THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CIVIL APPEAL NO 30 OF 2022

(Originating from Civil Case No. 28 of 2021 in the Resident Magistrate's Court of Morogoro)

SANGALE CLEMENT SAID ..... APPELLANT

VERSUS

FOCUS PATRICK MUNISHI..... RESPONDENT

JUDGMENT

Final Court Order on: 31/05/2023
Judgment date on: 06/06/2023

NGWEMBE, J:

This appeal originates from a summary judgment entered by the Resident Magistrate's Court of Morogoro (the trial court) under Order XXXV, Rule 1 (a) of **The Civil Procedure Code, R.E 2019.** The Plaint lodged before the trial court revolved around dishonored bank cheques, which were purportedly drawn by the appellant for the respondent in repayment of a debt valued at Tshs. 22,000,000/= a debt overdue to the respondent, which had not been paid despite the respondent's several demands.

Under Order XXXV Rule 2 (1) of **The Civil Procedure Code**, the appellant instituted a Civil Application No. 34 of 2021 seeking leave of the trial court to appear and defend the suit, but the application was

dismissed. The summary suit therefore proceeded having one witness, the respondent who testified on oath as PW1. The witness testified that he entered a business agreement for supply of rice. He paid the appellant a total of Tshs. 22,000,000/=, whereas Tshs. 21,600,000/= was paid through the appellant's account of NMB bank held in the name of his enterprise on 21/06/2018. Some other time when the appellant was passing through Morogoro heading to Dar es Salaam, the respondent handed him another cash amount of Tshs. 400,000/=. The bank pay in slip was admitted in court as exhibit P1.

Following such payment, the reciprocal was for the appellant to supply and deliver the agreed goods. Unfortunately, the appellant failed to heed to his contractual obligation by delivering those goods to the respondent. Such failure was followed with avoiding the respondent when he demanded for those goods and explanation for such failure. Consequently, the respondent demanded back his money, yet the appellant failed to repay the respondent's money.

After several demands, at last the appellant on 02/12/2019 issued a postdated cheque of Tshs. 10,000,000/= and another postdated cheque of Tshs. 12,000,000/= was issued to the respondent on 08/01/2020. On the due dates the respondent presented those cheques before the bank, alas, those cheques were dishonored on the reason that the drawer's account had no fund.

Copies of those cheques were tendered and admitted in court during trial marked collectively as Exhibit P2. That the respondent informed the appellant on the dishonored cheques, who in turn asked for some time to repay such money but he did not walk the talk. Finally, the respondent prayed during trial that the appellant be compelled to

repay his money with interest as the respondent had borrowed same from KCB Bank.

The trial court proceeded to award the following reliefs; Tshs. 22,000,000/= value of the dishonored cheque, an interest at 21% of the decretal sum from December 2019 to the date of judgment. Interest on the decretal sum at the rate of 12% per annum from the date of judgment until the date of full satisfaction of the decree. Compensation/damages of Tshs. 5,000,000/= and costs of the suit.

The appellant being aggrieved by the judgment and decree, has filed this appeal challenging the trial court's judgment on two main grounds namely: -

1) That the presiding magistrate erred in law and fact by deciding the matter in favour of the respondent while the court had no territorial jurisdiction over the matter.
2) That the presiding magistrate erred in law and fact by deciding the matter in favour of the respondent who sued a wrong party.

Each party was armed with an advocate in addressing this appeal, while the appellant was represented by learned advocate Florian Makinya, advocate Benjamin Jonas represented the respondent. On 23/05/2023 when the matter was tabled for hearing, the appellant's advocate prayed the appeal be addressed by way of written submissions which prayer was conceded by advocate for the respondent. The prayer was granted and both complied with the court schedule of filing their written arguments. Both counsels presented their industrious research with convincing legal arguments. This court commends them for good work.

Briefly, Mr. Makinya began his submission by arguing first the second ground, which complained on the respondent suing a wrong party. He strongly argued that, the agreement which bred to the case before the trial court was between the respondent and Mapanda Enterprises Ltd, the company which seems to be managed by the appellant. Suing the appellant instead of the company, amounted into suing a wrong party. Added that even the trial court, wrongly entertained the suit.

Justified his argument by referring to the prominent case of **Solomon Vs. Solomon and Company Ltd (1897) AC. 22** which case illustrated on how liability of a company cannot extend to subscribers, directors or managers. Further referred to section 15 (1)(2) of **The Companies Act No. 2 of 2002**. Rightly, extended his argument, by observing that, only when corporate veil is lifted, the shareholders or director of the company can be held liable for the companies' affairs.

