

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF MWANZA
AT MWANZA**

CIVIL APPEAL NO. 43 OF 2021

*(Arising from Civil Case No. 11 of 2020 in the Resident Magistrate of Mwanza at
Mwanza)*

BANK OF AFRICA TANZANIA LIMITED..... APPELLANT

VERSUS

MALIMA MAGHEMBE CHIWANYIRESPONDENT

JUDGEMENT

9th & 10th March, 2022

Kahyoza, J.

The Bank of Africa Tanzania Limited sued Maghembe Chiwanyi for among things, a decree of payment of Tzs. 84,525,535.39 being outstanding amount accrued interest and debtor charges. The trial court decided in favour of the Maghembe. Aggrieved, the Bank appealed to this Court. The Bank raised five grounds of appeal, one of them being that the trial court erred in law and fact in addressing issues not framed and recorded by the court, and without affording parties a chance to address the court on the same.

Mr. Kelvin Mutatina, the respondent's advocate conceded before hearing commenced that it was beyond dispute that the trial court did not comply with Order VIII R. 40 (1) of the **Civil Procedure Code** [Cap. 33

R.E. 2019] (the CPC). He submitted that the trial court did not frame issues before trial commenced. He added that failure to frame issues vitiated the proceedings and a subsequent judgment. He prayed the matter to be remitted to the trial court for trial de-novo.

The Bank advocate, Mr. Maliki concurred with the respondent's advocate that the proceedings are defective for the trial court's failure to frame issues. He, however, submitted that this being the first appellate court may vary the judgment and pass another decree instead of ordering trial de-novo. To support his submission, he cited the case of **Deemay Daati and two others V.R.**, [2005] TLR 132, at page 139.

In his Rejoinder Mr. Kelvin insisted that it was mandatory for court to frame issues before commencing trial. He argued that framing of issues was a pertinent procedure before delivering judgment. Failure to observe that meant that there was no judgment. He prayed the matter to be remitted for trial *de novo*.

Undeniably, the trial court did not frame issues. It tried the case without framing issues, which is mandatory procedural requirement. Both parties' advocates are in agreement that the trial court erred to try the case without framing issues. They lock horns on what is consequence of failure to frame issue(s) before trial.

What is the consequence of failure to frame issues?

It is unequivocal that one of pertinent steps as submitted by Mr. Kelvin in a Civil trial is framing of issues. Framing of issues is a duty of the trial

Magistrate or judge. A duty to frame issue(s) is provided under rule 40(1) of Order VIII and rule 1(5) of Order XIV of the **CPC**. Rule 1(5) of Order XIV makes it mandatory for the court to frame issue at the first hearing after reading the plaint and the Written Statements. It stipulates

*(5) **At the first hearing of the suit the court shall**, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon **proceed to frame and record the issues on which the right decision of the case appears to depend.** (emphasis is added)*

It is also clear that the decision of any court or tribunal is based on framed issues. The court is not required to frame issue only where the defendant at the first hearing makes no defence. Failure to frame issues is a procedural irregularity which is fatal only when it occasioned miscarriage of justice or affect the merits of the judgment. I find support in the holding of East African Court of Appeal in **Norman V Overseas Motor Transport (Tanganyika) Limited** [1959] E. A 131, where it was of the position that failure to frame issues is not necessarily fatal. It held stated that-

"If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court, and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed...In the instant case it would seem that the failure of the

court to frame issues was to some extent the fault of counsel on both sides. Nevertheless, the failure to frame the issues is an irregularity and the question is whether, notwithstanding the failure to frame the issues, the parties at the trial knew what the real question between them was, that the evidence on the question had been taken and the court duly considered it."

The Court took a similar position in another case of **S N Shah vs. C M Patel and Others [1961] EA 397** that-

"Whereas there would have been considerable advantage in framing the issues before the evidence was called, issues had been joined upon the pleadings and it was not, therefore, obligatory upon the learned Judge to frame issues. The fact that he did not do so would be no justification for upsetting his decision."

On reading rule 5 of Order XX of the **CPC**, I formed an opinion that as a general rule that the determination of a Civil matter has to be based on framed issues. Rule 5 of Order XX of the **CPC** provides-

*"In suits in which issues have been framed, the court **shall state its finding or decision with the reason therefore, upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the suit.**" (emphasis added)*

There are exceptions to that to general rule; the first exception is stated in the case of **Norman vs. Overseas Motor Transport (Tanganyika)**

Limited where matter was not framed as an issue but the parties adduced evidence sufficient to allow the court to determine it. A second exception is where the parties were allowed to address the matter not originally framed as an issue during the hearing as it has been decided in **George J. Minja vs. The Attorney General**, Civil Appeal No 75 of 2013. A third exception is where it appears the parties left the issue to the trial court for its determination, in line with **Odd Jobs vs. Mubia** [1970] EA 476 cited by the Court of Appeal in **Agro Industries Ltd vs. The Attorney General** [1994] T.L.R 43.

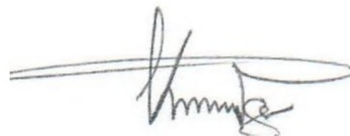
In the present case, the trial court is criticized for omitting to frame issues and for its failure to analyze the evidence. The court was bound to determine or evaluate evidence regarding the issues framed and make a determination. The court could only analyze the evidence given in relation to framed issues. It is not clear whether parties had an opportunity to address issues, which the trial court framed while composing its judgment. In other words, parties did not agree on matters in controversy and assemble evidence to prove or disapprove them. I am of the firm view that it unlikely that parties were accorded a fair hearing. It is my findings that failure to frame issues at the first hearing and framing them while composition a judgment denied parties an opportunity to a fair trial.

The appellant's advocate beseeched this court to step into the shoes of the trial court and determine the suit in merit basing on the evidence on record. The respondent's advocate prayed for a retrial. I decline at the outset the invitation to step into the shoes and decided the matter on merit. The trial was conducted without framing the issues as a result it is not clear that

the evidence on record covered all matters in controversy. Not only that but also the fact that the trial court raised and determined issues without affording the parties an opportunity to adduce evidence, amounts to breach of the parties' right to fair trial. Thus, it makes the entire proceedings and the judgment a nullity.

In the end, I quash the proceedings and set aside the judgment and decree. I remit the case file to the trial court for trial *de novo* before another magistrate with dispatch. I make no order as to costs as no party is to blame for errors which occasioned a retrial.

It is ordered accordingly.



J. R. Kahyoza

JUDGE

10/3/2022

Court: Judgment delivered in the presence of Mr. Kelvin Mutatina, the respondent's advocate and Ms. Rosemary Makori, advocate holding advocate Mr. Hamza Maliki's brief for the appellant. B/C Ms. Martina (RMA) Present.



J. R. Kahyoza

JUDGE

10/3/2022