, 2001, Madame Bubeshi, J. (rtd) granted leave to Nathan Kithaneli Kafanabo, Joseph Michael Haule, Zephania Mlelwa Malima and Thomas Aminiel Usiri to file a representative suit against Tanzania Portland Cement Company Limited (1st defendant) and National Insurance Corporation Tanzania Limited (2nd defendant) which they did. Thereafter, the case continued to be mentioned on various dates.

On 25th November, 2003, the plaintiffs filed an Amended plaint after being granted leave to do so by Madame Bubeshi, J. (rtd). At paragraph 5 of the Amended plaint, the plaintiffs aver inter-alia that

they are retired employees of 1st defendant Tanzania Portland Cement Company Limited and that they were under the SCHEME OF GROUP LIFE ASSURANCE entered in by the 1st defendant and the 2nd defendant in 1987.

At paragraph 6, the plaintiffs and all the persons listed in Annexure 'A' claim different amounts of money from the 1st defendant and 2nd defendant on grounds that they did not honour the Trust Deed made on 31st May, 1989 for the reasons better known to themselves.

At paragraph 8, the plaintiffs state that their claim is as indicated in annexure 'C' to the Amended plaint. At paragraph 10, the plaintiffs pray

for judgment and decree for payment of money as indicated in annexure 'c', interest at court rate, general damages and costs.

Annexure 'c' to the Amended plaint is a computation made by the plaintiff's representatives, indicating the name of each retired employee, his basicsalary, his total salary for 3 years and the amount that each of them prays to be paid by the defendants as emoluments from the scheme of group life Assurance which was established by the 1st defendant in 1987.

Before hearing suit, there was an application to join one Iddi Gunza in this suit. I dismissed it on 25th February, 2013. Thereafter, counsel for the

1st defendant raised a point of preliminary objection that this court has no jurisdiction to try this suit. I overruled it on grounds that this court was functus officio to determine it because a similar point of objection had earlier before been raised by counsel for the 1st defendant but it was overruled by my learned brother Mandia J. as he then was in his ruling dated 26th May, 2005 by ordering that the suit should proceed to trial on merits.

I started hearing this suit on 27th January, 2014. Eight issues were framed for determination by the court. They are as follows:-

1. Whether the matters covered in the claim form part of contract of employment between the plaintiffs and 1st defendant.
2. Whether there is a legally valid Trust Deed between the plaintiffs and the defendants and if yes whether the plaintiffs can enforce it against the defendants.
3. Whether the 1st defendant was the custodian of the proceeds of the Trust Deed.
4. Who are the parties to the Trust Deed.
5. Whether the 2nd defendant paid the benefits of the Trust Deed (if any) to the 1st defendant.
6. What is the relationship between 1st and 2nd defendants and the plaintiffs.

7. What is the relationship between 1st and 2nd defendants.

8. To what reliefs are the parties entitled to.

Before determining these issues, let us first of all look at the facts of this case. These facts are as follows:-

The plaintiffs are 102 in number. They are former employees of the 1st defendant. They allege that they retired on voluntary basis and were paid their terminal benefits except their life assurance package under the group endowment scheme which was established by the 1st defendant in 1987 to boost their terminal benefits and gratuity upon

retirement or death. It is further alleged by the plaintiffs that the 1st defendant formed a Trust Deed and appointed the Trustees. These Trustees are Mr. Harmer Laiti Kiwia, Mr. Abubakar Shebuge, Mr. Juma Mshihili, Mr. Gideon John Nassari and Mr. Mathew Sosten Kisinda. The plaintiffs claim that in breach of the rules of the Trust Deed, the 1st defendant and 2nd defendant did not pay them their life Assurance package payable under the group endowment Scheme totaling to Tshs 262, 216, 780. Before filing this suit, the plaintiffs served a demand notice to the defendants but they did not pay them their lifeassurance benefits. The defendants resisted their demand notice. Hence this suit.

Let me now start to determine the issues that this court has been called upon to determine. On the first issue, this court is called upon to decide as to whether matters covered in the claim form part of contracts of employment between the plaintiffs and 1st defendant. As it will be shown herein below matters covered in the claim do not form part of contracts of employment between the plaintiffs and 1st defendant.

