

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

CIVIL APPEAL NO. 58 OF 2019

(Arising from Civil Case No. 59 of 2018 Kisutu Resident Magistrate's Court)

HERI LORIOUS KAYINGA.....APPELLANT

VERSUS

AFRICAN BANKING

CORPORATION (T) LTD.....RESPONDENT

JUDGMENT

Date of Last Order: 18/03/2021

Date of Judgment: 13/05/2022

S.M. KULITA, J.

This is an appeal from the Resident Magistrate Court of Dar es Salaam at Kisutu. The brief facts of the case is that the Respondent herein, **AFRICAN BANKING CORPORATION (T) LTD** advanced the loan facility to the Appellant herein namely **HERI LORIOUS KAYINGA** amounting Tsh. 110,000,000/= . According to the agreement the borrower was to repay it in monthly instalment at the tune of Tsh. 956,984/= per month for a period of 264 months, from 20/06/2014 to 20/02/2017. It was a contractual policy that,

for the loan advanced to the staff members like the Appellant, the interest rate was 9% instead of 19% which was charged for outsiders. The Appellant is an ex-employee of the Respondent in which he was employed as a Legal Officer cum Acting Legal Manager.

Sometimes in March, 2017 the employment seized and the Appellant was yet to repay the loan to full settlement. After the termination of the employment contract by the Appellant, the Respondent decided to change the interest rate into 19% which is a commercial rate from 9%, the rate of interest for staff members. Thus, from 20/03/2017 the monthly repayment by the Appellant increased to Tsh. 1,600,000/= from Tsh. 956,000/=. However, the said rate was reduced to 16%, but the Appellant had never complied with neither of the said new rates, hence the Respondent lodged a civil suit at Kisumu Resident Magistrate's Court which was registered as a Civil Case No. 59 of 2018, the original case. Decision was for the Respondent.

Aggrieved with the decision of the trial court delivered on the 7th day of March, 2019 the Appellant herein lodged this appeal relying on the following three grounds;

1. That, the learned trial Magistrate erred in law and in fact and he was biased against the Appellant when he delivered the Judgment and decree in favour of the Respondent even after having held that the Appellant did not default in the facility agreement, which was a fundamental issue in determination of the suit.
2. That, the learned trial Magistrate erred in law and in fact, when he granted the reliefs not asked for and no prayer was ever made to amend the Plaint or Written Statement of Defense so as to incorporate in them as an alternative case in total disregard of mandatory provision of Order VII, Rule 5 and 7 of the Civil Procedure Code [Cap 33 RE 2002].
3. That, the learned trial Magistrate erred in law and in fact, when he interfered into the express contractual terms of the parties by forcing the parties to re-negotiate the new terms of the facility agreement, even when he held that the Respondent made unauthorized material alterations to the facility agreement to the Appellant's detriment.

The appeal was disposed of by way of written submissions. While the Appellant is unrepresented, the Respondent is represented by Mr. Omary Msemo, Advocate from Tan Africa Law Chambers.

In his written submission in support of the 1st ground of appeal the appellant submitted that, apart from the issue named *Reliefs that the parties are entitled to*, another issue that was framed as per the pre-trial conference was *whether the Defendant (Appellant herein) defaulted in the facility agreement*. He said that the trial Magistrate answered the said issue of default in the facility agreement in negative, that the Appellant/Defendant did not default in repayment of facility agreement as it can be so reflected at page 4 of the judgment. The Appellant submitted that in spite of that finding by the trial court still the Magistrate entered the judgment and decree on favour of the Respondent.

He said that that renders the decision a nullity.

Submitting on the 2nd ground of appeal the Appellant stated that the trial Magistrate granted the reliefs which were not prayed for in the plaint, which is contrary to Order VII, Rule 7 of the Civil Procedure Code. He mentioned the said reliefs being; first, an order that the Defendant/Appellant is duty bound to pay back the remaining balance of the loan at commercial rate that the parties will have to agree on, as per the clauses of the contract, secondly, the payment of 12% interest rate by the Appellant from the date of judgment to the date of full payment. The Appellant alleged that the above reliefs which were granted for the Respondent were not

among the reliefs sought in the plaint. As they are not among the reliefs asked for by the Respondent, it was improper for the trial court to grant them. He said that, according to Order VII, Rule 7 of the Civil Procedure Code the only reliefs that the court should grant are those which have been specifically pleaded.

As for the 3rd ground of Appeal, the Appellant said that the trial Magistrate interfered into the express contractual terms of the parties by forcing the parties to re-negotiate the new terms of the facility agreement, even when he held that the Respondent made unauthorized material alterations to the facility agreement to the Appellant's detriment. He averred that the fact that the Respondent made unauthorized material alterations to the facility agreement without involving the Appellant, which is contrary to clauses 7.1.3 and 19 of the contract (Exhibit D1), it was wrong for the trial court to order the parties to re-negotiate on the new terms of the facility agreement. He said that the proper remedy was to regard the contract discharged.