Further argued that in this case, no prerequisites existed for lifting the veil, nor any procedure for lifting of corporate veil was conducted. Supported his position by citing the cases of **Manji Vs. Masanja and another [2006] T.L.R. 27** and **Jones Vs. Lipman (1962) 1WLR 8322** along with **Deimla Co. Ltd Vs. Continental Tyre and Rubber Co. (1916) 2 AC. 307.** Along with the submission, he purported to annex a deposit slip which bore the names of Mapanda Enterprises Ltd and copy of Taxpayer Identification Number (TIN) bearing the same name, but he labelled the TIN as Certificate of Incorporation. These annextures were purportedly seeking to prove that Mapanda Enterprises, with which the respondent entered into agreement, is incorporated.

Submitting on the first ground, the learned advocate brought forward section 18 (a), (b) and (c) of **The Civil Procedure Code,** which provides for a place of suing. Therefrom, he rightly concluded that, the proper place of suing is either where the cause of action arose or where the defendant resides. Proceeded that, the appellant resides at Mafinga Town, Mufindi District, therefore, the trial court at Morogoro had no jurisdiction to try the matter. On this stance he cited the case of **Ahmed Ismail Vs. Juma Rajabu [1985] T.L.R. 204,** which maintained that, under the circumstance a case should have been instituted where the cause of action arose.

Submitted further that, court's jurisdiction should not be assumed. In this point he referred this court to the case of **Fanuel Mantiri Ng'unda Vs. Herman Mantiri Ng'unda [1995] T.L.R. 159** and that the issue of jurisdiction can be raised at any time even on appeal as it was decided in the case of **Tanzania – China Friendship Textile Co. Ltd Vs. Our Lady of Usambara Sisters [2006] T.L.R. 70**. That the respondent conferred jurisdiction to the court which did not have it, while ousting the jurisdiction of courts in Iringa region. Rested by prayer that, the appeal be allowed, the trial court's decision be quashed.

In turn Mr. Benjamin Jonas vigorously attacked the appellant's submission and the appeal as a whole. Rightly observed, what he called serious material irregularity apparent in the appellant's submission, by improperly annexing documents in the written submission. As such he cited the case of **Tanzania Union of Commercial Workers (TUICO) Vs. Mbeya Cement Company Ltd and National Insurance Corporation (T) [2005] T.L.R. 41** where it was held *inter alia* that, written submission is a summary of arguments and not evidence. The trend of annexing exhibits in the written submission was condemned,

consequently, the annexed documents were expunged and ignored. Thus, prayed this court to do the same in respect of annextures in the appellant's submission.

Advancing to the merit of this appeal, Mr. Benjamin made a general challenge to the whole appeal by arguing that, those grounds of appeal were not raised by the appellant in his application No. 34 of 2021 for leave to appear and defend. To him, the grounds are clothed with new issues, which were not heard by the trial court. He stated the law that the appellate court should deal with issues on which, the trial court expressed its opinion as it was held in the case of **Tanzania Cotton Marketing Board Vs. Cogecot Cotton Company S.A (2004) T.L.R. 132.**

Without prejudice to the above submission, the learned advocate proceeded to argue on the grounds of appeal. Submitting on the second ground on propriety of the suit for failure of the respondent to sue the appellant's company, Mr. Benjamin discredited all those submissions as misdirection and misconception of legal understanding. Categorically pointed out that, the dishonored cheques as exhibited in P2 were drawn by the appellant in persona as opposed to the company's name. He suggested that the cause of action was therefore, against the appellant in his personal capacity and not his company.

Arguing on the first ground, the respondent's learned counsel submitted that, the appellant's counsel was misguided and misplaced, because the dishonored cheques which formed the major subject of Civil Case No. 28 of 2021 were presented before Mt. Uluguru NMB Bank branch, where they were dishonored. Under those facts, the cause of action therefore, arose in Morogoro. Hence the trial court at Morogoro

was proper court with territorial jurisdiction of the place where the cause of action arose.

He invited this court to adopt an interpretation of section 18 (c) of **CPC** as made in **Abdallah Ally Selemani t/a Ottawa Enterprises (1987) Vs. Tabata Petrol Station Co. Ltd and another, Civil Appeal No. 89/2017** where the court observed that, all suits provided under section 18 of the CPC are to be filed where the cause of action arose or where the defendant resides or works for gain.

He reiterated his earlier observation that, an objection as to place of suing was to be raised at the earliest stage and the appellate court cannot entertain such objection unless, it was raised at trial and there has been subsequent failure of justice. His argument was strengthened by this court's judgement in **Mantrac (T) Ltd Vs. Summer Communications Ltd, Civil Appeal No. 279 of 2018.** Added that since the two conditions were not met, the ground be dismissed. Rested by a prayer that the appeal be dismissed for lack of merits.

