

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL APPEAL NO. 81 OF 2022

TRANSPAPER (T) LTD APPELLANT

VERSUS

MARKERZ LIMITED RESPONDENT

***(Appeal from the decision of the Resident Magistrate's Court of
Kivukoni at Kinondoni in Civil Case No. 80 of 2018)***

JUDGMENT

7th and 13th December, 2022

KISANYA, J.:

At the Resident Magistrate's Court of Kivukoni at Kinondoni (the trial court), the above named appellant instituted a suit against the respondent herein claiming for payment of Tshs. 45,057,356/= being outstanding contractual sum and Tshs. 13,980,000/= being interest accrued from the principal sum. She also prayed for general damages, interest on the decretal sum and costs of the suit.

In terms of the plaint, the appellant's cause of action was based on breach of contract. It was alleged that on 24th December, 2013, 28th February, 2014 and 11th March, 2014, the appellant supplied the respondent with various stationary items valued at Tshs. 45,057,356. To

support his averment, the appellant appended the delivery notes and tax invoices. She decided to sue the respondent on the ground that the latter had failed to pay for the supplied goods.

The respondent filed a written statement of defence in which she denied to have breached the contract with the appellant. She further stated that there was no contractual outstanding sum on the contention that there was no contract between her and the appellant. It was also the respondent's averment that, the delivery notes were on conditional that payment would be made in advance. She further alleged to have paid on delivery of every items.

Before the hearing could commence, the court adopted the issues to following effect: *one*, whether or not, the respondent paid in full the purchase price of the supplied goods; *two*, if the first issue is in negative, what is the outstanding sum; *three*, whether the respondent breached terms and condition of supply of goods; *four*, whether the appellant suffered damages of any delay for non-payment; and, *five*, what relief(s) are parties entitled to.

To prove her case, the appellant paraded one witness, Mr. Yohana Yunan (PW1). He testified that the appellant supplied the defendant with

printing material valued Tshs. 45,000,000 and that despite invoices served to her, she (the respondent) neglected to pay. To supplement his oral testimony, PW1 tendered five (5) invoices.

On the other side, the respondent called one witness namely, Billioner John Mheu (DW1), who testified, among others, that the respondent had no business relation with the appellant.

In the course of determining the first issue, the trial court considered other issues as reflected at page 5 of the typed judgment.

The relevant excerpt reads:

"In order to resolve this issue, I think we should first answer on whether there is evidence that the defendant placed an order for printing materials, whether the defendant received goods, and what were the terms and conditions of that contract for sale of goods."

As the record further speaks, the learned trial magistrate considered the issue whether the appellant proved that there was an arrangement for supply of goods between the appellant and the respondent. Addressing that issue, the trial court held the view that there was no evidence to prove the contract for supply of goods between the

appellant and respondent. That being the case, it was further held that the respondent did not breach the terms and condition of sales of goods. For that reason, the trial court went on dismissing the plaint.

Feeling that justice was not served to her, the appellant has appealed to this Court on the following grounds of appeal:

- 1. That the learned trial magistrate erred in law and in fact by failing to summarize the facts of the case and analyze evidence adduced by witness of the plaintiff. By that failure, the learned trial magistrate ignored facts and evidence and made a totally wrong conclusion and decision.*
- 2. That the learned trial magistrate erred in law and fact by dismissing the suit on the basis that the sale of goods lacked terms and conditions of supply without considering full invoices comprised in Exhibit P1 which constitute a contract between parties and stipulated conditions thereof.*
- 3. The learned trial magistrate erred in law and fact by failing to consider contradictory evidence of DW1. Upon confirming that the defendant never signed or filed the witness statement of defence on record, the learned magistrate should have concluded that the suit was undefended and ought not to have entertained the evidence from DW1.*

4. That the learned trial magistrate erred in law and in facts by concluding that plaintiff's claim had no basis.

With leave of the court, this appeal was initially disposed of by way of written submissions filed by Ms. Shiza John, learned advocate for the appellant and Mr. Nehemia Nkoko, learned advocates for respondent.

Submitting on the first ground of appeal, Ms. John submitted that the trial court failed to summarize the facts of the case and analyze evidence adduced by the appellant. His submission was based on the contention that, it was wrong for the trial court to conclude that there was no contractual relationship between the parties while that issue was not framed. Mr. Nkoko did not respond on the issue whether the trial court's decision was based on the issue framed before the hearing of the matter.

Considering that framing of issues is a point of law which goes to the root of the case, I found it appropriate to probe the parties to address the Court on whether the issues for determination of the dispute between the parties were framed properly; and whether the parties were heard on the issues determined by the trial court.

Having gone through the record and the submissions by the counsel for both parties, I will proceed to determine the issues pertaining to this appeal.