In his reply to the 1st and the 2nd grounds of appeal, Advocate for the Respondent, Mr. Omary Msemo seems to have submitted on the matters basing on the 2nd ground only. That is, the reliefs which the trial Magistrate has awarded, if it was not arising from the 1st framed issue, "*whether the Defendant (Appellant herein) defaulted*

in the facility agreement" it falls under the 2nd framed issue which allows the court to award *any other relief(s) it finds fit to grant*. He said that this 2nd framed issue includes the reliefs which were not sought by the parties.

As for the 3rd ground which states that the trial Magistrate interfered into the express contractual terms of the parties by forcing the parties to re-negotiate the new terms of the facility agreement, even when he held that the Respondent made unauthorized material alterations to the facility agreement to the Appellant's detriment, the Respondent's Counsel submitted that the Appellant was aware of the variations of the interest rate, thus it was not unilateral. The counsel submitted that the decision of the trial court was proper in ordering the repayment as per the contract in the sense that, the Respondent is still liable to pay the loan. He added that had the Appellant been honest, he would have proceeded to service the loan at least at the original rate, even if he disputes the variation. The counsel concluded that the lower court's decision is clear that the borrower (Appellant) was not discharged from the obligation to repay the loan, irrespective of the variations.

Rejoining the Respondent's submission in respect of the 1st ground of appeal, the Appellant stated that the evidence on record clearly

supports the 1st framed issue that the Respondent defaulted the facility agreement. He said that that resolution was sufficient to warrant dismissal of the suit, but on contrary the trial Magistrate entered judgment and decree on favour of the Respondent.

As for the 2nd ground, what the Appellant has rejoined reiterates what he had stated in his submission in chief that the reliefs that the trial Magistrate had granted were not sought in the plaint.

In his rejoinder for the 3rd ground of appeal, the Appellant stated that in ordering the parties to re-negotiate the the terms of facility agreement, it means the trial Magistrate abandoned his duty of adjudicating the suit and delegated it to the parties to resolve it by themselves. As for the other submission in respect of this ground, it is the reiteration of the Appellant's submission in chief.

That was the end of rejoinder submission.

From the above submissions, here is my observations in respect of the 1st ground of appeal; The said ground states "the learned trial Magistrate erred in law and in fact and he was biased against the Appellant when he delivered the Judgment and decree in favour of the Respondent, even after having held that the Appellant did not default in the facility agreement, which was a fundamental issue in determination of the suit."

Before I start to analyse this issue I would like to clarify that it has been alleged by the Respondent at the lower court and reiterated in this appeal that the commercial interest rate for the Respondent's customers was 19%, but for the staff members, as it was for the Appellant it was 9%. The Respondent's employment with the Appellant ceased in March, 2017. That led the Respondent to increase the monthly interest rate to 19% with effect from 20/03/2017 as the Appellant was no longer the employee to them. That fact had never been disputed by the Appellant herein, before this court nor at the trial court.

The said rate of interest was then lowered to 16% from 19%. The Appellant's dispute on this matter is that the said alteration in the interest rate from 9% was unprocedural.

Now, analyzing the 1st ground of appeal; in my perusal over the original case file, I have noted the findings of the trial Magistrate at page 4 of the judgment stating that the Defendant (Appellant herein) never defaulted in the facility agreement. The said Magistrate added that the fault that happened was contributed by the Plaintiff himself (Respondent herein) for not consulting the Appellant on the change of the interest rate.

According to the records and the Appellant's submission the Respondent has powers to vary the interest rates according to clause 12 of the loan facility agreement, but in doing so she violated clauses 7.1.3 and 19 of the facility agreement (Exhibit D1) by increasing the interest rate from 9% to 19% then changed it to 16% without consulting the Appellant. The above said clauses 7.1.3 and 19 provide that in making variations on the interest rates, the Bank (Respondent) has to consult the customer (Appellant) and agree each other on that. It is therefore apparent that, though she was at liberty to vary the interest rate from the Staff rate to the Commercial rate as per clause 12 of the facility agreement, the Respondent didn't adhere the requirements of clauses 7.1.3 and 19 of the facility agreement.

Having so reaching into the said finding, the issue is whether it was proper for the trial Magistrate to order the Appellant to pay back the remaining balance at the rate that the parties are going to agree. In my view that is a correct finding as the Appellant has not yet settled the loan in full. In spite of the fact that the Respondent defaulted for not communicating with him on the variation of the interests rate as per clauses 7.1.3 and 19 of the Loan Facility Agreement, the Appellant does not dispute that his employment

with the Respondent seized in March, 2017 and his loan facility is not fully settled.

For this analysis in respect of the 1st ground of appeal, I find it with no merit.

Analyzing the 2nd ground of appeal that the trial Magistrate granted the reliefs which were not prayed for in the plaint, I have this to say; I went through the reliefs sought in the plaint and noticed the 2nd prayer stating;

"(ii) For orders that the Defendant pay the full outstanding amount due to the plaintiff".