First of all, the plaintiffs in this case are not claiming for their terminal benefits arising out of their employment with the 1st defendant when they reached the age of retirement. The 1st defendant did pay them their work benefits on retirement. As it

was pointed out by Mandia, J. as he then was on 26th May, 2005, the propriety of the suit between the parties hangs on the existence of a group Life Assurance Scheme which cannot be linked to terminal benefits arising out of employer/employee relationships.

Secondly, the contracts of employment between the plaintiffs and the 1st defendant were entered into on the first day of their employment.

Thirdly, the question of group Assurance Scheme came into existence later during the course of their employment in July, 1987 when the General Manager Mr. Basilida called a meeting of all workers

which was addressed by the Administration Manager Mr. Abubakar Mshihili who informed them during his address that the 1st defendant had designed a scheme known as group Endowment Scheme from which all of its employees will benefit by being paid 10%, 20%, 30%, 40%, 100% per annum depending on one's rank once they retire or die. Therefore, I answer the first issue in the negative.

The 2nd, 3rd, 4th and 5th issues talk about the Trust Deed. Let me begin with the fourth issue as to who are the parties to the Trust Deed. According to the evidence on record that is exhibit P1, the parties to the Trust Deed is the 1st defendant Tanzania Portland Cement Company Limited and Mr. Harmer

Laiti Kiwia, Mr. Abubakar Shebuge, Mr. Juma Mshihili, Mr. Gideon John Nassari and Mr. Mathem Sosten Kisinda.

I think the next issue to be considered is the third issue on which the court is called upon to determine as to whether the 1st defendant was the custodian of the proceeds of the Trust Deed. In my opinion, the custodian of the proceeds of the Trust Deed are the Trustees. The 1st Defendant was only the author of the Trust after declaring to the employees during the meeting called by its General Manager Mr. Basilida in July, 1987 that a Group Assurance Endowment Scheme is gona be established by it for their benefit either on retirement or death.

The issue which I think should follow to be determined is the second one. On this issue, the court is called upon to decide as to whether or not there is a legally valid Trust Deed between the plaintiffs and the defendants and if yes whether the plaintiffs can enforce it against the defendants. The Trust Deed was tendered in evidence as exhibit P1. It was contended by counsel for 1st defendant that in order for the Trust Deed to be legally valid, it must be registered with RITA as per the Trustees Incorporation Act Cap. 318 R.E. 2002. She said, the Trust Deed in issue was registered at the Land Registry which is not the proper place to register Trust Deeds. She submitted that the TRUST DEED

is invalid and not binding and that it contravenes S. 3 of the Trustees Incorporation Act Cap. 318 R.E. 2002 which provides inter-alia as follows:-

“...a trustee or trustees holding property in trust for any religious, educational, literary, scientific, social or charitable purposes who has not or have not been incorporated under any law or whose incorporation is not provided by any law, shall apply for incorporation under this Act.”

Furthermore, it was contended by counsel for the 1st defendant that even if the Trust Deed was

valid still the plaintiffs cannot enforce it against the defendants except the registered trustees.

First of all, I wish to point out here that the Trust Deed was not between the plaintiffs and the defendants. It was between the 1st defendant and the trustees namely:-

Mr. Harmer Laiti Kiwia.

Mr. Abubakar Shebuge.

Mr. Juma Mshihili.

Mr. Gideon John Nassari &

Mr. Mathew Sosten Kisinda.

Secondly, I wish to point out that S.3 of the Trustees Incorporation Act. Cap. 318 R.E. 2002 which was relied upon to invalidate the Trust Deed

has nothing to do with the registration of Trust Deeds. It has something to do with incorporation of the Trustees under the Trust Deed. I agree with counsel for the 1st defendant that the Trust Deed in issue ought to have been registered by the 1st defendant with the office of the Administrator General/RITA but a failure to register it does not render it invalid so long as it is signed by the author (1st defendant) and the trustees. Its registration was a mere formality. The 1st defendant company loved the plaintiffs who were its former employees. As a team they generated billions of Tanzanian shillings for the company's owners. They did so under hot, noisy and dusty conditions of their cement

production plant. So, the 1st defendant decided to form a Trust for their benefit on retirement or death.

In my view, even if a failure to register it with the office of the Administrator General/RITA renders the Trust Deed invalid, such a failure cannot make the plaintiffs lose their rights under it as it was non of their business or duty to register it. The duty do so squarely lied on the 1st defendant who prepared it and registered it in a wrong place. It is also funny for the 1st defendant to declare its own document as invalid and not binding.

