IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CIVIL APPEAL NO. 10 OF 2022

(Originating from the Judgment and Decree of the Resident Magistrate Court of Mbeya at Mbeya in Civil Case No. 58 of 2018)

ALLIANCE FINANCE CORPORATION LTD .....APPELLANT

VERSUS

SAFARI DENIS SAMSON.....RESPONDENT

JUDGEMENT

Date of last Order: 06/12/2022

Date of Judgment: 06/04/2023

Ebrahim, J.

This is the first appeal, the appellant ALLIANCE FINANCE CORPORATION LTD is challenging the decision of the Court of Resident Magistrate of Mbeya at Mbeya (the trial court) in Civil Case No. 58 of 2018, vide the judgment dated 10th December, 2019. The impugned decision was made in favour of the respondent after the trial court found that the Appellant breached a contract by taking the respondent's motor vehicle without notice contrary to clause 18 of the agreement.

Before the trial court the respondent, SAFARI DENIS SAMSON was a plaintiff. He instituted a suit against three persons namely; the

appellant i.e., ALLIANCE FINANCE CORPORATION LTD, TATA AFRICA HOLDINGS TANZANIA LIMITED and STEAM GENERATION AND RECOVERIES LTD (who were the 1st, 2nd and 3rd defendants respectively) for unlawful repossession of a motor vehicle (a bus), TATA make with registration No. T 667 DLZ.

The respondent/plaintiff prayed to the trial court for orders; compelling the defendants to hand over a motor vehicle with registration No. T 667 DLZ, payment of Tshs. 100,000,000/= as general damages, permanent injunction order precluding the defendants not to continue with illegal conducts of depriving his motor vehicle, an order for the 1st and 2nd defendants to return the motor vehicle to Mbeya at their own costs and costs of the suit. The defendants denied all claims.

After hearing the evidence of all parties, the trial court found that the respondent had no any claim against the 2nd and 3rd defendants but the 1st defendant only. Thus, the 1st defendant (the appellant herein) was condemned for breach of contract and ordered to return the motor vehicle to the respondent at her own costs. Dissatisfied by the decision, the 1st defendant/appellant is now before this court as the only appellant though at the time of filing the appeal the memorandum of appeal bared the name of the three appellants.

The brief facts of the case as gathered from the record are that; in January, 2018 the respondent purchased a motor vehicle from TATA African Ltd (the seller) for a business of transporting passengers. A purchasing costs of the Motor vehicle was Tanzanian shillings (Tshs) 101,000,000/=. The respondent made an initial payment at a tune of Tshs. 30,000,000/= to the seller whereby the rest of payment i.e Tshs. 71,000,000/= was secured as a loan from the appellant. The loan agreement between the respondent and the appellant was that the appellant should retain original registration card of the motor vehicle as security for loan. Thus, the same motor vehicle was a collateral for the loan and that in case of default the appellant had a right of repossessing the motor vehicle for the purpose of recovering the loan.

Unfortunately, the respondent defaulted payment hence the appellant exercised her right of repossession of the motor vehicle through her agent one Steam Generation and Recoveries Ltd. It was alleged that the respondent default occurred on 10th July 2018 and the repossession by the appellant was made on 2nd December 2018. The respondent was not amused with the repossession therefore he instituted the suit which is a subject of the instant appeal.

The appellant preferred six grounds of appeal as follows:

1. *That the learned trial Magistrate erred in law and in fact by holding that the appellant is in breach of contract.*
2. *That the learned trial Magistrate erred in law and in fact by holding that there was a requirement to issue notice to the respondent before the appellant took possession of the motor vehicle.*
3. *That the learned trial Magistrate erred in law and fact in holding that the 1st appellant did not follow the agreed repossession procedures.*
4. *The learned trial Magistrate erred in law and fact in declaring the repossession of the motor vehicle as null and void.*
5. *The learned trial Magistrate erred in law and fact in finding and holding that the appellant did not have the right to repossess the motor vehicle.*
6. *That the learned trial Magistrate grossly erred in law and fact to order the 1st appellant to return the motor vehicle to the respondent.*

At the hearing of the appeal the appellant was represented by advocate Nzaro Kachenje whereas the respondent had services of advocate Peter Kiranga. The appeal was argued by way of written submissions. Parties duly filled their respective submissions. Each party tried to give a

detailed and long submissions for and against the appeal. Counsels for the parties also included other matters than those found in the grounds of appeal. Nonetheless, I will firstly consider the first ground of appeal due to the reasons to be apparent in the due course.

On the first ground of appeal, counsel for the appellant submitted that breach of contract as founded by the trial court was not framed as one of the issues for determination hence the appellant was not afforded the right to be heard. He contended that the trial court raised the issue of breach of contract *suo moto* thus, the principle of natural justice on the right to be heard demanded the learned trial Magistrate to invite the parties to address the court on the same. He relied on the case of **Charles Christopher Humphrey Kombe vs Kinondoni Municipal Council**, Civil Appeal No. 81 of 2017 and **Wegesa Joseph M. Nyamaisa vs Chacha Muhogo**, Civil Appeal No. 161 of 2016 where the Court of Appeal of Tanzania said that raising a new issue for determination without according parties the right to address the court is fatal irregularity which vitiates a judgment.