The 5th prayer states;

"(v) For the payment of interests at the Court's Rate of 12% from the date of judgment and decree until the date of payment in full"

The 7th prayer states;

"(vii) Any other relief the Honourable Court will deem just and fit to grant".

When you carefully read the contents of prayer no. (ii) mentioned above, you can find it being adopted by the trial Magistrate in awarding the relief that, *the Appellant should pay back the remaining (outstanding) balance* of the loan at commercial rate

which they will have to agree consensually as per clauses 7.1.3 and 19 of the Loan Facility Agreement.

As for the relief of awarding the Court's Rate at 12% from the date of judgment and decree until the date of payment in full, the trial Magistrate granted it relying on the 5th prayer in the plaint, ie. relief no. (v) in which the Appellant claimed for the *payment of interests at the Court's Rate of 12% from the date of judgment and decree until the date of payment in full.*

Therefore, it is not true that the trial Magistrate awarded the reliefs which were not sought in the plaint. Even if there could be a relief of such nature (reliefs not prayed), sometimes it can not be fatal for the court to grant it, depending on the nature of the case. It can be granted if the court finds it necessary for the good ends of justice. That's why some plaints like the one filed for this case at the lower court consists the prayer for *"Any other relief the Honourable Court will deem just and fit to grant"*, which is prayer no. (vii).

The Appellant cited Order VII, Rule 7 of the Civil Procedure Code alleging that, it is a provision which has been violated by the trial Magistrate by awarding the reliefs not sought in the plaint. I have gone through that said provision and noticed it stating, among the

other things, that the court may also give the relief that it think just even if it has not been asked for. This is where the prayer stating "Any other relief the Honourable Court will deem just and fit to grant", applies.

Therefore, the allegation that the reliefs granted were not sought is not true, and even if that had been the case, the same could have been regarded correct as per the provision of **Order VII, Rule 7 of the Civil Procedure Code** which allows the trial court to grant the reliefs though not prayed, when it finds it necessary for the good end of justice.

For those reasons this ground of appeal must fail, not only for the Appellant's failure to interpret the provision of Order VII, Rule 7 of the Civil Procedure Code, but also regarding the fact that the said relief was sought for by the Respondent in her plaint and during trial at the subordinate court.

Further submitting on the related issue, the Appellant stated that the trial Magistrate arbitrarily deliberated and determined the the suit upon facts that do not go to the issues, contrary to the mandatory provision of **Order XX, Rule 5 of the Civil Procedure Code**. Actually in determining the case, the court is bound by the pleadings and the issues framed. The Appellant averred that the

trial Magistrate decided the case outside the issues that were framed. In my perusal over the original case file, particularly the judgment and proceedings, I have not seen such fault. Hence, no denial of justice of such nature has been made that can render the decision a nullity.

Having so said, I find the 2nd ground of appeal unmeritorious.

In the 3rd ground of appeal the Appellant alleged that the trial Magistrate erred in law and in fact, when it interfered into the express contractual terms of the parties by forcing the parties to re-negotiate the new terms of the facility agreement, even when it held that the Respondent had made unauthorized material alterations to the facility agreement, at the detriment of the Appellant. It is my view that, though the framed issue stating "*whether the Defendant (Appellant herein) defaulted in the facility agreement*" has just been partially proved, that the fault in the subsequent service of loan repayment by the Appellant was contributed by the Respondent, it is not fatal for the trial court to order **the Appellant to settle the remaining part of the loan** that he has not yet serviced. It is among the relief(s) that the parties are entitled to. It was the 2nd framed issue to be determined by the trial court. This issue was determined for the Respondent.

On the other hand, the Respondent was rightly ordered to adhere the procedures stipulated under clauses 7.1.3 and 19 of the Loan Facility Agreement before the Appellant was asked to settle the said remaining sum of the loan repayment at the commercial rate that will be mutually agreed by the parties themselves. Therefore, upon it being mutually agreed by the parties, the remaining loan facility will have to be paid by the Appellant in monthly basis as it is so stipulated in the agreement. This should be affected from the date, and upon the arrangement that the parties themselves will make as per the clauses 7.1.3 and 19 of the said Loan Facility Agreement (Exhibit D1).

As for the payment of interest rate of 12% from the date of delivery of judgment of the trial court to the date of payment in full, as it was so ordered by the trial court, I find it overtaken by event as by opting to file an appeal possibly execution of the said order had stopped. Infact, that is a position according to the Respondent's submission of which the Appellant does not dispute.

Conclusively, I find the appeal with no legal weight, save for the minor variations on the trial court's order on the issue of 12% interest rate of which this court orders that, it is to be paid by the Appellant after the lapse of the period for servicing the remaining part of the loan by the Appellant that will be agreed by the parties,

if it happens that the said period lapses without the Appellant having completed the repayment.

In upshot the appeal is dismissed. No order as to costs.



S.M. KULITA

JUDGE

13/05/2022

