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

CIVIL APPEAL NO. 19 OF 2021

DAVID NICHOLAS NYENDO.....APPELLANT

VERSUS

ALLY SALUM SALEHE.....1ST RESPONDENT

AFRICAN BANKING CORPORATION
TANZANIA LTD (BANC ABC) .....2ND RESPONDENT

JUDGMENT

Last Order: 13/05/2022
Judgment: 20/07/2022

MASABO, J.:-

The appellant herein was the plaintiff in Civil Case No. 121 of 2019 before Ilala district court where he sought to enforce his right over a house with Registration No. 70952 Plot 210 situated at Mwanagati area, Ilala Municipality in Dar es Salaam (the suit premise). The suit ended barren after it was dismissed for want of merit. In further pursuit of his right, the appellant is before this court armed with the following three grounds of appeal:

i. The district court erred in fact and law to dismiss the entire suit because of the default of repayment of the loan by the first respondent and the house in issue placed as a collateral without taking into account the existing agreement between them;

ii. The district magistrate erred in fact and law for failure to relate the reliefs sought by the plaintiff and the issues arose to settle the dispute,

iii. The trial magistrate erred in law and fact for failure to consider Exhibit PE3 which is the contractual agreement between the plaintiff and the second defendant.

The factual background to the case is intriguing. It is rooted in two separate agreements/business transactions. The first, is a credit facility agreement by which the 1st respondent obtained a credit facility of Tshs 120, 000,000/= from the 2nd respondent and secured the said sum with the suit premise. The second is an agreement for sale of motor vehicle by which the 1st respondent agreed to sell the plaintiff a motor vehicle at a consideration price of Tshs 37,000,000/=. The 1st defendant defaulted both agreements. He never paid the credit facility to completion and never delivered the motor vehicle to the plaintiff.

Later on, after negotiation with the 1st respondent, the plaintiff agreed to set off his claim against the 1st respondent by taking over the loan. The agreement was brought to the attention of the 2nd defendant. The plaintiff started to service the loan but things did not run smoothly between him and

the 2nd defendant. Although he had paid a substantive sum, the 2nd respondent notified him that a sum of Tshs. 123,591,108.96 remained outstanding as of 26th September 2018. Much as he was discontented as he had already paid a large sum through the 1st respondent's account, he requested for restructuring of the loan to enable him to smoothly repay the outstanding sum. The 2nd defendant turned down the proposal and threatened to sell the suit premise.

Aggrieved, the appellant filed a suit in which he prayed for a declaratory order that the money he had paid be considered. He subsequently prayed that the 2nd defendant be ordered to restructure the loan and deduct the amount already paid so that the plaintiff can be in position to repay the outstanding loan facility. After full trial, the court held that there was nothing to enforce in favour of the plaintiff as he was not a party to the credit facility agreement.

Hearing of the present appeal proceeded in writing *ex parte* the 1st respondent after he defaulted appearance. The appellant was not

represented. The second respondent enjoyed the service of Mr. Mohamed Muya, learned counsel.

Opening his submission, the appellant consolidated the 1st and 3rd ground of appeal and proceeded to argue that, during the trial, the plaintiff had the following three exhibits: Exhibit PE1, a sale agreement for the suit premise signed by the plaintiff and the 1st respondent; Exhibit PE2, an affidavit of consent sworn by the 1st respondent vide which he deponed that the plaintiff will pay off the loan owed to the 2nd defendant and Exhibit PE3, a letter from BankABC (2nd respondent) by which the 2nd respondent acknowledged the agreement between the appellant and the 1st respondent. He proceeded that, having admitted these exhibits, the court was bound to consider them positively in his determination but he surprisingly ignored them and insisted that the 1st defendant has defaulted payment of the loan while it was vivid through Exhibit PE3 that the 2nd respondent acknowledged the agreement and directed the plaintiff to present a viable proposal for repayment of the loan. He concluded that by ignoring Exhibit PE3, the trial magistrate offended the provision of section 89 (1) of the Evidence Act [Cap 6 RE 2019].

In regard to the second ground that there was a mismatch between the reliefs prayed by the plaintiff and the issues determined by the court, the plaintiff argued that as per the provisions of Order XIV rule 1 and 3 of Civil Procedure Code [Cap 33 RE 2019] the trial court is duty bound to frame issues for determination and the issues framed should match the prayers in the plaint. Surprisingly, the issues framed by the trial court were inconsistent to the prayers. He concluded that, the mismatch prejudiced him as it orchestrated the dismissal of his suit.

The 2nd respondent's counsel sternly resisted the appeal. Replying to the consolidated 1st and 3rd ground of appeal, he submitted that the appellant is an alien to the credit facility agreement. Thus, he can reap any benefit from it. He exemplifies that, as demonstrated through Exhibit DE1, the credit facility agreement dated 20th March 2013 was between the 1st and 2nd respondents. He added further that, the appellant claim concluded contrary to the mortged deed because, having mortgaged the suit house, the 1st respondent relinquished his right to dispose of the mortgaged premise until after the formal discharge of the mortgage. Thus, he had no capacity to dispose it by sale during the pendency of the mortgage. The purported

disposal by sale of the suit premise to appellant was wrong and since there was neither a formal consent or tripartite agreement between the appellant, the 1st respondent and the 2nd respondent, the appellant has no any claim against the 2nd respondent as he was not a party to the credit facility agreement.