From the outset and upon perusal to the records together with the parties' arguments, it is certain the appellant does not in any way dispute the facts constituting the claim; that they had entered an agreement for supply of rice; the said rice was not supplied to the respondent; and the appellant do not dispute that he received money from the respondent and such money was never refunded to the respondent. Equally the value of the original claim of Tshs. 22,000,000/= is not disputed by the appellant. On top of that, the two cheques constituting an aggregate of Tshs. 22,000,000/= were dishonored when were presented for payment at NMB Bank, Mt. Uluguru branch. Lastly, the averment by the respondent that the appellant having been informed of the dishonored cheques, he promised to repay

the debt on the other way is not disputed by the appellant. Therefore, in the course of resolving this appeal those facts will be taken as undisputed facts.

Having introduced the facts of the case and the respective submissions of each counsel, obvious this appeal raises two issues for determination by this house of justice namely; *first* - whether the trial court had territorial jurisdiction to entertain the suit; *second* - whether the appellant was a proper party.

Considering the arguments advanced by advocate Benjamin regarding annextures to the written submission, without any iota of doubt, I fully subscribe to it. The position of law is clear, a written argument is not evidence rather are substitute to oral submission. As such, those annextures of pay in slip and TIN number do not deserve this court's eye. The decision in the case of **Tanzania Union of Commercial Workers (TUICO) Vs. Mbeya Cement Company Ltd and National Insurance Corporation (T**) stand as a good legal position in our jurisdiction. I humbly subscribe to it. Consequently, I proceed to expunge those annextures as having no room in this appeal.

Regarding the complaint of the respondent's advocate that the appellant has introduced new issues as he failed to raise them at the earliest stage, I think as well the law is settled in our jurisdiction that, the appellant ought to have raised them in his application for leave to defend. However, both issues constitute a combined question of law touching the issue of jurisdiction of the trial court.

Considering the nature of this appeal, I think it is more equitable if those grounds are determined on merits. The observations made by Mr. Benjamin will be relevant in the overall analysis and determination of the whole appeal.

Proceeding with the main grounds, I will begin with the first issue of whether the trial court had jurisdiction to try the suit. I have noted that the learned advocates are holding the same understanding of section 18 of the CPC. The application of that section into the facts of this appeal is where the two advocates do part ways. Again the question is which facts constitute cause of action and where that cause of action occurred?

Based on the above questions, the appellant's counsel believes the suit was to be instituted in the Resident Magistrate's Court of Iringa where the appellant resides, and that, the trial court at Morogoro had no territorial jurisdiction. At the same time the respondent's counsel holds a different view that, the trial court had jurisdiction, since the cause of action arose herein Morogoro region.

I take cognizance that, jurisdiction of court is fundamental and is conferred by statutes and not parties as correctly so submitted by advocate Makinya and rightly referred to the case of **Fanuel Mantiri Ng'unda (supra).** Not only that case alone, but there are numerous decisions on same, including the case of **Tanzania Electric Supply Company (TANESCO) Vs. Independent Power Tanzania Limited (IPTL) [2000] T.L.R 324** and **National Bank of Commerce Ltd Vs. National Chicks Corporation Ltd & Others, (Civil Appeal No. 129 of 2015) [2019] TZ CA 345.** In the latter, it was *inter alia* held: -

> *"Parties to a dispute may prefer their dispute be determined by a certain court, but they cannot vest that court with the jurisdiction it legally does not have or vice versa. Preference has something to do with the parties' choice but jurisdiction, as we have stated above, is a creature of either the Constitution or law."*

This position of law is clear and has never changed. The suit may be instituted either where the defendant resides or where the cause of action arose. Even the case of **Ahmed Ismail Vs. Juma Rajabu** which Mr. Makinya laid reliance held the same position.

Notwithstanding the above legal position, yet it is much different from the circumstances of this appeal. In the above cited case, the cause of action arose in Arusha and the defendant was residing in Arusha, but the plaintiff filed the suit in Tanga High Court registry. This Court sitting at Tanga ruled that, it was erroneous to file the suit in Tanga registry instead of Arusha. All the same, it observed that the error was not prejudicial and proceeded to determine the matter on merits.

Much as I agree with both counsels in respect of section 18 of the Civil Procedure Code, together with interpretations from many precedents, I think the center of contention may be rested upon answering subsidiary or ancillary questions like; *First what was the cause of action in this appeal? Second when and where did the cause of action arise.*

The appellant's counsel did not express on what constitutes a cause of action in this appeal. However, Mr. Benjamin, boldly suggested that the cause of action arose upon the appellant's act of drawing and issuing dishonored cheques. It is clear that those cheques were drawn at Iringa, but were discovered to be cold cheques and hence were dishonored at Morogoro.

