IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL No. 131 OF 2020

(Originating from Civil Case no. 164/2018 of the Kinondoni District Court dated 29/4/2020 before HON DONASIAN RM)

FELIX MODESTUS MPANGO ..... APPELLANT

VERSUS

AFRICAN MICROFINANCE LIMITED ..... RESPONDENT

Date of Last Order 30/09/2022
Date of Judgment 04/10/2022

JUDGMENT

BADE, J.

This is an appeal from Kinondoni District Court where the Appellant Modestus Mpango previously lost to African Microfinance Ltd, who sued to recover a loan of TZS 26,000,000 lent to the appellant to further its transport business. The whole suit it seems was based on misconceived parties' expectations, with the Appellant expecting to get a loan amount of 80,000,000 while the Respondents acceding to only advance 26,000,000 basing on the assessment the business of the appellant.

It was the appellant's case that the 26,000,000 was just part of the payment of the amount of 80,000,000 that he requested where he deposited titles to motor vehicle T655 AMZ and T226 ABN, and that he was going to receive the balance upon issuing of further security in terms of a title deed that he was going to recover from Access Bank. He claimed further that the respondents refused to advance any further amount despite presenting the title deed. So he failed to meet the target for what the amount was advanced for.

In testimony, the document P3 exhibited the advanced amount of 26,000,000 and signed by both parties, as well as the fact that these monies were had by the appellant. No further evidence was given by the appellant to rebut these facts. This amount had a repayment schedule with time and amount; of which the appellant failed to honor. So on the final analysis it was found by the trial court that the appellant did not meet his side of the bargain by repaying the amount owing to him against a schedule of payment that was agreed upon. The only amount he repaid was TZS 2,200,000 clearly out of schedule, and in breach of their respective contractual obligations. He was thus ordered to pay back TZS 32,718,000 after deducting the amount that the appellant paid so far.

This the appellant was not satisfied with, and preferred this appeal. After filing of the petition of appeal and upon several initial appearances, the respondents herein failed to enter appearance when the matter was called for hearing, which prompted the appellant to pray and been granted with an exparte hearing order. At this point also, the court prompted suo motu to

have the appellant address it on the issue of notice of appeal and time limitation; these being matters of law, for which the appellant complied.

He thus satisfied this court by making brief submissions that there is no notice requirement for civil appeals from district court to high court as per Order XXXIX Rule 1(1) of the Civil Procedure Code RE 2022 which simply requires that an intended appeal to be filed through a memorandum of appeal accompanied with a copy of the judgment and decree, without specifying the time limit within which to so do.

Now, where there is no time limit prescribed by the law, Item no 1 of part II of the schedule to the Law of Limitation Act Cap 89 RE 2019 comes into play, prescribing the said time limit to be 90 days. He thus maintained that the time limit for preferring an appeal from a District Court to High Court is 90 days. He cited a Court of Appeal decision that puts the matter in perspective in **Bukoba Municipal Council vs New Metro Merchandise, Civil Appeal no 374 of 2021 (Unreported).**

Having settled matters of jurisdiction, the appeal was then scheduled for hearing on merits, where the appellant prayed in court and was allowed to argue the appeal by written submissions.

The filed memorandum of appeal thus had two grounds of appeal, viz

1.That the trial magistrate erred in law and fact for determining the suit while it had no pecuniary jurisdiction to do so, and

2. That the trial magistrate erred in law and fact for determining the suit relying on the board resolution which was not tendered as exhibit in court and without indicating in which number the purported board resolution was received as exhibit in court.

And therefore prayed to allow the appeal, quash the proceedings and order retrial from the primary court.

On filing his submissions, the appellant filed a document with several grounds of appeal which were not in the memorandum of appeal. To be specific, he unprocedurally include two more grounds of appeal, and at the same time abandoning the first ground of appeal, and went on to argue the three grounds of appeal that he has added. This is without any leave of the Court to supplement or add his grounds of appeal.

I have looked at the submissions and upon consideration, saw that I have to address the issue of submitting and arguing on new grounds of appeal, which found their way into the court records at a late stage. In civil litigation, the pleading is a base and the main element of every civil suit. Every party must present proper pleading to establish their rights, defense, argue or prove their case. Same way, a party has to submit and establish his pleadings by adducing appropriate evidence.

Strict sensu, pleadings are the statement of claim, any rebuttal thereto, and any further and better particulars. Now, grounds of appeal being an extension of the matters argued during trial, they too have to be pleaded, and cannot be introduced in the court records anyhow. Pleadings define and

confine the matters in dispute which parties must confine their arguments and evidence, help in springing of surprises and avoid unnecessary waste of time and consequent costs as both parties are prepared.