As for Exhibit. PE2, he argued that, it has no weight in resolving the dispute as it was just an oath explaining that the 1st respondent and the appellant has an agreement by which the appellant undertook to pay off the loan through the 1st respondent's bank account. He argued further that, Exhibit PE3 is similarly devoid of any weight as it was a mere letter written by the 2nd respondent in response to the appellant's letter. He added that as this letter is not a contract, it would have been materially wrong for the court to ground a conviction based on the letter. The trial court cannot be faulted to have violated the provision of section 89 (1) of the Evidence Act as the exhibits tendered were all considered but found to be of no assistance to the appellant's case.

Rebutting the 2nd ground of appeal, Mr. Muya argued that the trial court committed no wrong as the suit was decided based on the issues framed during the final pre-trial conference which was conducted in the presence of all the parties. Closing his submission, he argued that the grounds of appeal is baseless and is maliciously instituted to inhibit the enforcement of loan recovery measures by 2nd respondent's.

I have considered the submission from both parties and the lower court records which I have painstakingly read. I prefer to start with the 2nd ground of appeal in which the appellant is challenging the aptness of the issues for determination. In preface, issues for determination are a road map for any trial. They draw the attention of the magistrate/judge and the parties to the precise matters which are in dispute. They are basically points of disagreement drawn from the material proposition of fact or of law to which the parties are at variance (affirmed by one party and denied by the other party (Order XIV rule 1(3) and (4) the Civil Procedure Code). Issues may not come from outside the pleadings unless the court deems it important in which case, they may be framed from witness statements or documents/exhibits rendered in court as per Order XIV rule 4). In **Oriental**

Insurance Brokers Limited v Transocean (Uganda) Limited [1999] 2 EA 260, cited by the Court of Appeal in **Astepro Investment Co. Ltd v Jawinga Company Limited,** Civil Appeal No. 8 of 2015, it was stated that:

> "A trial court may frame issues based on the evidence of the parties or statements made up by their counsel though the point has not been covered by the pleadings provided that that parties are afforded an opportunity to address the court on the new issues framed."

Framing of issues normally takes place during the final pretrial conference (FPTC) conducted by the trial court after the case file being remitted from a failed mediation pursuant (Order VIII rule 40) or at the first of hearing (Order XIV Rule 5). In the present case, there is no dispute that the trial magistrate discharged his duty by framing the following three issues for determination at the FPTC conducted on 27th August 2018, namely: 1*. whether there was an agreement between the plaintiff and the 2nd defendant regarding the former repayment of the 1st defendant's loan to the 2nd defendant; 2. whether there is a breach of fundamental terms of the said greement and 3. to what relief(s) are the parties entitled to*. As per the record, on that day, the plaintiff appeared in person and the 2nd respondent was represented by

the Mr. Muya learned counsel hence an assumption that they were consulted or made aware of the issues framed by the court. In the premises, I find the merit in Mr. Muya's submission that the appellant's complaint is an afterthought.

Regarding the alleged anomaly, I have examined the record to see if there was any anomaly in the issues framed. With respect to the appellant, I did not find any anomaly on the issues framed by the trial court as they reflect the points of variance. For easy of reference, the major assertion as appearing in paragraphs 4, 7 and 8 of the plaint are as follows:

> "4. That the plaintiff's claim against the defendants for unrecognizable of payment and agreement between the plaintiff and the defendants of loan of the first defendant in respect of the secured house PLOT NO 210 BLOCK 4 ILALA MUNICIPALITY, DAR ES SALAAM in which the plaintiff bought it in agreement to make a repayment of the remaining loan to the second defendant.
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> 7. That the plaintiff entered into agreement with the 1st defendant to repay the loan and then after the house will remain to be the property of the plaintiff.
>
> 8. That on 8th May 2015 at the consent of the bank the meeting made between the bank, the plaintiff and the 1st defendant and

> lawyer of the plaintiff and the first defendant and the bank represented by Mr. MAJULE at the bank office and all the parties agreed to restructuring the loan facility and the plaintiff to repay the loan granted to the 1st defendant.

All these assertions were denied by the 2nd defendant. Hence, they were material propositions from which the issues for determination ought to emanate. Comparing the proposition in these paragraphs and the prayers of the plaintiff against the issues framed by the trial court, I am constrained to agree with the 2nd respondent's counsel that the appellant's submission in support of the second ground is lucidly misconceived. The first two issues for determination are consonant to the points of disagreement between the parties and the last issue specifically deals with all the prayers fronted by the appellant. Needless to say, and as alluded above, there is no legal requirement that the issues should match with the prayers. Even if this was the case, it would have been superfluous for the trial court to turn every prayer into a separate issue for determination while he could do that in a single line as he perfectly did. The second ground of appeal is thus without merit.

