IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CIVIL APPEAL NO 4 OF 2021

(Originating from the decision of the District Court of Kyela in Civil Case No. 1 of 2019)

BETWEEN

LETSHEGO BANK(T) LTD .....APPELLANT

VERSUS

MWANGASA AGNESS .....1ST RESPONDENT

KENNETH HAONGA .....2ND RESPONDENT

JUDGMENT

A. A. MBAGWA, J.:

The appellant was aggrieved by judgment and decree of the District Court of Kyela in Civil Case No. 1 of 2019 in which the respondents sought and were granted a decree against the appellant for permanent injunction from selling the motor vehicle with registration No. T112 BJU Toyota Ipsum owned by second respondent and declaration for the appellant not to interfere with ownership of a motor vehicle owned by the second respondent.

The brief account of the matter is that 1st respondent was a business woman who owned shops in Kyela and Mponela area in Malawi. Sometimes on 24th June, 2017, the appellant advanced a loan to a tune of Tsh. 20,000,000/= to the 1st respondent while the 2nd respondent stood as the guarantor. The loan was secured by motor vehicle with

registration T112 BJU owned by the 2nd respondent and other items from the 1st respondent. In 2018 the 1st respondent shop was burnt hence she stopped paying the loan. As such, the appellant advertised to sell the mortgaged properties. The respondents instituted a suit against the appellant for permanent injunction not to sell the mortgaged motor vehicle and interfere with its ownership. The appellant refuted the claim and in her written statement of defence raised a counterclaim of Tsh. 20,752,321.64 which was the outstanding loan amount and interests thereto together with recoveries costs. No reply was filed by the respondents to the counterclaim.

When the suit was ripe for hearing, the trial court framed issues in the main suit together with the counterclaim. To prove the case, the 1st respondent was the sole witness and presented six documentary exhibits which were collectively received and marked P1. On the other hand, the appellant had one witness (John Kilango) with nine documents marked as Exhibit D1 and D2 collectively. Upon hearing the parties, the trial court was satisfied that the 1st respondent proved the claim and ordered the appellant not to sell the second respondent's motor vehicle. Dissatisfied with the decision, the appellant filed a memorandum of appeal containing the following five grounds;

1. That the learned trial magistrate erred in law by failing to make findings on the entire counter claim raised by the appellant, notwithstanding that it was not opposed as the plaintiffs did not file their reply to counter claim;

2. That the learned trial magistrate erred in law and in fact by confusing the point of determination under third and fourth issue with the erroneous interpretation over the legality and extent of clause 8.2.3 of the loan agreement in isolation with the entire loan agreement;

3. That the learned trial magistrate erred in law to rule out that the contract was frustrated by fire incident that it was covered under the insurance clause of the loan agreement without proof of existence of fire, its cause and extent of destruction of the first respondent's property;

4. That the trial court erred in law by failing to exercise its discretion judiciously when it totally dispensed with appearance of the second plaintiff for the entire trial given the fact that it was his property that was under probe; and

5. That the trial court erred in law and in fact for failure to properly evaluate the evidence of the appellant on the required balance of probability.

When the appeal came for hearing, the appellant was represented by Ignas Ngumbi while the 1st respondent had the service of Amadeus Mallya, both learned advocates. The appeal proceeded in absence of the second respondent. Parties agreed the appeal to be argued by way of written submission. Both parties filed their submissions in time.

It was submitted by Mr. Ngumbi that on 10/1/2019 when they filed their written statement of defence, they included a counterclaim and on 11/2/2020 when the suit went for final PTC the court framed issues for counterclaim but unfortunately the judgment has no findings on the counterclaim. Mr. Ngumbi continued to submit that the decree is defective for not having outcome on the counterclaim. To bolster his argument, he cited the case of **Runway(T) Limited vs Wia Company Limited & Another**, Civil Appeal No. 59 of 2015 CAT at Dar E Salaam. On that basis he prayed the proceedings and judgment of the trial court to be nullified.

Submitting on the second and third grounds, the counsel said that no evidence was given by the 1st respondent to prove the cause and extent

of destruction apart from investigation letter from OCCID for Kyela. The appellant continued to submit that the holding that the 1st respondent was to be indemnified by the insurer on the alleged fire incident does not fall under insurance policy as the appellant was not the insurer rather a broker. He referred to the case of **Metropolitan Tanzania Insurance Co. Ltd vs Frank Hamad Pilla**, Civil Appeal No. 191 of 2018 CAT at Dodoma. The counsel said further that it was a misdirection on the part of the magistrate to examine legality of the insurance clause as it was not among the issues framed. Mr. Ngumbi added that insurance clause was limited to only one month and not exceeding Tsh. 800,000/= compensation.

On the fifth ground Mr. Ngumbi submitted that the 1st respondent did not discharge her duty to prove the case as required under section 110 and 111 of the Evidence Act [Cap 6 R: E 2019]. He continued to say that the appellant's evidence proved existence of loan with the 1st respondent which was also conceded by the 1st respondent. He was of the view that on the basis of that evidence, it was the 1st respondent who breached the contract by defaulting even before occurrence of fire. Based on that submission he prayed the appeal to be allowed with costs.