First for consideration is the point of law raised by Mr. Nkoko, that the present appeal is time barred. I have noticed that the learned counsel did not state the time required to lodge an appeal against the decision subject to this appeal. It is on record that the impugned judgment was made by the trial court in the exercise of its original jurisdiction under the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC) and the Magistrates Courts Act, Cap. 11, R.E. 2019. Neither the CPC nor the MCA prescribe for the time within which to appeal against the decision of the Resident Magistrate's Court in the exercise of its original jurisdiction. Therefore, in view of item 1 of Part II of the Schedule to the Law of Limitation Act, Cap. 89, R.E. 2019, the time within which to appeal against such decision is ninety days (90) counting from the date of judgment. However, it is settled law, as rightly argued by Ms. John, if the appellant has applied for copies of judgment, the time starts to run upon being supplied with the said copies as provided for under section 19(2) of the Law of Limitation Act (supra). [See also the case of **Velerie Mcgiven vs Salim Farkrudin Balal**, Civil Appeal No. 386 of 2019 (unreported)]

In our case, it is common ground that the judgment subject to this appeal was delivered on 28th April, 2022. Therefore, the time within which to appeal was expected to lapse before 27th July, 2022. The record bears it out that the appellant applied for copies of judgment and decree on 10th May, 2022. It also on record that the correct copies of judgment and decree were supplied to the appellant on 16th June, 2022, whereas the memorandum of appeal was lodged on 24th June 2022. That being the case, Mr. Nkoko's argument that the appeal is time barred lacks merit. It is clear that the appeal was filed within time specified by the law.

Second for determination the issues raised by the Court, *suo mottu*, on the whether the issues were properly framed and whether the trial court determined the framed issues. As hinted earlier, the said issues were raised after considering Ms. John's contention in support of the first ground that the trial court determined an issue which was not framed during the trial.

Responding to the issues raised by the Court, Ms John submitted that the issue whether there was a contract was not framed by the trial court. She submitted that the issues were not properly framed as the said issue was not framed. The learned counsel went on faulting the trial court

for determining the issues which were not framed and without giving the parties the right to be heard. In the result, she argued that the decision of the trial court was not proper and urged this Court to allow the appeal.

On his part, Mr. Nkoko invited the Court to consider that one of the issue framed during the trial court was whether the respondent paid in full the purchase price of the supplied. On that account, he submitted that the trial court was right to hold that the said issue could be determined by considering whether there was a contract between the appellant and respondent. He was of the view that the claim for payment of the purchased price could not be answered without considering whether there was a contract.

Mr. Nkoko further submitted that there are two set of issues framed during the trial. According to him, the first set of issues were framed before on 18th June, 2019. He went on submitting that the second set of issues was framed on 10th November, 2021 before another magistrate. It was his argument that, upon taking over the matter, the predecessor magistrate was required to determine the matter basing on issues framed by his successor. In that regard, he was of the view that, the case was determined based on the wrong issues.

Mr. Nkoko submitted further that he was alive to the position that the proper recourse on the foresaid defect is to remit the case file to the trial court for determination of the issue framed before it. However, he was of the view that parties were not prejudiced because they were in agreement to the second set of issues. For that reason, the learned counsel asked this Court to determine the appeal basing on the issues which were addressed by the trial court. To buttress his argument, he cited the case of **Mkurugenzi Mkuu, Shirika la Bandari Zanzibar**, Civil Appeal No. 47 of 2018 (unreported). It was also his contention that the respondent stands to suffer if the order for retrial is made by this court on the ground that the said order will enable the appellant to fill gaps in her case.

In her rejoinder, Ms. John reiterated her submission in chief that the issues framed by the trial court did not determine the dispute between the parties as the issue related to the contract between the parties was not framed. She further submitted that the order for retrial will serve the interest of both parties.

I have gone through the record and considered the law governing the issue under consideration. Order XIV rule 1(1) of the CPC provides

that an issue is framed basing on the material proposition of fact or law which are affirmed by one party and denied by the other party. It is further provided for under Order XIV, Rule 1(3) of the CPC that, each material proposition affirmed by one party and denied by the adverse party forms a distinct issue. The law is settled that failure to frame issues is an irregularity which may vitiate the judgment and proceedings if the omission occasioned failure of justice. See for instance, the case of **Haj Ibrahim Mohamed Saeed vs. Al-Haj Othman Kaid Sallam** [1962] EA 149 which was cited by the Court of Appeal in **Barclays Bank Tanzania Limited vs Sharaf Shipping Agency (T) Limited and Another and Habibu African Bank Limited vs Sharaf Shipping Agency and Another**, Consolidated Civil Appeals No. 117/16 of 2018 and 119 of 2019, CAT at DSM (unreported), where it was held that:

"The need to frame issues has been repeatedly stressed by the Court. Here the failure to do so, or to refer to the terms of the Rent Restriction Ordinance, appears to some extent to have misled the learned Judge in his consideration of the case."