Apart from faulting the trial court for deciding the issue which was not framed by the parties, counsel for the appellant proceeded submitting about how the contract between the appellant and the respondent was

formed. Counsel for the appellant was of the view that since parties were not afforded the right to address the issue of breach of contract by the trial court, he is now addressing this court on the same. He concluded that there was no breach of contract on the part of the appellant since she exercised her right under the agreement.

In reply, as to the first ground of appeal counsel for the respondent submitted that the trial court was proper to hold that the appellant breached contract. He referred to the clauses of the agreement which the trial court relied upon in its decision. Counsel for the respondent did not give any account about the appellant's counsel complaint that breach of contract was a new issue. He just submitted that the appellant truly breached a contract. Thus, the trial court was justified in its decision.

In his rejoinder submissions on the first ground of appeal counsel for the appellant reiterated the contents of the submission in chief. He then expounded each clause of the agreement relied by the respondent's counsel in arguing that the appellant breached contract. He concluded reiterating his view that the appellant did not breach contract rather she exercised her right as per the agreement.

I have considered the submission by the counsels for the parties, the record and the law. The issue to begin with, in my considered view, is whether breach of contract was one of the issues framed by the parties and the trial court for determination. In case the answer will be negative, it will be followed with the issue as to whether parties were prejudiced and the remedy thereof.

Framing of issues in relation to the matter at hand is governed by **Order XIV rule 1(1) of the Civil Procedure Code, Cap. 33 R.E 2019**, where a material proposition of fact or law is affirmed by one party and denied by the other. **Order XIV rule 1 (5)** read together with **Order VIII B rule 4** requires the trial court, upon reading the pleadings and hearing the parties at the first hearing, to frame and record the issues on which the right decision of the case shall be based upon.

In the instant matter the record shows that at the final Pre-Trial Conference held on 9/7/2019 parties agreed on, and the trial court framed the following issues:

1. *Whether the plaintiff claims a motor vehicle from the defendants.*
2. *Whether the 1st defendant had any liability to repair the plaintiff's motor vehicle*

3. *Whether there was misinterpretation between the plaintiff and the 2nd defendant in the contract signed by both parties.*
4. *Whether the deprival of the plaintiff's motor vehicle resulted into the loss of the plaintiff's and passengers' luggage.*
5. *To what reliefs are the parties entitled to.*

Having framed the above issues, the case was fully tried by each party adducing evidence. Thereafter, the trial court resolved each of the above issues. It is clear in the impugned judgment that the learned trial Magistrate after resolving the 1st to 4th issues which were resolved against the respondent, she was left with the 5th issue. Before resorting to the 5th issue, the learned trial Magistrate went ahead to look on the terms of the contract. The learned trial Magistrate stated as follows:

> *"I find it necessary to look at the terms of the contract signed by the plaintiff and the 1st defendant....."*

Basing on the foregone, in my view, the learned trial Magistrate resorted to a fresh issue which was not framed for determination. Admittedly, a trial Magistrate enjoys discretion under **Order XIV rule 5 of the CPC** to amend issues or add new issues at any time before pronouncement of the judgment. **Order XIV rule 5(1)** provides as follows:

> *"5.-(l) 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"* (emphasis added).

Now, if the trial Magistrate enjoys the discretion of amending the issues or adding them as he/she thinks fit, the minor issue for determination at this juncture is whether he/she may do so without affording parties opportunity to address the court on the amended or added issues.

In the case of **Barclays Bank Tanzania Limited vs Sharaf Shipping Agency (T) Limited & Another**, Consolidated Civil Appeals No. 117/16 of 2018 and 199 of 2019, the Court of Appeal of Tanzania at Dar es Salaam (unreported) faced the circumstances akin to those under consideration by this court. In resolving the issue, the CAT said that:

> *"Although the duty to frame issues is of the trial Judge, the same cannot be done without involving the parties or their advocates who have both the duty to assist the court on the process and a right of hearing as well. Admittedly, the trial Judge enjoys discretion under Order*

XIV rule 5 to amend issues at any time before pronouncement of the judgment. ***Nonetheless, unless the amended issue is captured in pleadings and evidence, he is bound, before amending the same, to afford the parties a right of hearing****. See for instance,* ***Peter Ng'homango v. the Attorney General,*** *Civil Appeal No. 114 of or 2011(unreported) where it was held:*

"Cases must be decided on the issues on the record and if it is desired to raise other issues they must be placed on record by amendment. In the present case the issue on which the judge decided upon was raised by himself without involving the parties and in our opinion he was not supposed to take such a course""

A similar position was stated in the case of **People's Bank of Zanzibar v. Suleman Haji Suleman** [2000] T.L.R. 347 where an additional issue was framed and determined in the course of composing judgment without involving the parties. The Court of Appeal held that:

"In a situation where a court amends an issue or raises fresh issue or where it considers a matter before it can

only be decided on technical point which has not been addressed by the counsel the proper thing for the court to do at any stage before judgment is to re-open the case and give the counsel on each side reasonable opportunity to lead evidence or address the court on the issue before the court gives its judgment and failure to do so amount to miscarriage of justice".