Interpreting the law properly, the cause of action is the right to sue. The right to sue is born where there is a civil wrong. Take for example breach of contract, the act of entering to the contract itself is not the cause of action, but upon breach of that contract that is when it triggers cause of action. No one should think, in a case of contract, one

must sue in the court of the place where the contract was entered, unless some other supervening events prevail. The suit shall be instituted where the breach occurred. Such breach is what in law we call *cause of action*. See **Black's Law Dictionary, Ninth Edition**, interprets *cause of as follows*: -

> *"A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person"*

Likewise, **Edwin E. Bryant** in his book **The Law of Pleading Under the Codes of Civil Procedure** (2nd ed. 1899) at page 168 illustrates cause of action to mean: -

> *"What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be - (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right"*

In another good work, **McCaskill, Actions and Causes of Action, 34 Yale L. J. 614 (1925),** the author gives a clear timing of the cause of action to be when the wrong or delict has happened or occasioned by a party. He expounded as quoted hereunder: -

> *"The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong"*

In our case, considering that the original suit was preferred under Order XXXV of the CPC, I am of the settled view that the respondent

was not entitled to file the summary suit until when those two cheques were dishonored. The dishonored cheques in this appeal triggered a cause of action to the respondent against the drawer of those cheques. The question where the agreement was drawn and signed had nothing to do with dishonored cheques.

Under our laws, it is provided under section 47 (2) of **The Bill of Exchange Act, Cap 215** on accrual of cause of action in clear terms as quoted hereunder: -

> **Section 47 (2)** –*"Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder."*

To tell the nature of cause of action and where it arose, one can extract from the plaint or statement of the claim. Upon inquisitive perusal to the trial court's proceeding and pleadings, I found the cause of action was disclosed in paragraph 4 and 5 as reproduced hereunder: -

> *4. "That the defendant purported to pay the plaintiff through Bank cheque No. 042331 in the sum of ten million shillings (Tshs. 10,000,000/=) payable on 2nd December, 2019 and cheque No. 042332 in the sum of twelve million shillings (Tshs. 12,000,000/=) payable on 8th January 2021.*
>
> *5. That the plaintiff presented the herein named Bank cheques for payment in respective dates, but the cheques were returned un-honored with instructions that the same be referred to the drawer as there were no sufficient funds in the drawer's account"*

Taking the pleading together with PW1 statement before the trial court, it is justified to decide that, the cause of action arose in Morogoro region on 2nd December, 2019 and 8th January 2021 when the respective cheques were dishonored.

Considering the appellant's residence is in Mafinga Township, Mufindi district in Iringa region, then applying section 18 (a) of the **Civil Procedure Code,** the district Court of Mufindi or the Resident Magistrate's Court of Iringa had jurisdiction to entertain the matter, had the respondent chosen to institute the case at a place where the defendant resides.

At the same time, the district court of Morogoro or the Resident Magistrate's Court of Morogoro had jurisdiction to try the matter under section 18 (c) of the CPC, since the cause of action arose in Morogoro municipality as per above explanation. Moreover, is the explanation of section 63 of **The Magistrates Courts Act, Cap 11 R.E 2019** which provides on concurrent jurisdiction as hereunder: -

> **Section 63.- (1)** *"Subject to the provisions of any law for the time being in force, where jurisdiction in respect of the same proceedings is conferred on different courts, each court shall have concurrent jurisdiction therein"*

Even in other common law jurisdictions, the place of suing in cases of this nature is clearly established and settled. For instance, in India under **The Negotiable Instrument Act, 1881,** actions for dishonored cheques are to be commenced in courts within the locality where dishonor took place.

It follows in our case that, both courts that is, those courts in the appellants residence and the trial court where the cause of action arose were competent courts to try the matter. Preference by the respondent

to institute his case before the trial court in this case, followed the precedent in the case of **National Bank of Commerce Ltd Vs. National Chicks Corporation Ltd & Others**. In fact, by suing the appellant in Morogoro did not oust jurisdiction of the courts in Iringa region.

To reach at this conclusion, one must read section 18 of the CPC as a whole. The submissions by Mr. Makinya seem to be incomplete as he did not address properly section 18 (c) in anywhere in his submission. As such advocate Benjamin was right to observe that Mr. Makinya's argument was misguided.

Therefore, the first issue is resolved in affirmative that, the trial court had territorial jurisdiction to hear and determine the suit as it did. Consequently, I proceed to dismiss the first ground entirely.

The second ground by the appellant was to the effect that, the appellant was not a proper party to be sued, hence the suit was misconceived. Mr. Benjamin was very brief on this. To interpret what he submitted, he meant that the cause of action was born from the appellant's action in his personal capacity and not on behalf of the company. While advocate Makinya held firm stance that the agreement was entered between the respondent and Mapanda Enterprises Ltd. To follow the arguments of advocate Makinya, he suggests that, the respondent ought to sue the company as opposed to the appellant in person.

In considering deeply on this ground, I may rightly confess that, Makinya's argument is wanting. First, he thinks the cause of action arose when the agreement was entered, but in resolving the first issue, the cause of action arose upon drawing a dishonored cheques. Alternatively, the fact that Mapanda Enterprises Ltd is a company with limited liability

was never established anywhere before the trial court. Even by assumption that, what he annexed in the submissions deserved consideration, which is not the case, the annextures did not in fact and in law establish corporate personality. Therefore, the status of Mapanda Enterprises is unknown save only to the appellant.

Apart from that, there is this fact that the respondent deposited part of the money through the account held in the name of Mapanda Enterprises Ltd and part of the money was paid to the appellant in cash. More so, there is no statement by the appellant that a company receipt was issued in respect of Tshs. 400,000/= cash money, so paid by the respondent. All correspondence between the appellant and the respondent regarding repayment of money were between them in ordinary capacity without any formality demonstrating that the appellant was acting for the company. Lastly, as Mr. Banjamin rightly observed, the appellant promised to repay the money several times in his capacity and he drew the cheques in question not in the company's name, but in his personal names. Exhibit P2 shows that the drawer and owner of account No. 60206600250 is SANGALE CLEMENT SAID for both, Cheque No. 042331 and 042332.

It is unknown how would the appellant seek to repay the debt which did not fall in his personal liability. Meditating the facts of this case, I am of the considered view that, if the appellant was not responsible in his personal capacity, he would not have done any of the above or conduct himself the way he did. In any case, the appellant would have intimated to the respondent that he (SANGALE CLEMENT SAID) was not responsible personally, but the company called Mapanda Enterprises Ltd. He may even direct the respondent to the right person, right from the beginning.

Under the doctrine of estoppel, the appellant cannot be heard denying being associated with the matter at this stage while in fact he acted all along under his personal capacity. This has reminded me the discussion advanced by on Jurist Robertson, A, in his article **Reasonable Reliance in Estoppel by Conduct, UNSW Law Journal,** also referring to the case of **March Vs. E & M H Stramere Pty Ltd (1991) 171 CLR 506,** illustrated that: -

> *"At common law, the estoppel prevents the representor from denying the truth of the assumption in litigation between the parties, so the rights of the parties are determined by reference to the assumed state of affairs. In equity, the estoppel prevents the representor from acting inconsistently with the assumption, without taking steps to ensure that the departure does not cause harm to the representee."*

Under the prevailing circumstance, all the undertaking between the parties were clearly between them in personal capacity. Advocate Makinya's submission in this appeal cannot assist the appellant from evading a clear and undisputed liability. This court takes cognizance of the precedents the appellant cited in this case, that is, **Solomon**'s case, **Manji Vs. Masanja** and **Jones Vs. Lipman** also that of **Deimla Co. Ltd Vs. Continental Tyre and Rubber Co,** these are just few out of countless precedents on corporate personality and the doctrine of lifting the corporate veil. All the cases are inapplicable in this appeal, as it has been demonstrated, there was no proof of any existing company having been involved in the case. In the circumstances of this appeal, my verdict is that, the appellant was a proper defendant before the trial court, the second ground is thus dismissed.

Having so reasoned bearing in mind those undisputed facts this appeal is unmerited and I proceed to dismiss it entirely. The summary judgment entered by the trial court is left undisturbed. Considering the nature of the appeal, it is much justifiable, and I order, that the respondent be paid the costs as prayed.

Order Accordingly.

Dated at Morogoro this 6th day of June, 2023.

P. J. NGWEMBE

JUDGE

06/06/2023

Court: Judgement delivered at Morogoro in chambers on this 6th day of June, 2023 in presence of the Advocate Benjamini for the Respondent and aslo holding brief for Advocate Florian for the Appellant.

Sgd: L. Lyakinana, Ag, DR

06/06/2023

Court: Right of appeal to the Court of Appeal explained.

Sgd: L. Lyakinana, Ag, DR

06/06/2023

I Certify that this is a true and correct copy of the original

Deputy Registrar

Date 12/6/2023 at Morogoro