As rightly observed by Mr. Nkoko, the issue framed when the matter was called for final pretrial and scheduling conference on 18th June, 2019 were:

- 1. Whether the plaintiff supplied the goods to the plaintiff.*
- 2. Whether the goods supplied to the defendants were not paid.*
- 3. What relief(s) are the parties entitled.*

In view of thereof, parties were required to adduce evidence to prove or disapprove the above stated issues. However, before commencement of the hearing on 10th November, 2021, before Hon. Mlashani, RM to whom the matter was re-assigned, the learned counsel for both parties proposed the following issues:

- 1. Whether or not, the defendant supplied in full the purchase price of supplied goods.*
- 2. If the above issue is in negative, what is the outstanding sum.*
- 3. Whether the defendant breached terms and condition of supply of goods.*
- 4. Whether the plaintiff suffered damages of any delay for non-payment.*
- 5. What relief(s) are parties entitled to.*

It is on record that the said issues were adopted by the trial court. I am alive to the position that, under Order XIV, Rule 5(1) of the CPC,

the trial court is enjoined to amend the issue at any time before passing a decree. The provision stipulates:

"The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit; and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed."

In the present case, nothing to suggest the trial court the second set of issues was framed by the court in the exercise of its power under Order XIV, rule 5(1) of the CPC. In the result, the trial court erred to frame the second set of issues. This is when it is considered that the status of the set of issues is not known. Much as the first set of issues was not dropped, the trial court ought to have considered the same. This was not done.

Even if I was to consider Mr. Nkoko's contention that parties were not prejudiced by the foresaid anomaly, the issue for determination is whether the second set of issues was properly framed and whether the trial court's decision was based on the said issues.

As intimated earlier, the claim by the appellant was based on breach of contract. This fact is depicted from paragraph 3 and 4 of the plaint in which the appellant averred as follows:-

3. That the Plaintiff cause of action against the Defendant is breach of contract.

4. That the Plaintiff claim against the Defendant is the sum of the tune of Tanzanian Shillings Fort-Five and Fifty-seven thousand, three hundred and fifty six only (Tshs. 45,057,356) being outstanding contractual sum payable to the Plaintiff and Tshs. 13,980, 235.

The above facts were vehemently disputed by the defendant. Her averment in paragraphs 2 and 3 of the written statement of defence went as follows:

2. That the contents of paragraph No. 3 of the Plaint are strong (sic) disputed and the Defendant states, that there is no breach of contract as no particulars of breach are set out by the Defendant. The Plaintiff is put into strictest proof thereof.

3. That the contents of paragraphs 4, 5, 6, 7, 8 and 9 of the Plaint are strongly denied to the extent that, there is no outstanding contractual sum due as there was no contract executed between the parties..."

From the foregoing, it is clear that the appellant and respondent were at issue on whether there was a valid contract between them; and whether there was a breach of contract by the respondent. Being guided by the provision of Order XIV, Rule 1(3) of the CPC, the foresaid issues ought to have been framed for determination of the real controversy between parties. It follows therefore, that the issues were not properly framed by the trial court.

As indicated herein, it was in the course of composing the judgment when the learned trial magistrate addressed the issues, whether the appellant proved that there was an arrangement for supply of goods between her and the respondent, whether the respondent placed an order for printing materials, whether the respondent received goods; and what were the terms and conditions of the contract for sale of goods.

Although the provisions of Order XIV Rule 5(1) of the CPC empowers the trial court to amend issues at any time before passing a decree, it is settled position that parties must be heard on the amended or additional issues. This position was also stated in the case of **Scan-Tan Tours Ltd vs The Registered Trustees of Catholic Diocece of**

Mbulu, Civil Appeal No. 78 of 2012 (unreported) when the Court of Appeal held as follows:

"We are of the considered view that generally a judge is duty bound to decide a case on the issues on record and that if there are other questions to be considered they should be placed on record and the parties be given an opportunity to address the court on those question.

In the instant case, parties were not asked to address the trial court on the new issues. Yet, as rightly observed by Ms. John, its judgment was based on the issues which was not placed on record. It is common knowledge that parties give evidence to prove or disapprove the issue framed by the court. Since it was not recorded whether parties were at issue on whether there was an arrangement for supply of goods between them, whether the respondent placed an order for printing materials, whether the respondent received goods were not framed, the appellant could not be blamed for failure to produce evidence to prove the same. It is my further view that the said issues were required to be determined as substantive issues.

On the foregoing reasons, I hold the view that the issues were not framed properly and that the parties were not accorded the right to be

heard on the issues determined in its decision. The appellant was prejudiced because she lost the suit, inter alia, basing the new the issues. In the result, judgment and proceedings of the trial court are a nullity. Therefore, I find no need of addressing other grounds of appeal.

For the reasons I have endeavored to give, I allow the appeal. In the exercise of the revisionary powers of this Court, I proceed to quash the judgment and proceedings starting from the stage of framing the second set of issues and set aside the decree of the trial court. On the way forward, the case file is remitted to the trial court for retrial from the stage of framing issues. Given the circumstances of this case, each party is ordered to bear its own costs.

DATED at DAR ES SALAAM this 13th day of December, 2022.



S.E. KISANYA
JUDGE