As to whether or not the Trust Deed can be enforced by the plaintiffs against the defendants, I

fact that the 2nd defendant did so can be deduced from the evidence of the 2nd defendant's witness Mr. Henry Mwakisi who told this court that the 1st defendant did establish a Group Endowment Assurance Scheme with the 2nd defendant, the National Insurance Corporation of Tanzania Limited and that under the said scheme, the 1st defendant had to contribute money for its sustainability. That, he does not have evidence of how much money was contributed by the 1st defendant to the scheme. It appears however that he was reluctant to show how much was paid by the 2nd defendant to the 1st defendant for the benefits of the plaintiffs. This disposes of the 2nd, 3rd, 4th and 5th issues. Most of them have been answered in the positive.

am of the considered view that it cannot be enforced by the plaintiffs against the 2nd defendant but it can only be enforced by them against the 1st defendant who prepared it of its own will and the Trustees who accepted to hold their benefits under the trust. I wish to point out here that non joinder of the Trustees in the suit does not render the suit against the 1st defendant incompetent.

The next issue to be determined is the fifth one. On this issue, the court is called upon to determine as to whether or not the 2nd defendant paid the benefits of the Trust Deed (if any) to the 1st defendant. In actual fact, the 2nd defendant paid the benefits of the Trust Deed to the 1st defendant. The

Let me now go to the sixth issue. On this issue, the court is asked to determine as to what is a relationship between 1st and 2nd defendants and the plaintiffs. In my view, this issue is a mere academic one. It is not in dispute that the plaintiffs are former employees of the 1st defendant. They all retired. Counsel for the 2nd defendant submitted that apart from P.W.2 Thomas Usiri who tendered exhibit P4 to show that he retired, there is no evidence to show that the rest of the plaintiffs actually retired in order to qualify for the scheme benefit. He said that they believe that the rest of the plaintiffs were terminated or entrenched or resigned from employment and that therefore they do not qualify for the scheme benefit.

However, from the totality of evidence on record there is no doubt that all of the plaintiffs retired from employment. Thus, they all qualify for the scheme benefit. Moreover, the 1st defendant does not deny that they all retired from employment. The plaintiffs are related to the 1st defendant as its former employees but they have no relationship with the 2nd defendant the National Insurance Corporation Tanzania Ltd. This disposes of the sixth issue.

The seventh issue is as well a mere academic one. On this issue, the court is asked to determine as to what is a relationship between 1st and 2nd defendants. This issue is very simple. In terms of the

relationship between the two, the 1st defendant was the client of the 2nd defendant as an insurer with whom it deposited its money under the Group Endowment Assurance Policy. This disposes of the seventh issue.

The last issue is the eighth one. In this issue, the court is asked to determine as to what reliefs are the parties entitled to. In my opinion, the plaintiffs are entitled to judgment in their favour as against the 1st defendant only. The plaintiffs top ranking officers such as Fadhili Senkoro, Nathan Kafanabo, Saimon Malingo and Joseph Haule are entitled to 40% of their salary per annum with effect from July, 1987 to the date of retirement being their retirement

benefits arising out of the Trust Deed. The plaintiffs low ranking officers such as P.W1 Zephania Marema who was a Miller and P.W.2 Thomas Usiri who was a driver are entitled to 30% of their salary per annum with effect from July, 1987 to the date of their retirement being their benefits arising out of the Trust Deed. The plaintiffs are also entitled to interest at court rate of 7% per annum on the decretal sum from the date of filing this suit to full payment of the decretal sum.

As from whom the plaintiffs ~~are~~ supposed to be paid their retirement benefits as between the 1st defendant and the Trustees, the answer to this question is that the one who is supposed to do so is

the 1st defendant who authored the scheme, undertook to contribute to the scheme and stood to control and indemnify the Trustees with whom it deposited confidence to administer the scheme.

In the final analysis, I enter judgment in favour of the plaintiffs as against the 1st defendant with costs and I dismiss the suit as against the 2nd defendant without costs.

A. Shangwa

JUDGE

28/5/2015

Delivered in open court this 28th day of May, 2015 in the presence of Miss Tausi for 1st defendant and in

the presence of some few plaintiffs but in the absence of counsel for 2nd defendant.

A.Shangwa

JUDGE

28/5/2015