IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC: CIVIL APPEAL NO.43 OF 2020

(Arising from the District Court of Nyamagana Civil Case No.19 of 2018)

SAGIA KING MASABA ..... APPELLANT

VERSUS

BAYA KUSANYA MALAGI ..... RESPONDENT

JUDGMENT

Date of last Order: 23.03.2021

Date of Judgment: 30.03.2021

A.Z.MGEYEKWA, J

The appellant herein came to this court armed with a Petition of Appeal seeking to challenge the decision of the District Court of Nyamagana in Civil Case No. 19 of 2018; the first trial court delivered the judgment in favour of the respondent.

To appreciate the issues of contention giving rise to the present appeal and on which the parties to this appeal have locked jaws, I find it appropriate to revisit the background of the present matter; the parties to

the present appeal were also parties in Civil Case No. 19 of 2018 before the District Court of Nyamagana.

According to the Plaint the cause of action against the appellant was founded on payment of Tshs. 25,000,000/= which was unpaid, arising from dishonoured cheques drawn by the appellant in favour of the respondent as payment for the purchase of Yotung bus. It was not disputed that the parties had an oral agreement that the respondent should sell to the appellant a Yutong Bus with Reg. No. T 822 DGT. It was not disputed that the respondent deposited cheques of different date same amount to the Equity Bank, the said cheques were admitted in evidence as Exhibit P1 collectively. However, the said cheques were dishonoured upon presentation through Equity Bank, Mwanza Branch at Nyamagana.

It is not disputed that the appellant was not notified that the cheques were dishonoured. The respondent contacted the appellant on the misdeed that had occasioned and requested the appellant to settle the debt but the appellant paid only Tshs. 5,000,000/=. The respondent was not pleased hence he lodged a suit at the District Court of Nyamagana.

The trial court determined the case in which the respondent herein successfully sued the appellant for alleged breach of contract. The Judgment thereof was pronounced on 28th March, 2020.

Consequent upon that, the appellant filed the present Civil Appeal No. 43 of 2020 seeking this court to overrule the decision of the trial court. The appellant has lodged four grounds of appeal as follows:-

1. *That, the trial court erred in law and facts for its failure to recognize that the contracts were between three parties.*
2. *That, the Hon. Court erred in law and fact for holding that the appellant liable without proof.*
3. *That, the trial court wrongly admitted evidence hence reached a wrong decision.*
4. *That, the trial court erred in law and fact for entering judgment in favour of the respondent.*

Following the global outbreak of the Worldwide COVID - 19 pandemic (Corona virus), the hearing was conducted via audio teleconference, the appellant had the legal service of Mr. Mwita, learned counsel while the respondent enjoyed the legal service of Mr. Muyengi, learned Advocate. Both parties agreed to conduct the hearing by the way of written submissions whereas the applicant filed his submission in chief on 15th March, 2021. The respondent filed his reply as early as 19th March, 2021. Both parties complied with the court order.

It was Mr. Mwita. The learned counsel for the appellant who started to kick the ball rolling. Mr. Mwita opted to combine all the four grounds of appeal and argue them together. He submitted in length but straight to the point. Regarding the ground that the trial court failed to recognize that the contract was between three parties, the appellant' Advocate argued that the parties impliedly admitted the involvement of Equity Bank as the third party to contract by not inquiring its appearance to check the bus and take photos of the bus which its payment is the subject matter in the case. To support his position he referred this court to page 5 of the trial court judgment.

Mr. Mwita went on to argue that the respondent gave the bank a blue card and sale agreement they agreed until the transfer of the name from the respondent to the appellant then the bank could transfer and pay the respondent a total sum of Tshs. 180,000,000/=. Mr. Mwita fortified his submission by referring this court to pages 5 and 6 of the trial court judgment. He insisted that the Equity Bank was a necessary party since the sale agreement was with the bank. To bolster his argumentation the learned counsel for the appellant cited the case of **Abdullatif Mohamed Hamis v Mehboob Yusuf Osman**, Civil Revision No.6 of 2017 whereas the Court of Appeal of Tanzania adopted the Indian case of **Benares**

Bank Ltd Bhagwands, A.I.R (1947) All 18, the court laid down two tests of necessary party to suit; one being the court must not be in a position to pass an effective decree in the absence of such a party. Second being there has to be a right of relief against such a party in respect of the matter involved in the suit. He argued that they adopted the two tests and the same are applicable in the instant case, a party of reasoning, a necessary party is the one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed.

It was his view that in that perspective the court would not pass the judgment to the respondent because the same would be of no practical utility to the respondent. Mr. Mwita went on to submit that Equity Bank was a necessary party to the suit hence its non-joinder in the suit rendered an ineffective decision of the court.

Submitting on the third and fourth grounds that the trial court wrongly admitted evidence hence reached a wrong decision as a result it entered a judgment in favour of the respondent. Mr. Mwita contended that the trial court did not analyse the evidence on the record but based its decision on mere facts without any proof. To support his position he referred this court to page 3 of the judgment, three cheques were drawn

from Equity Bank by the appellant to pay the balance to the respondent. He further argued that it is settled law that once a cheque is dishonored by either nonpayment or non-acceptance the holder of the instrument must give notice in respect of the same as prescribed under section 48 (a) of the Bill of Exchange Act, Cap. 215. Insisting, he argued that the evidence of the respondent was weak to prove that he contacted the appellant on the dishonored of the said cheques.

Mr. Mwita did not end there, he argued that the evidence on record shows that the respondent once presented the cheques (Exh.P1 collectively) the same was dishonored. He added that the respondent did not notify the appellant by notice contrary to section 48 (a) of the Bill of Exchange Act, Cap. 215. He also cited the case of **Apronius Mutalemwa Muzo v Oscar Batalingaya Kombo and Other**, Civil Appeal No. 215 of 2017. He added that the respondent's act of selling the bus caused the appellant to suffer loss as his matrimonial house was sold by the bank.

On the strength of the above submission, Mr. Mwita beckoned upon this court to allow the appeal with costs.

On his part, Mr. Muyengi, learned counsel for the respondent, strongly resisted the appeal. He opted to consolidate the first and second grounds and argue them together. He argued that the contract was not between

three parties. He added that this ground was not raised at the trial court neither in the appellant's pleading. Mr. Muyengi stated that the appellant in his written statement of defence admitted that the contract was between two parties. He went on to state that the agreement was between two parties and the appellant has admitted the same in paragraph 5 of his written statement without mentioning that Equity Bank was a party to the said contract. The learned counsel went on to argue that the appellant has never mentioned that the Equity Bank was liable to pay any amount of money.

Mr. Muyengi continued to argue that it is settled principle of law that matters not pleaded nor raised during trial cannot be raised during the appeal. To support his submission he cited the case of **Hotel Travetine Limited and 2 Others v National Bank of Commerce Limited** (2006) TLR 133. He insisted that the appellant never stated during the trial or in his pleading that the contract was contrary to the above established principle of law. He went on to state that the respondent produced evidence which was admitted as Exh. P1 to prove his claim. He added that the appellant admitted to the majority of facts that were pleaded in the respondent's Plaint including the fact that the appellant was indebted to the tune of Tshs. 25,000,000/=. Mr. Muyengi valiantly argued that this is

enough proof that the respondent claims of Tshs. 25,000,000/= are valid. Thus, his grounds are demerit.

On the third and fourth grounds that the appellant complaints that the court wrongly admitted evidence hence reached a wrong decision and entered a judgment in favour of the respondent. He submitted that the trial court decision was based on evidence adduced by the respondent which included three cheques that were tendered and admitted as Exh.P1. He added that the appellant did not object the tendering of the said cheques, he admitted the issuing of the three cheques in a tune of Tshs. 30,000,000/= which were dishonoured. Mr. Muyengi lamented that it is not true that the respondent failed to notify the appellant once the cheques.

It was Mr. Muyengi's further argumentation that the allegation that the respondent never gave notice to the appellant contrary to the Bill of Exchange Act not only is false but also such issue was neither raised by the appellant in his written statement of defence nor during the trial. He added that it was not right to raise such grounds at this juncture. To bolster his submission he referred this court to the case of Hotel **Travertine Limited and 2 Others v Bank of Commerce Limted** (2006) TLR 133.

On the strength of the above submission, Mr. Muyengi beckoned upon this court to dismiss the appeal with costs.

Rejoinder, Mr. Mwita reiterated his submission in chief. Insisting, he argued that the Equity Bank was a party to the suit because it was involved fully in the transaction. To fortify his submission Mr. Mwita referred this court to pages 5 and 6 of the typed judgment and insisted that there is a Misjoinder of necessary parties to the suit. The learned counsel for the appellant insisted that the law under section 48 (a) of the Bill of Exchange Act requires another party to be notified and the notification must be proved. He lamented that the appellant testified that the respondent did not notify him.

Mr. Mwita distinguished the cited case of **Hotel Travertine Limited** (supra) with the instant case that the circumstances of the case were different.

In conclusion, the learned counsel for the appellant has thus urged this court to allow the appeal with costs.

I have given careful consideration of the record of the trial court and the first appellate court as well as the submissions made by the learned counsel for the appellant and the respondent and realized that the central issue for determination is *whether or not the present appeal is meritorious.*

In determining the instant appeal, I will be guided by the canon of civil justice which suggests that "*the person whose evidence is heavier than that of the other is the one who must win*" - **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113.

Addressing the first and second grounds, which relates to non-joinder of party. The appellant's Advocate is complaining that the Equity Bank was a necessary party. I have perused the records of the trial court and realized that the respondent filed a suit under summary procedure against the appellant. The respondent was demanding Tshs. 25,000,000/= and general damages for breach of contract to mention a few.

It worth noting that the choice of whom to sue, lies on the plaintiff who has the duty to show the cause of action against the person who she/he sues. In the matter at hand, the respondent chose the appellant as the proper person to sue since he is the one who breached the agreement. Before and during the hearing the appellant did not raise his concern that the Equity Bank was a necessary party to the suit.

The records of the trial court show clearly that the parties framed issue for determination as follows; whether there was a contract between the plaintiff and defendant, whether the parties fulfilled their obligation and whether there was a breach of contract by the defendant, and to what

reliefs are parties entitled to. The issues were discussed and determined without raising the issue of the necessary party. I have perused the written statement of defence the issue of the necessary party was not raised.

I am in accord with the learned counsel for the respondent that this is a new issue that was not determined at the trial court. The appellant was required to confine himself to the pleadings which are on the court record. In my respectful view, it is not correct for the appellant to come before this court claiming that Equity Bank was a necessary party while he did not raise the same at the trial court. The appellant's evidence was supposed to confirm what he stated in his written statement of defence. In the case of **Yara Tanzania Limited v Charles Aloyce Msemwa t/a Msemwa Junior Agrovet & 2 Others**, Commercial Case No. 5 of 2013, Mwambegele J (as he then was) held that:-

> " *It is cardinal principal of law of civil procedure founded upon prudence that parties are bound by their pleadings... If I may be required to add another persuasive authority from Nigeria, I would add* ***Adetoun Oledeji (Nig) Ltd v Nigeria Breweries*** *PLC (2007). In which it was also categorically stated that it is settled law that parties are bound by their pleadings. That is the position of the law in Nigeria as well as in this Jurisdiction. See* ***Peter Karanti and 48***

others v Attorney General and 3 Others, *Civil Appeal No. 3 of 1988 at Arusha (unreported)." [Emphasis added].*

Equally, in the cases of **James Funk Gwagilo v Attorney General**, Civil Appeal No.67 of 2001 (unreported) and **Hotel Travertine Limited and 2 Others v National Bank of Commerce Limited** (supra) the Court of Appeal insisted that:-

> *" The issue of acceptance by conduct, if all available,* ***should have been pleaded*** *and argued before the learned trial judge. As a matter of general principle, an appellate court cannot allow matters not taken or pleaded in court below, to be raised on appeal." [Emphasis added].*

Based on the above authority, it is clear that the appellant was required to plead the same in his written statement of defence to allow the parties to argue on it and the court to determine the same.

Addressing the third and fourth grounds of appeal that the trial court wrongly admitted evidence hence reached the wrong decision and wrongly decided in favour of the respondent. The evidence on record shows that on 30th December, 2017, 30th January, 2018, and 28th February, 2018 the appellant drew three cheques with Equity Bank. However, the cheques were returned dishounoured. To substantiate his submission the respondent tendered several cheques which were

collectively admitted as Exhibit P1. The law requires that once a cheque is dishonoured the holder must be notified. Section 48 (a) of the Bill of Exchange Act, Cap. 215 [R.E 2019] state that:-

> *" 48. (a) where a bill is dishonoured by non-acceptance, and notice of dishonoure is not given, the rights of a holder is due course subsequent to the omission shall not be prejudiced by the omission.*

Applying the above provision of the law, the respondent was required to notify the appellant once the cheques were dishonoured. On his part, the respondent's Advocate admits that the respondent failed to notify the appellant once the cheques were dishonoured however, he notified the appellant on the bounced cheques.

In the typed trial court proceedings specifically page 32 the appellant admitted that he paid the respondent Tshs. 180,000,000/= and the remaining balance was to be paid in due course. The appellant testified further that he paid the respondent Tshs. 5,000,000/= and the remaining balance was Tshs. 25,000,000/=. The appellant on page 33 of the typed court proceedings testified further that he once paid the amount through cheque but the same bounced. Therefore, it is clear that the appellant was aware that the cheques were dishonoured.

In my view, as long as the appellant admitted that the cheques bounced the same suffice to mean that he was aware that the outstanding balance was unpaid. I differ with the learned counsel for the appellant that the appellant was not notified that the cheques were dishonoured. I am saying so because in his testimony he admitted that the cheques bounced that means he had the obligation to fulfill the contractual terms by paying the remaining balance timely not otherwise.

For the avoidance of doubt, I have read the case cited by Mr. Mwita; **Apronius Mutalema** (supra). In the cited case the cheque was presented to the bank for encashment but it was dishonoured and there was no any endorsement showing that the cheque was returned to drawer. There was no proof that whether the cheque was presented to the bank.

In my view, this case is distinguishable from the instant case. In the instant case, unlike the cited case above, the dispute is on notification. The appellant admitted that the cheques were dishonoured and he was aware that the remaining balance was not paid. Therefore, he cannot claim now that he was not notified while he was aware that he is indebted after being informed by the respondent. Therefore, the trial court was

right to decide the case in favour of the respondent because the respondent's evidence was heavier compared to the appellant's evidence.

For reasons canvassed above, I find the grounds of appeal raised by the appellant are demerit.

Guided by the above findings and authorities, I find this appeal has no merit. Therefore, I proceed to dismiss it without costs.

Order accordingly.

DATED at Mwanza this 30th March, 2021.

A.Z.MGEYEKWA

JUDGE

30.03.2021

Judgment delivered on 30th March, 2021 via audio teleconference whereby Mr. Muyengi, learned counsel for the respondent was remotely present.

A.Z.MGEYEKWA

JUDGE

30.03.2021

Right to appeal fully explained.