IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM.

CIVIL APPEAL No. 127 OF 2017

(Originating from Civii Case No. 148 of 2014 of the District Court of Iiala at Samora)

AFRICAN BANKING CORPORATION ....APPELANT

VERSUS

SEKELA BROWN MWAKASEGE......................RESPONDENT

Date of last Order: 10/03/2020
Date of Judgement: 10/03/2020

J U D G E M E N T

MGONYA, J.

In this first appeal, the Appellant, the **AFRICAN BANKING CORPORATION** challenges the Judgment and Decree of the District Court of Ilala at Samora (trial court) in **Civil Case No. 148 of 2014**. The impugned Judgment dated 03/05/2017 was in favour of **SEKELA BROWN MWAKASEGE** the Respondent herein.

Before the trial court, the Respondent had sued the Appellant objecting the recovery of **Tshs. 21,443.043.24/=** being the outstanding money unpaid by the Respondent on

account of the defaulted amount which is said to be paid from the Overdraft Facility Agreement between the parties hereto.

During the hearing at the trial court, the Respondent herein tendered for evidence one exhibit **(Exhibit P1)** of which trial Magistrate basing on the same, the trial Magistrate ruled the suit in favour of the Respondent herein as said earlier. The Appellant was aggrieved by the decision of the trial court, hence this appeal.

The Appellant preferred the **six** grounds of appeal which I reproduce herein below:

1. ***That, trial Magistrate erred in law and fact by making a decision on matters not pleaded by the Respondent in the Plaint.***
2. ***That, the trial Magistrate erred in law and in fact by disregarding pleadings filed by the Respondent and the Appellant.***
3. ***That, trial Magistrate erred in law and fact by failure to analyse the evidence adduced by the Appellant and the Respondent.***
4. ***That, trial Magistrate erred in law and fact by holding that there was no agreement for overdraft facility between the Appellant and the Respondent without sufficient evidence to prove the same.***

5. ***That, the trial Magistrate erred in law and in fact by hoiding that the Appellant was supposed either to deny or rebut that the Respondent was wrongfully arrested without considering that the facts were not pleaded in the Respondent's Plaint.***
6. ***That, the trial Magistrate erred in Law and in fact by failure to go through exhibits tendered by the Appellant and holding that the Respondent was not given an opportunity to call a lawyer.***

On the hearing date, I ordered the parties to dispose the Appeal by way of written submissions. Both sides adhered to the said order hence this Judgement.

Submitting on the **1st** and **5th** grounds, it is the Appellant's Counsel assertion that the trial Magistrate concluded the matter in favour of the Respondent with the facts which were not pleaded in the Plaint against the issue which was before the Court that:

"Whether there was an agreement for an overdraft facility between Plaintiff and Defendant and whether the purported facility agreement dated the 18th day of April, 2012 is certainly and binding to the Plaintiff".

The Appellant pointed the **last paragraph in page 9** of the Judgment which stated that the court was satisfied with the Plaintiff's testimony that he was forcefully arrested and locked in the room by some people sent by Appellant and forced the Respondent to sign the document. Neither, the Respondent was never given an opportunity to call a lawyer or relatives, but just forced to sign the Agreement.

From the above assertion, it is the Appellant's submission that, after the discovery of an overdraft, the Appellant approached the Respondent who is also their client and upon Agreement, the Plaintiff voluntarily signed the documents in respect of the pledge of the vehicle, and her shop. Further, the Respondent stock agreed to pay the money voluntarily as she did to some amount of money which was advanced to the bank.

It is the Appellant's further submission that it was wrong for the trial court to base only to the Respondent's asertion and give weight to the matters which were neither pleaded nor proved and yet relied for decision.

Submitting for the **2nd, 3rd, 4th** and **6th grounds of Appeal,** it is the Appellants submission that the trial Magistrate failed to analyse and consider the evidence of the Appellant in the trial

court decision despite of several documents which were admitted as evidence from the Appellant to prove their case. Instead, concluded that there was no agreement for an overdraft facility between the Respondent and the Appellant. It is the Appellant's concern that in evaluation of evidence, the trial Magistrate relied only on the evidence and testimony of the Respondent in reaching to the final determination.

The Appellant's Counsel further submitted that, from the chronological floor of the Judgment one will detect that the trial Magistrate only narrated what was stated by both parties during the hearing of the case. However, when the trial Magistrate was analysing the evidence which was submitted before the court he just ended by agreeing only to the facts and testimony presented by the Respondent and neglecting the evidence and testimony adduced by the Appellant which was supported by the evidence.