Pleaded facts would show jurisdiction, substantiality of issues to be tried, who bears the burden of proof in the case, show matters admitted and thus precluded to be re argued, become basis for estoppel and many other legal principles that govern our civil practice. More importantly, they are permanent public records of the court's decision on questions that have raised and decided between parties and control any further subsequent proceedings of the court.

The law has tritely held that parties are to be bound by their pleadings **(**O.6 r 1 of the Civil Procedure Code). This position was re – affirmed in the cases of ***Jani Properties Ltd versus Dar-es-Salaam City Council (1966) EA 281; and Struggle Ltd versus Pan African Insurance Co. Ltd (1990) ALR 46 -47*****,** wherein Court rightly observed that;

> *"parties in Civil matters are bound by what they say in their pleadings which have the potential of forming the record moreover, the Court itself is also bound by what the parties have stated in their pleadings as to the facts relied on by them. No party can be allowed to depart from its pleadings" (see also* ***Semalulu versus Nakitto High Court Civil Appeal No. 4 of 2008)"*****.**

In an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" which was published in **[1960] Current Legal Problems, at P174** the author stated;

"As parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings… for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise ... The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defense not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defense not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

This view is further fortified in the case of **Philips Anania Masasi v Returning Officer Njombe North Constituency and Others, Misc. Civil Cause No. 7 of 1995, Songea (Unreported)** where Samatta, J as

he then was stated:- "Litigation is not a game of surprise" Likewise, the appellant in this appeal is required to stick to his grounds of appeal submitted with the Memorandum of appeal, not raising new grounds and issues at the time of submission. The appellant was required to obtain leave of the Court to add a new ground of appeal instead of submitting the same.

In that case I find that the addition and arguing of grounds of appeal were unprocedural and thus reject all the grounds of appeal so added. The court will not be detained to make considerations on them. The only item remaining for consideration is the one ground of appeal which was not abandoned, and whose arguments have been submitted upon.

This ground is couched that the trial magistrate erred in law and fact for determining the suit relying on the board resolution which was not tendered as exhibit in court and without indicating in which number the purported board resolution was received as exhibit in court.

On scrutiny of the judgment and proceedings, it is found that the basis of this assertion is PW1's testimony that the collateral offered for the loan was in the name of Mpango 2005 Ltd, while the name in the collateral card was that of the appellant herein. She testified further on cross examination that the authority to borrow from the plaintiff was on the board resolution, which named the appellant as one of the company directors.

The appellant did not object nor took any step to procure in court the said board resolution by any of the known civil procedure such as initiative to discover or issue a notice to produce. The PW testified through cross

examination that they had a board resolution dated 30/10/2016 allowing the defendant to borrow from the Plaintiff, and that the defendant/appellant herein was actually amongst the directors. See page 21 - 22 of the typed proceedings.

If a fact is not specifically traversed during trial, they are deemed admitted. And a material fact must be specifically denied, because a fact is admitted if it accepted by the other party either expressly or impliedly by not denying, which means it needs no further proof. Also importantly, if a party adduce evidence beyond their pleadings, and the other party does not take any objection to such evidence on record, the court cannot act upon such evidence, neither can it make out a case not pleaded.

In my view the question here pertinent to ask was this an issue as to whether the board resolution was in existence in that it was pleaded upon or adduced in evidence during the trial? As per the provisions of Order XIV rules 1, 2 and 3 of the Civil Procedure Code Cap 33 RE 2022 is that issues arise when a material proposition of fact or law is affirmed by one party and denied by the other; that a material propositions are those propositions of law or fact which plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defense; and that each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue and be determined upon in resolve.

Admittedly, the appellant put a question on cross examination to PW1 about the board resolution, but this was never in dispute. If it was, then it would

have been made an issue for determination, it was never a material proposition to be proved or disproved; neither was it ever framed as such. It really means despite cross examining the witness on this item, the same did not have any probative effect on the material propositions that were framed to be proved/unproved. It did not have any effect on the case of the Plaintiff that was in Court for proof.

On looking at the judgment of the court, the learned trial magistrate did not base his findings on this testimony. It was not part of the issues framed for determination in the trial of the case, so he never had to make any finding on it, neither did he attempted to do so. It is not referred anywhere on the typed judgment either. So upon due consideration of the issue posed on the second ground of appeal, I find the same to have no merit.

The appeal is dismissed with costs.

DATED at Dar es Salaam, September 30, 2022

A. Z Bade

JUDGE
September 30, 2022

This judgment has been delivered today on 04th October 2022 in the presence of the Appellant.

X 

A. Z. Bade
JUDGE
Signed by: Aisha Bade

October 4, 2022