In contrast, the 1st respondent Mwangaza Agnes replied that the trial magistrate lumped issues framed in the main suit and counter claim hence the findings were made without separating them. She distinguished the case of **Runway (T) Limited** (Supra) in that in the latter the court did not determine counterclaim at all.

In the second ground it was submitted that the insurer is under obligation to indemnify the insured. As for clause 8.2.3 of the loan agreement she said that it was against insurance policy as it gave room for indemnifying upon proof of other person property destruction who is not party to the loan contract. She referred to the case of **Castellain v Preston** (1883)11 QBD 380 and Raoul Colinvaux in Law of Insurance, 3rd Edition, Sweet & Maxwell Limited, London 1970. She distinguished the case of **Metropolitan Tanzanian Insurance Co. Ltd** (Supra) for being irrelevant with the present circumstances.

Replying on issue of appearance of the 2nd respondent, she submitted that she was defending his interest as there was proof that he is in Zimbabwe and the court rightly proceeded under order IX rule 10 of the Civil Procedure Code [Cap 33 R: E 2019].

As to whether the 1st respondent has proved her case it was replied that the there was evidence that she had paid seven months instalments as

per terms of contract but failed when fire destructed her business and the bank was aware.

In rejoinder the appellant restated her submission in chief except that the case of Castellain was distinguished for being on insurance contract and that they had impliedly abandoned fourth grounds as they did not submit on it.

Having considered the rival submissions and the record of the appeal, I will decide grounds of appeal in the manner adopted by the parties.

To start with, the first complaint has two parts, **one** that the respondent did not file reply to counterclaim raised by the appellant in their written statement of defence. The 1st respondent did not respond on this issue. Filing counterclaim is governed by order VIII rule 9 of the Civil Procedure Code [Cap 33 R: E 2019], which provides that;

> ***Where in any suit the defendant alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of a cause of action accruing to the defendant before the presentation of a written statement of his defence the defendant may, in his written statement of defence, state particulars of the claim made or relief or remedy sought by him.***

And rule 11(1) provides for filing reply to counter claim it states;

Where a defendant sets up a counterclaim, the plaintiff and the person (if any) who is joined as a party against whom the counterclaim is made, shall each, if he wishes to dispute the counterclaim, present to the court a written reply containing a statement of his defence in answer to the counterclaim within twenty-one days from the date of the service upon him of the counterclaim.

It is the requirement of the law for the plaintiff to file defence to the counterclaim raised. It is also the law that once counter claim has been filed it is treated as a separate suit hence rules of pleadings apply equally and judgment may be entered or an order to proceed with hearing ***ex-parte*** may be made. See **Airtel Tanzania Limited versus Ose Power Solutions Limited,** Civil Appeal No. 206 of 2017, CAT at Dar Es Salaam (Unreported) and **Joe R.M. Rugarabamu v. Tanzania Tea Blenders Ltd** [1990] TLR 24 and

The respondents having not filed reply to counter claim the trial court was required to make necessary order in line with order VIII rule 12 of the Civil Procedure Code [Cap 33 R: E 2019] and not to leave it as it did.

The second limb is on defective decree, the appellant submitted that the decree is defective for not containing outcome on counterclaim while the 1st respondent replied that issues on counterclaim were determined together with the main suit. The law requires that if a counterclaim has

been set in written statement of defence, the court should make orders for it either being tried separately, striking it out or any other order. In this appeal the court acknowledged existence of counterclaim and framed issues thereto. I have gone through the judgment and found that indeed issues of the main suit and counterclaim were combined by the trial magistrate but the extracted decree has only relief and outcome on the main suit. Similar scenario was discussed in the case of **Runway (T) Limited** cited by the appellant and the court held that;

> ***Since, there was a counter claim with its reliefs sought, they ought to have been decided and their outcome reflected in the decree as required under rule 6(1) of Order XX of the (CPC. In the absence of the citation of the reliefs sought in the counter claim for which no order of the court was made in terms of Order VIII rule 12, we think it contravened the provisions of Order XX rule 6(1) of CPC with the effect of rendering the decree invalid.***

In the similar vein, the decree which is the subject of this appeal is invalid for not containing relief sought in the counterclaim for which no prior order had been made regarding its disposal. That being said and done, the first ground has merits.

Second and third grounds were argued together and the appellant submitted that clause 8.2.3 of the loan agreement was misinterpreted

by the trial magistrate for applying principles of insurance contracts while the 1st respondent is of the view that the said clause was set with bad intention. To canvass this issue the court took into account the provision of section 10 of the Law of Contract Act that parties are bound by the terms of contract they freely entered, see the case of **Philipo Joseph Lukonde v. Faraji Ally Saidi**, Civil Appeal No. 74 of 2019 and **Simon Kichele Chacha v. Aveline M. Kilawe,** Civil Appeal No. 160 of 2018, (both unreported).

Clause 8.2.3 of the loan agreement reads

> *8.2.3. Uharibifu wa jumla wa mali kwenye biashara*
>
> *Ikitokea uharibifu wa mali kwenye biashara na mali za majirani wengine watatu kutokana na majanga ya asili, bima italipa mkopo uliobaki kwa awamu ya sasa ya mkopo na riba iliyopatikana na mkopo huo mwezi husika itasamehewa. Mkopaji atanufaika na mafao ya bima sawasawa na mkopo hadi kufikia shilingi laki nane (800,000).*

Going though clause 8.2.3 in exhibit P1 and D1 respectively it had two conditions **one,** the incident had to cover three neighbours, **two** it covered only the principal money and interest thereof in the respective month. In the plaint, the plaintiffs were not claiming the loan to be repaid through insurance cover rather what can be gathered from the reliefs sought was for injunction not to sell the motor vehicle and

interference with ownership. The insurance clause did not specifically relieve the 1st respondent from paying the loan rather was excused from paying principal amount and interest within a month of occurrence of the ***force majure.*** It is cardinal principle of law that parties to the suit should always adhere to what is contained in their pleadings. See **Charles Richard Kombe t/a Building v. Evarani Mtungi**, Civil Appeal No. 38 of 2021; **Barclays Bank (T) Ltd v. Jacob Muro**, Civil Appeal No. 357 of 2019 (both unreported).

Upon appraising the pleadings there is no where the 1st respondent pleaded illegality or otherwise of clause 8.2.3 of the loan agreement she had entered with the appellant. Moreover, there is nowhere the 1st respondent claimed the loan to be repaid through insurance cover, even issues which were framed had no bearing on clause 8.2.3 of the loan agreement.

I am also of the view that the trial magistrate fell into error when concentrated on propriety of the insurance clause contained in the agreement. To my understanding the condition was set to give assurance that the occurrence should be naturally and not self-motivated. It has to be noted that the 1st respondent adduced no evidence to show the source and cause of the outbreak of fire and that

the situation was rescued by people or authorities concerned so as not to affect her neighbours. It was upon the 1st respondent to lead evidence to show that the fire occurred as ***force majure*** as contained in the contract. To that extent this ground succeeds.

Regarding the fourth ground, the applicant in her submission in chief did not submit on it and during rejoinder he submitted to have abandoned it, hence no deliberation has been made on that respect.

On last ground Mr. Ngumbi submitted that the 1st respondent did not prove her case on the standard required. In reply it was submitted that there was evidence that the 1st respondent had paid seven instalments. It is a settled principle of law that, generally, the burden of proof lies on the party who alleges anything in his favour. It is also common knowledge that in civil proceedings, the standard of proof in each case is on the balance of probabilities. This means that the court will sustain such evidence which is more strong than the other on a particular fact to be proved. See **Jasson Samson Rweikiza Versus Novatus Rwechungura Nkwama,** Civil Appeal No. 305 of 2020, CAT at Bukoba (Unreported).

The 1st respondent alleged that she took a loan of 20,000,000/= to be repaid in twelve (12) instalments but managed to repay only seven

instalments. She failed to repay the remaining instalment after her shop got burnt and the loan was covered by insurance cover. In contrast, the appellant alleged that although the loan was covered by insurance the 1st respondent did not meet conditions set forth in clause 8.2.3 of the loan agreement to benefit from the insurance cover.

As discussed in ground two and three above, I am of the considered opinion that the 1st respondent failed to prove her case because **one,** there was no evidence to show that the fire was a ***force majure***, **two** the 1st respondent did not meet a condition that the incident should affect other three person, **three** no report on the fire incident was brought to the attention of the court for exhibit P1 dated 29/06/2018 fall short on source of fire and indicates that investigation is still going on, **four** the claim was not for declaration on legality or otherwise of the insurance clause contained in the loan agreement as it can be depicted from nature of relief sought in the plaint. As to whether the 1st respondent had paid seven or six instalments, the 1st respondent in her plaint pleaded that she had paid six instalments which tallied with the appellant evidence but when the 1st respondent was testifying in court she said that he repaid seven instalments and did not offer explanation if she continued to repay after institution of the suit. The 1st respondent was bound by what she had pleaded in pleadings. **Five** no assessment

on loss caused by the fire and the amount if at all that could cover the outstanding loan of the 1st respondent to the appellant. In the end, this ground succeeds as demonstrated above.

In view of the above, I allow the appeal. Accordingly, I hereby declare the trial court proceedings as a nullity and consequently I quash the judgment and set aside the decree of the trial court dated 18/12/2021. I further direct to rehear the suit and the counter claim in accordance with the law.

It is so ordered.

Right of appeal fully explained.

A. A. Mbagwa

JUDGE

27/04/2022

Court: Judgment delivered before E.R. Marley – Ag DR in the presence of Ngumbi Ignas, the learned advocate for appellant, the first respondent and in absence of the second respondent this 27th day of April, 2022.

THE HIGH COURT OF TANZANIA

E. R. Marley

Ag DEPUTY REGISTRAR

27/04/2022