The Appellant's Counsel itemized the disregarded evidence by the trial Magistrate to be:

i. ***The bank statement which shows that Respondent withdraws the money form the Appellant ATM Machine which shows the date that was started to repay until when started to default;***

ii. ***The letter wrote by Respondent to request the bank on mode of payments; and***
iii. ***Overdraft facility letter agreement and the charter mortgaged deed.***

The Appellant's Counsel submitted that during trial, the Respondent did not present any evidence to prove and convince the court that she was arrested and locked in one of the rooms at the Appellant's bank. However, surprisingly the trial Magistrate decided to make a conclusion against the Appellant based on the unsupported statements from the Respondent by holding that there was no Overdraft Facility Agreement since the Respondent was forced to sign the overdraft facility Agreement.

From the above averment, the Appellant's Counsel prayed the court to allow the appeal, quash the impugned Judgement with costs and declare the Respondent's claim at the trial court baseless.

Opposing the grounds of Appeal, the Respondent's Counsel averred that, during trial, the evidence before the court led by the Plaintiff was to the effect that, the said Loan Agreement was uncertain and could not bind the Respondent as it was entered with undue influence and not by her free consent. Further, the evidence revealed that the Respondent had not taken any money

from the Defendant which gave rise to the Loan Facility Agreement.

In addition, it is the Respondent's concern that the said Agreement is in a form of a letter and not Agreement and one can ask if the same is certainty a Loan Agreement or not.

The Respondent further submitted that, during defence, DW1 the only defence witness failed to disprove that the Plaintiff signed the Loan Agreement and mortgage her vehicle and stocks voluntarily and freely without undue influence. Moreover, DW1 was not in employment by the time all the transactions took place and that he was testifying on hearsay evidence which is contrary with the law.

Further, it is the Respondent's concern that, if the she stole the money from Appellant's ATM, then why the Appellant did not report the matter to Police.

In the event therefore, the Respondent prayed the court to dismiss the entire Appeal with costs.

In determining the **1st** and **5th grounds of appeal** of which both focus to the Appellant's concern that the trial Magistrate erred in determining matters which were not pleaded, I had an opportunity of going through the Respondent's Plaint.

Concentrating to the same, it came to my knowledge through the contents in the Plaint the Plaintiff's the Respondent's major claim against the Defendant is for the court's declaration that the purported **Facility Agreement dated 18/4/2012** between the parties is uncertain and not binding as against the Plaintiff. Further, the Plaintiff prayed the court to declare the Defendant's intended attachment and sell of the Plaintiff's vehicle with **Registration No. T 466 CDD Toyota Rav 4** and her **business stocks** is unreasonable.

Unfortunately for the Respondent herein, I have to declare that, from the said entire contents and its Plaint, I have failed to locate anywhere the averments of the Respondent's claim of being held fugitive in one of the rooms at the Appellant's premises and been induced to sign an Overdraft Facility Agreement. Further, I have read the trial court's proceedings and from the same, I have noted that the issue of being induced was at the upper front and in fact took a big part of the Respondent's complaint against the Appellant herein.

Indeed, the said point/claim was highly taken up by the trial Magistrate and constructed a base of the trial court's decision declaring that there was no valid Agreement between the parties upon being satisfied that there was an inducement on the part of the Respondent herein.

At this juncture, let me expound about variance between **pleading** and **proof in law.** It is well settled that a party can be permitted to adduce evidence on the basis of the case pleaded by him in his pleading and he cannot set up a case inconsistent with his pleadings. This principle was swell elaborated in one of the Indian's case of ***HARIHAN PRASAD SINGH V. BALMIKI PRASAD SINGH, (1975) 1 SCC 212 AIR 1975 SC 733: (1975) 2 SCR 932; where it was held that:***

> *"No amount of proof can substitute pleadings which are the foundation of the claim of a litigating party."*

The purpose is in two folds;

First, is to appraise the opposite party, distinctly and specifically, of the case he is called upon to answer, so that he may properly prepare his defence and may not be taken by surprise. **Secondly**, is to maintain an accurate record of the cause of action as a protection against a second or subsequent proceeding founded upon the same allegations as it was state in the case of ***SIDDIK MAHD. SHAH V. SARAN, AIR 1930 PC 57.***

The fundamental rule of pleading is that a party can only succeed on the basis of what he has **pleaded** and **proved**. He cannot succeed on a case not set up by him. He also cannot be permitted to change his case at the stage of trial if it is inconsistent with his pleadings. Such variation would cause surprise and confusion and is always looked upon by courts with considerable disfavour and suspicion. See ***NARENDRA V. ABHOY, AIR 1934 CAL 54 (FB).*** It will also introduce a great amount of uncertainty into judicial proceedings, if final determination of causes is founded upon inferences, at variance with the pleadings of the parties. On this point one can refer the Indian cases of; ***"ESHANCHUNDER SING V. SAMACHURN BHUTTO, (1886) 11 MIA 7: 6 SUTH WR 57 (PC); TROJAN AND CO. V. RM. N. N. NAGAPPA CHETTIAR, AIR 1953 SC 235: 1953 SCR 789; and NAGUBAI AMMAL V. B. SHAMMA RAO, AIR 1956 SC 593: 1956 SCR 451."***

Whether or not a particular plea has been raised must be decided by reading the pleading as a whole keeping in mind the substance rather than the form of pleadings. Where parties are aware of the controversy and go to trial with full knowledge that a particular question is at issue, **absence of specific pleading**

is a mere irregularity. Finally, a pure question of law can be raised at any state if this irregularity happens.

In the book of ***PLEADINGS AND PRACTICE (With Model Forms of Plaints and Defences) Eighth Edition in Two Volumes at page 50. The famous Author N. S. BINDRA,*** stating about the principles and test for upholding the decision of a plea not covered by pleading and issues struck in the trial Court summarised as follows:

> *"**First,** that the parties must have fully known before going to the trial that the new plea taken would be thrashed out and decided in the suit to have a bearing on the ultimate result of the suit. None of the parties should be taken by surprise on account of a new plea foreign to the pleading of the party raising it.*
>
> ***Second** that the opponent of the party setting up the new plea must have accepted the challenge of the said plea without objection as to its absence in the pleading or issue by adducing rebutting evidence or otherwise dealing with the same.*

__Third__ that the party challenging the plea must have reasonable opportunity to meet it effectively and to adduce evidence against the said plea.

__Forth__, that the court must see that by allowing one party to raise a new plea or case not pleaded in his pleading, or for which no issue was framed, no prejudice or injustice is done to the other party."

The above conditions are relevant in order to harmonize the trial and focus to the determination of the parties' pleadings to **command fair decision**. This is to say that Plaintiff shall succeed or fail on his own pleadings and evidence and not on basis of any mistake committed by Defendants or any kind of an afterthought.

Looking at instant Appeal, it is my firm observation that, the Respondent during trial, came up with the afterthought new facts to accommodate her case. Had it been that the facts of being held fugitive and induced to sign the Agreement were in the Plaint, there could have no any legal irregularity as it ***is a general principle that the court cannot consider or deal with issues that were not canvassed and pleaded.***

It is from the above explanation, **I am satisfied that the learned trial Magistrate indeed decided the case before him contrary to the law by entertaining the facts which were not pleaded and the same formed the basis of the trial court decision. In the event therefore I accordingly sustain and find the 1st and 5th grounds of appeal with merits.**

The **2nd, 3rd, 4th and 6th** grounds of Appeal are all about the trial Magistrate error to analyse the Appellant's evidence and take the same into consideration for decision. Having gone through the entire proceedings of the trial court and submission by the Appellant's Counsel, indeed I have found that there is no anywhere in the entire judgement that the four exhibits that have been tendered for evidence in favour of the Appellant herein during trial have been analysed. I can say without any hesitation that the trial court didn't exhaust the evidence analysis and have failed to consider some serious material facts from those evidences. In absence of such analysis it is obvious that the omission is contrary to the law. Further, the said omission indeed in my firm observation lead the Magistrate into an the erroneous conclusion as it is clear from the Judgement that the trial Magistrate have gravely failed to **address, analyse** and **weigh**

the evidence of both sides, but rather concentrated to the Respondent's testimony of which was **neither pleaded nor proved** as said earlier.

Looking at **Exh. 1**, which was an Overdraft Loan Agreement, it is strange that the Respondent have denied to sign the said exhibit freely but rather she signed out of duress. This fact was neither pleaded nor proved. Under this situation, the trial Magistrate cannot rely **on the mere words** and leave the evidence which in fact the Respondent herself submitted for evidence without showing and prove that indeed there was duress. Under the situation, I expected the Respondent to line up the witnesses that could appear before the court and testify that at least the Respondent had shown concern that she was forced and report the matter to the relevant Authorities about this serious duress. In my firm observation, it is quite strange for someone to be forced to sign some documents on serious commitment and still keep quite until the time she instituted the case and yet, the said claim be omitted in her Plaint. Under the circumstances, the Respondent was expected to report the matter to the Police so that investigation can be conducted to that effect. However, that was not the case.

Referring to **Exh. P1,** there are some serious clauses that I have come across which carries some serious and heavy commitment which if the Respondent was to sign an agreement under duress and still keep quiet, one has to ask so many question. Not only that, but, one can ask as to how some very personal information can land into a contract which one was forced to sign and without herself be part of the said Agreement. Eg. How can a bank know its client's car registration number and the business at Kariakoo without the knowledge from the client herself?

Referring to this fact, **Clause 7** states about the Security of the loan that the Respondent had placed in terms of any default. The **Chattel Mortgage over** the vehicle with Registration **No. T 466 CDD** and **Pledge of Stock in shop located at Kariakoo Mchikichini** are all the very personal particulars that they ought to be availed by the loan beneficiary herself.

Again, referring to **Exh. D1** it is undisputed fact from both the Appellant and the Respondent that the Respondent herein maintains a bank account with the Appellant. I have referred to the said Exhibit of which indeed, according to the transactions therein, the Respondent withdrew some amount in different occasions until such amount was detected by the Appellant as

seen in Exh. D1, the bank account. Further, it is in thje same statement that the Respondent was able to repay the Appellant the sum of **Tshs. 20,000,000/=** as well stated by the Respondent herself in **Exh. D2** a letter from the Respondent to Appellant herein by admitting that she has paid and that she is praying for 24 months to pay the remaining balance. For ease of reference, the contents of the said letter **(Exh. D2)** deserves to be quoted as herein below:

> ***"..........Nakubali kuwa nilichukua fedha kwenye account yangu, fedha ambazo sikuwa nimeweka. Lakini nimerudisha kiasi cha Sh. 20,000,000/=. Nilikuwa naomba kiasi kiiichobaki niweze kurudisha kwa kipindi cha miezi ishirinina nne. Pamoja na riba....."***

The above contents tallies with the Respondent's bank account statement which was tendered before the court as evidence as **Exh. D1** respectively. This cannot be a coincidence, but a reality. Under these circumstances and evidence, how comes the Respondent at this point deny her own letter **Exh. D2?**

Again, referring to **Exh. D2,** if at all the Respondent was still denying the letter, to my considered opinion, it was wise for her to pray the court to refer the said letter to the Handwriting Bureau for expert opinion about the handwriting to ascertain if the letter was really from her handwriting or not. However, that was not the case. This shows how weak and slack the Respondent was in proving her case. If at all there was such a request, it could have been helpful movement from the Respondent as the handwriting expert could also assist on the authenticity of the Respondent's signature which appears in all the documents, from **Exh. P1, Exh. D1, Exh. D2, Exh. D3** and **Exh. D4** respectively, which according to my bear eyes appears to be the same.

All the above facts were supposed to be looked at and analysed by the trial Magistrate before reaching into the conclusion in his Judgement.

At this juncture again, coming back to the Judgement in issue, as we have seen what the trial Magistrate was supposed to do before reaching into the decision in the Judgement, it is imperative that I revisit the meaning of "**Judgment".** The word Judgment has been defined under **section 3** of the **CPC** as:

"Judgment means the statement given by a Judge or Magistrate of the grounds for the decree or order."

In determining the second set of grounds of appeal, I ask myself whether the trial Court decision / Judgment qualified to be termed as a Legal Judgment. The next question is, what are the necessary contents of the Judgment. In order to answer this question properly, let me refer to the book *"CIVIL PROCEUDRE IN TANZANIA STUDENT MANUAL" by my late learned brother Chipeta J. when he said:*

> *"What, then, is meant by the term "Judgment?" in a civil suit, a judgment may be defined as a reasoned account and analysis of the evidence, findings of fact thereon, an exposition of the principles of law applicable to such facts, and the decision as to the rights and liabilities of the parties to the suit. In other words, a judgment is a written document which resolves the issues in a suit and finally determines the rights and liabilities of the parties in the suit. In the language of the Civil Procedure Code, a judgment means the statement given by the judge or the Magistrate of the grounds of a Decree or Order (see section 3, Civil Procedure Code.)"*

In the instant case, the decision of Hon, trial Magistrate dated **03rd of May, 2017** does not conform with the qualification of a legal Judgement as seen above, failure of the above, I find the remaining grounds of Appeal successful.

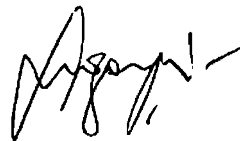
In the event where I have appreciated all grounds of Appeal herein to have substance and succeeded, the instant **Appeal is accordingly allowed.**

I further, proceed to quash and set aside the decision of the **District Court of Ilala at Samora in Civil Case No. 148 of 2014** accordingly.

The Appellant deserves to have its costs from the Respondent respectively.

It is so ordered.

Right of Appeal Explained.

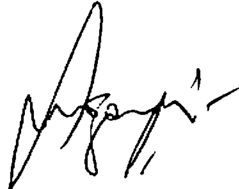


L. E. MGONYA

JUDGE

10/03/2020

Court: Judgment delivered in my chambers in the presence of Mr. Mohamed Muya, Advocate for the Appellant, the Respondent in person and Ms. Janet RMA, this 10th day of March, 2020.



L. E. MGONYA
JUDGE
10/03/2020