Turning to the consolidated 1st and 3rd ground of appeal, it is trite that, a judgment must contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision (Order XX rule 4 of the Civil Procedure Code). Thus, when composing a judgment, a judge or magistrate is duty bound to analyze the transcription of testimonies of all witnesses and all the exhibits rendered in court. It is similarly crucial at this stage that credence be accorded to every witness as it is a cardinal law of evidence that every witness be entitled to credence and his evidence be believed unless there are good reasons for not doing so. A similar treatment is expected in respect of documents produced as evidence in court. As per section 89 of the Evidence Act [Cap 6 RE 2019]:

> 89.-(1) When a document is produced before a court, purporting to be a record or memorandum of the evidence, or of any part of the record of the evidence given by a witness in judicial proceedings or before any officer authorised by law to take that evidence, and purporting to be signed by a judge or a magistrate, or by any such other officer, the court shall presume-
> (a) that the document is genuine;
> (b) that any statements as to the circumstances in which it was taken, purporting to be made by the person signing it, are true; and
> (c) that such evidence was duly taken.

In the present case, it has been submitted and fervently argued that the trial court offended the provision above by failure to accord any weight to the documentary evidence produced in court by the plaintiff. In specific, it has been argued that in his judgment, the trial magistrate ignored exhibit PE1 containing the sale agreement between the appellant and the 1st respondent; Exhibit PE2 containing the affidavit of consent and Exhibit PE3, a letter by the 2nd defendants vide which she acknowledged the arrangement between the appellant and the 1st respondent.

In my scrutiny of the evidence on record, I have observed that much as it is true that the trial magistrate did not specifically mention these exhibits in his judgment, his analysis of the evidence on record is potent and free from misapprehension. He adequately weighed the evidence before him and made his findings based on the evidence on record. Through page 6 and 7 of the judgment, it has been demonstrated that the trial magistrate analyzed the evidence on record. He highlighted the points which were undisputed in evidence and the points to which the parties were at variance. In particular, he explicitly noted that the loan agreement between the 1st and the 2nd

respondent was still intact as there was no concrete evidence that it shifted to the appellant, a finding which I unreservedly subscribe to.

The fact that he did not specifically mention the three documents above does not suffice to fault the well-researched and reasoned judgment of the trial magistrate. Needless to emphasize, as correctly observed by the learned trial magistrate, the most crucial issue to be resolved first by the trial court was the existence/status of the agreement from which the suit emanated. Only after resolving this issue the court could proceed to the subsequent issues. As the suit emanated from the credit agreement it was incumbent for the court to satisfy itself whether the appellant derives any right from this agreement which he sought to enforce. As correctly held by the trial magistrate and argued by Mr. Muya, the appellant could not enforce the terms of the credit agreement to which he was neither a party nor a beneficiary.

Since the appellant's claim was based on existence of tripartite agreement for transfer/concession of rights, the burden rested upon him to prove the existence of such agreement. In the absence of a tripartite agreement

formally transferring and vesting the contractual rights and obligations into the appellant, there was nothing for him to enforce as he derived neither rights nor responsibilities from the loan agreement and the mortgage deed thereto. Entertaining the appellant prayers would have materially contravened the doctrine of privity of contract under which, the right to sue under a contract is a reserved right exclusively available to a person who is a party to the contract. The principle was espoused in English case of **Tweddle vs. Atkinson** (1861 EWHC J57 (QB), and cemented in a plethora of subsequent cases such as **Dunlop Pneumatic Trye Co. Ltd v Selfridge**, [1915] AC 847 and **Berswick vs. Berswick** (1966) Ch 538.

Much as a third party may exceptionally sue in certain circumstances, such circumstances do not exist in the present case as no concrete evidence was rendered in support of the purported assignment/concession of rights/obligations from the 1st respondent to the appellant. The sale agreement (Exhibit P1) which is purported to be the concession/assignment agreement is silent on the loan agreement and does not involve the 2nd respondent. All what it witnesses is the disposition of the suit by way of sale.

Nothing in this exhibit shows that the 1st respondent ceded his contractual rights and responsibilities to the appellant.

Although Exhibit PE2 and Exhibit PE3 indicate that there were certain arrangements purporting to transfer and vests the 1st respondent's contractual responsibilities into the appellant, such documents are insufficient to ground a judgment in favour of the purported transfer in the absence of a tripartite agreement setting out in clear terms the parties' covenants and deeds. It is to be further that, as per clause (f) of the Mortgage Deed (Exhibit DE2) the 1st respondent was duty bound not to attempt to create any mortgage or charge upon or permit any lien or encumbrance to arise on any part of the mortgage without the consent of impose off the 2nd defendant. Implicitly, by purporting to dispose of the collateral by way of sale, the 1st respondent erred as he acted contrary to the mortgage deed. The trial can certainly not be faulted in its finding.

In the foregoing, the appeal fails. The judgment and decree of the lower court are upheld and the appeal is dismissed in entirety. Considering the

circumstances of the case, I have found it fair and just that the costs be shared by each of the parties shouldering its respective costs.

DATED at **DAR ES SALAAM** this 20th day of July 2022.

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE