IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISRTY OF ARUSHA AT ARUSHA

CIVIL APPEAL NO.5 OF 2022

(C/f Civil Case No.1 of 2021 at the District Court of Karatu at Karatu)

NMB BANK PLC.....APPELLANT

VS

FABIOLA DEOGRATIAS MAAMI

T/A FABIOLA CURIO SHOP..... RESPONDENT

JUDGMENT

Date of last Order:10-8-2022

Date of Judgement:21-9-2022

B.K.PHILLIP,J

Aggrieved by the judgment of the District Court of Karatu at Karatu, the Appellant herein lodged this appeal on the following grounds;

i) That the trial Court erred in law and fact by admitting and relying on the Exhibit P1, hence reaching into an erroneous decision.

ii) That the trial Court erred in law and fact by not considering the written statement of defence filed by the Appellant hence rendered an erroneous decision.

iii) That the trial Court erred in law and fact by not adhering to its orders dated 7th January 2022 hence reached into an erroneous decision.

iv) *That the trial Magistrate erred in law and fact by not considering the evidence adduced by the respondent witness vis-vis cross examination done by the Counsel for the Appellant , hence reached an erroneous decision.(sic)*

The Appellant prayed that the proceedings of the trial Court be nullified and its judgment set aside with costs.A brief background to this appeal is that in the year 2021, the respondent herein instituted a case at the District Court of Karatu at karatu against the appellant herein claiming for payment of USD 24,958.53 which is equivalent to Tshs 54,908,766/= being amount of money for sales of various goods made by the respondent, Tshs 10,000,000/= being general damages for breach of contract for E-Commerce and Point of Sale services, interests on the decretal sum and costs of the suit. It was respondent's case she owns a Curio shop at Bashay Area in karatu District.She successful opened and maintained a bank account with the Appellant Bank to wit; Account Number 40910009353 in the name of Fabiola Deogratias Maami and was supplied by the appellant a Point of Sale (POS) Terminal/ Machine for her curio shop after signing the terms and conditions for E- Commerce and POS Merchant Contract. The respondent alleged that on 31st of August 2020, she sold various goods to three customers who were foreigners and paid her a total of USD 24,958.53 through her bank account aforesaid via the POS which approved the transaction and receipts were issued. She complied with all the required steps and conditions including taking the copies of the cardholder identification cards and their valid passports. Upon

requesting to be supplied with her Bank statement she realized that the said amount of USD 24,958.53 was not reflected in her bank account. She lodged her complaints to the appellant who promised to sort out the problem but nothing was done. Consequently, she served the appellant a demand notice for payment of the said sum of USD 24,958.53 as well as intimating her intention to institute a case in Court if the said amount would not be transferred to her Bank account. The appellant did not heed to the her demands, hence she filed her case against the appellant.

On the other hand , the appellant disputed the respondent's claims and alleged that the respondent is the one who was in breach of said contract for E- Commerce and POS Merchant service because she engaged herself in prohibited processing of consecutive fallback transaction which is in violation of banks visa , Mastercard rules and operating best practice and regulations. Moreover, the appellant claimed that the sales transactions alleged to have been done by the respondent were held due to the reason that the account owners were not present in Tanzania while the chargeback window was initiated. The appellant prayed for the dismissal of the respondent's case.

Upon failure of mediation the case was scheduled for hearing.The trial Magistrate framed three issues for determination; to wit;

i) Whether there was breach of Contract
ii) Whether the plaintiff (the respondent herein) suffered any damage

iii) What reliefs the plaintiff was entitled to.

As usual hearing commenced by the respondent giving her evidence.Upon the closure of the respondent's case, the defence case was scheduled for hearing. However, the appellant defaulted to enter appearance on the hearing date for the defence case. Consequently, the respondent's advocate prayed for judgment to be composed basing on the evidence adduced in Court by the respondent. The prayer was granted. The trial Magistrate composed his judgment which was in favor of the respondent. He ordered the appellant to pay the respondent a sum of Tshs 59,908,766/= being the equivalent of USD 24,958.53 and damages.

Back to the appeal in hand, the appeal was heard viva voce. The learned advocates Godfrey Saro and Samwel welwel appeared for the Appellant and respondent respectively.

Submitting for the first ground of appeal Mr. Saro argued that the respondent did not read out loud exhibit P1 after being admitted in evidence. He contended that failure to read out in Court an exhibit is fatal. He prayed that Exhibit P1 should be expunged from the Court's records. He cited the case of **Erick Ashery Vs Republic, Criminal Appeal No. 32 of 2020** (unreported) to cement his arguments.

With regard to the 2nd ground of appeal Mr. Saro argued that the trial Magistrate did not consider the appellant's written statement of defence and erred to make a finding that the Appellant acknowledged that he received the claimed amount. He referred this Court to paragraphs 13-14 of the Appellant's written statement of defence.

Submitting for the 4th ground of appeal Mr. Saro argued that on the 7th of January 2021 the Court ordered the appellant to be notified of the next date for the case, but he was not notified. He contended that the Court erred to compose the judgment for the case without hearing the appellant in contravention of its own order. He insisted that Court Orders have to be complied with. To cement his arguments he cited the case of **Tanzania Breweries Ltd vs Edson Dhobe & 19 others , Misc Civil Application No. 96 of 2000** (unreported) and **Stephen Reuben Mgana & others Vs Kenya kazi Security (T) Ltd , Revision application No 22 of 2019** (unreported).

With regard to the 4th ground of appeal , Mr. Saro argued that the trial Magistrate erred for failure to analyze and consider the respondent's testimony vis-vis her response during the cross examination done by the appellant's Advocate unto her.

In rebuttal, Mr. Welwel submitted as follows; that in civil cases there is no legal requirement that exhibit should be read out loud after being admitted. The case cited by Mr. Saro is a Criminal case. Exhibit P1 was annexed to the plaint and was well known to both parties. The respondent proved her case to the standard required by the law and the existence of the contract between the parties was not disputed. Thus, even if this Courts decides to expunge Exhibit P1 from the Court's record the respondent's case will not be weakened.

With regard to the 2nd ground of appeal, Mr. Welwel argued that the appellant was required to appear in court to defend his case. The written statement of defence is not evidence.

In response to the 3rd ground of appeal, Mr. Welwel argued that the case was scheduled for the first time for defence hearing on 30th of November 2021 in the presence of Mr. Saro who was representing the appellant. Surprisingly, 30th of November 2021, when the case was called for defence hearing Mr. Saro and the appellant's principle officer did not enter appearance in Court. Subsequently, the defence hearing was adjourned to 7th of January 2022 and the Court ordered the advocate who was holding brief for Mr. Saro to inform him on the hearing date. He contended that there was no order for summons to be issued to the appellant and his advocate. He was of the view that the judgment of the trial Court cannot be termed as an ex-parte judgment because the appellant cross examined the respondent.He referred this Court to the case of **Shaban Mbaga and another Vs Karadha Company Ltd and another (1975) T.L.R. 13** and **Moshi Textile Mills Ltd Vs Voest (1975) T.L.R.17,** to bolster his arguments.

With regard to the 4th ground of appeal, Mr. Welwel contended that the Court considered all what transpired during the cross examination but there was no material facts / arguments which were established in the said cross examination that could shake the respondent's case. He beseeched this Court to dismiss this appeal with costs.

In rejoinder , Mr. Saro,reiterated his submission in chief and added that both in Civil and Criminal cases the law requires exhibits to be read out after being admitted in evidence .The written statement of defence is part of pleadings, the Court is required to consider it in its decision. He insisted that this Court has to re- evaluate the evidence adduced and the exhibits tendered in Court. Moreover, he submitted that Mr. Welwel was the one who held his brief when the case was called for defence and ordered to notify him of the next hearing date for the defence case but did not do so.

Having analyzed the submissions made by the learned advocates, let me proceed with the determination of the grounds of Appeal.Starting with the 1st ground of appeal, I wish to state outright that I am inclined to agree with Mr. Welwel that the same has no merit as I will elaborate hereunder;

The case cited by Mr. Saro is a criminal case. Mr. Saro neither supplied this Court with any civil case in which the Court expunged an exhibit on the reason that after being admitted it was not read out in Court nor cited any provision of the law to support his assertion. I have not come across any provision of in the Civil Procedure Code which provides that upon being admitted in evidence, exhibits have to be read out in Court. It is noteworthy that in civil case all documents intended to be relied upon by the parties are normally annexed to the plaint /written statement of defence or filed in Court and supplied to the other party prior to the hearing date. In short , in Civil cases parties always have ample time to

read the exhibits prior to the hearing date whereas the procedure in Criminal cases is different.Thus, the case of **Erick Ashery Vs Republic** (supra) being a criminal case is not relevant and distinguishable from the facts of this case

Coming to the 2nd ground of appeal, upon perusing the judgment of the trial Court and the appellant's written statement of defence I do not see any fault committed by the trial Magistrate because what he has written in his judgment is supported by the pleadings. In paragraph 4 of the appellant's written statement of defence , the appellant acknowledged that the transactions alleged by the respondent in paragraph 6 of the plaint were done and approved, and stated that the transactions were upheld because the account owners disputed those transactions as they were not in Tanzania. Thus, it is the finding of this Court that this ground of appeal has not merit. In addition, the trial Court entered judgment based on the evidence adduced by the respondent. Thus this ground of appeal is hereby dismissed.

With regard to the 3rd ground of appeal, the Court's records reveal that the on 19th November 2021 respondent's case was closed and the defence case was fixed for hearing on 30th November 2021 in the presence of Mr. Saro. On 30th November 2021 when the case was called for defence hearing Mr. Saro did not enter appearance. Mr. Welwel appeared in Court and held Mr. Saro's brief. He informed the Court that Mr. Saro was in a Court session and that they had agreed the defence hearing to be adjourned to 10th of December 2021 if it was convenient to the Court. The Court granted , Mr. Welwel's prayer. The defence hearing was

adjourned to 10th of December 2021. Unfortunately, on the 10th of December 2021, the trial Magistrate was indisposed, so defence hearing was adjourned again to 7th January 2022 in the presence of Mr. Welwel who appeared in Court and held Mr. Saro's brief. On 7th January 2022 when the case was called for the defence hearing Mr. Saro did not enter appearance. Mr. Welwel appeared in Court and this time did not hold Mr. Saro's brief. The Court issued an Order for last adjournment of the defence hearing and fixed the same on 14th January 2022. On 14th January 2022 when the case was called for defence hearing only Mr. Welwel appeared in Court. Mr. Saro did not enter appearance in Court. Mr. Welwel prayed for judgment to be entered in favour of his client. Consequently, the Court scheduled the case for judgment on 28th January 2022 and ordered the appellant to be notified of the date for judgment.

From the foregoing, Mr. Saro's argument that on 7th of January 2022 the Court ordered Mr. Welwel to notify him of the next date for defence hearing is not correct. However, as narrated herein above , Mr. Saro was aware that the case was scheduled for defence hearing on 7th of January 2022 because in the previous session, that is 10th December 2021 Mr. Welwel held his brief, that means he was aware of the Court orders made on that date because he instructed Mr. Welwel to hold his brief and nder normal circumstances he was obliged to communicate with his learned friend Mr. Welwel. It is noteworthy that once an advocate instructs his fellow advocate to hold his/her brief the Court does not need to issue summon to notify such an advocate on the next date for the case. I am of a settled view that on 7th January 2022 the trial Magistrate was justified

to issue an order for last adjournment of the defence hearing since Mr. Saro defaulted to enter appearance in Court and did not inform the Court on his absence. Mr.Saro's complaint that Mr. Welwel held his brief and did not notify him what transpired in Court does not hold water since lack of communication between him and Mr. Welwel cannot affect the Court orders. That was their private arrangement. The bottom line here is that the Court's records reveal that all along Mr. Saro had been aware that the case was scheduled for defence hearing. I am alive of the principles lied down in the case of **Tanzania Breweries Ltd** (supra) **and Stephen Reuben Mgana & others** (supra) that Court orders have to be complied with. What I have noted in this case is that Mr. Saro was not notified of the date for judgment as ordered by the Court on the 14th of January 2022. However, in my opinion the failure to comply with that Court order cannot vitiate the trial Court's judgment. After all, Mr. Saro managed to file his appeal in time. It is the finding of this Court that this ground of appeal has no merit and is hereby dismissed.

With regard to the 4th ground of appeal, Mr. Saro did not point out any specific point or arguments which arose during the cross examination of the respondent which was of paramount importance and worth to be considered by the trial magistrate. Therefore , his argument is vague and baseless. The trial Court's judgment is base on the evidence adduced by the respondent and no evidence was produced in Court by the appellant to prove the allegedly breach of contract by the respondent.

In the upshot, this appeal has no merit. The same is dismissed in its entirety with costs.

Dated this 21st day of September 2022

B.K.PHILLIP

JUDGE.