What is discerned from the above decided cases of the superior court in our jurisdiction is that, a trial Magistrate may amend issues or add a fresh issue without recalling the parties or their advocates to address the court if the amendment or a fresh issue is captured in the pleadings and evidence. However, if the issues are not from the pleadings and evidence, parties and/or their advocates are supposed to be invited to address the court.

See also, **Oriental Insurance Brokers Limited v. Transocean (Uganda) Limited** [1992] EA 260, where it was guided as follows:

"Under the provisions of Order 13 of the Civil Procedure Rules, a trial court has the jurisdiction to frame, settle and determine issues in a suit. ***A trial court may frame issues based on the evidence of the parties***

or statements made up by their counsel though the point has not been covered by the pleadings provided that that parties are afforded an opportunity to address the court on the new issues framed." (Bold emphasis added).

As to the matter at hand, having scanned the pleadings on the record, the respondent's claims in the plaint were directed to TATA AFRICA HOLDINGS TANZANIA LTD who was the 2nd defendant for illegal repossession of the motor vehicle which however was resolved by the trial court that the respondent had no claim against her. There was no any claim of breach of contract by the respondent against the appellant. More so there was no evidence adduced by the parties; neither the appellant nor the respondent which led to the claim of breach of contract. Again, the proceedings do not anywhere indicate that parties had any controversy regarding terms of the contract between the respondent and the appellant. Conspicuously, the issues which were framed before commencing a full trial of the case reflected what was pleaded in the respondent's plaint and resisted by the appellant and other defendants who are not parties in this appeal.

It can also be observed from the respondent's counsel submission filed in this court regarding this appeal in the introduction that "*the respondent had instituted the suit against the appellant claiming illegal repossession of the motor vehicle by the appellant*". In my considered opinion, claim of illegal repossession is not as same as the claim of breach of contract as the trial court introduced in the impugned judgment. In the circumstances, it is my findings that the trial court's conviction that the appellant breached contract was a fresh issue not captured in the proceedings and evidence. Thus, inviting parties to address the court on the new issue was crucial and inevitable.

That being the case, the that follows is whether parties; specifically, the appellant was prejudiced by the course taken by the trial court and the remedy available to the situation.

It should be noted at the outset that a decision based on an issue which parties have not been accorded the right to address the court is prejudicial to the parties and vitiates the judgment. This is so because, the irregularity has the effect of denying the parties' right to be heard; a fundamental principle of natural justice. In the cited case of **EX-B.8356 S/Sgt Sylvester S. Nyada v. The Inspector General of Police &**

Attorney General, Civil Appeal No. 64 of 2014, the Court of Appeal of Tanzania held as follows:

> *"There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed suo motu which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as* ***to act otherwise might well result in denying of the parties the right to fair hearing.***"

In the matter under consideration, the decision of the trial court was made in favour of the respondent after the trial court found that the appellant breached contract. As the result the trial court proceeded making the order that the appellant should return the motor vehicle to the respondent at her own costs. Out-rightly, the decision of the trial court, entirely based on a fresh issue which parties did not have an opportunity to address the court. Indeed, a path which the trial court took prejudiced the appellant because other issues which were framed

and agreed by the parties were resolved against the respondent. However, at the end result the decision came into favour of the respondent after the trial court raised a new issue.

Further, it is also my position that had the trial court placed the issue of breach of contract to the parties to expound, the appellant would have adduced evidence leading to or made explanation regarding the contract as the counsel for the appellant tried to make in this court through his written submission though it was a wrong path considering that this court is exercising appellate powers.

Having found that the appellant was prejudiced by the decision of the trial court, the followed question is what is the remedy/remedies available to the parties.

In **EX-B.8356 S/Sgt Sylvester S. Nyada v. The Inspector General of Police & Attorney General** (supra), the CAT guided as follows:

> *"We desire to add, as correctly submitted by the appellant that where this is done, prudence requires that the parties be afforded opportunity to address the Court on the issues so amended or added, in tandem with the audi alteram partem principle of natural justice....."*

In the circumstance, I hereby allow the appeal on the strength of the first ground of appeal only. Thereafter, this court invoke its revisional jurisdiction under **section 44(1)(b) of the Magistrates Courts Act, Cap 11 RE 2019** to nullify and set aside the impugned judgement of the trial court dated 10th December 2019 and the subsequent orders thereof. Thereafter, the file is remitted to the trial court with the directive that the same trial magistrate should call parties to address the court on the new issue raised by the court *suo motto* and proceed to compose a fresh judgment from the previous issues and the one raised by the court. Owing to the fact that the matter is a backlog case from 2018, the process should be expedited. In considering the circumstances led to the instant decision, I give no order to cost. Each party shall bear its own costs.

Ordered accordingly.

R.A. Ebrahim
JUDGE

Mbeya
06.04.2023