IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB-REGISTRY)

AT DAR-ES-SALAAM

CIVIL CASE NO. 179 OF 2022

DB SHAPRIYA & CO. LIMITED ..... PLAINTIFF

VERSUS

NCBA BANK TANZANIA LIMITED (Formerly known as COMMERCIAL BANK OF AFRICA (TANZANIA) LIMITED ..... DEFENDANT

JUDGMENT

25/08/2023 & 19/02/2024

NKWABI, J.:

Put a table between two persons who are facing each other. Then put number 6 on the table and ask those two persons to read it. One of them will surely read the same as "six" while the other will naturally read it as "nine". This appears to be the same with the perspectives between the parties to this suit. While the plaintiff is steadfast that the defendant breached its duty to her, its client, the defendant is uncompromising that she did not breach any duty and was perfectly entitled to block the money in the plaintiff's account. Further, while the counsel for the plaintiff deems the 1st issue carries the kernel of the suit, the counsel for the defendant thinks that the 2nd issue truly embodies the nitty-gritty of the suit. I shall not be distracted by the vantage points maintained by the parties and

their advocates. My duty is to deliver justice, period. It is which I am about to deliver.

The plaintiff is interestingly suing the defendant for reliefs as I reproduce:

(a) A declaration that the defendant had illegally blocked the account of the plaintiff causing damages to the plaintiff including failure to perform projects and payments of credit facilities;

(b) Payment of specific damages to the tune of EURO three million three hundred two thousand nine hundred forty-three and twenty-six cents (EURO 3,302,943.26), United States Dollars one hundred fifteen thousand four hundred fifty and eight four cents (USD 115,450.84) or its equivalent in Tanzania shillings and Tanzania four.

(c) General damages to be determined by the Honourable Court for loss of use of the money, profit and inconveniences suffered on account of business frustration caused by the unprofessional conduct of the defendant;

(d) Interest of 9% per month on item (c) above from 19th April 2017 till the date of judgment;

(e) Interest of 12% per month on the above decreed amount from the date of judgment till full payment of the decree.

(f) Costs of this suit; and

(g) Any other reliefs this Honourable Court deems just to grant.

Mediation was conducted but was fruitless. The case file was returned back for trial. On the final pre-trial conference, this Court framed the issues for consideration and determination thus:

1. Whether the defendant breached its duty by failing to honour the demands/payment instructions from the plaintiff.
2. Whether the defendant was justified to block the plaintiff's account.
3. Whether the plaintiff suffered any losses.
4. What reliefs are parties entitled to.

The plaintiff had only one witness. Throughout his testimony, PW1 who is the managing director of the plaintiff, said the plaintiff maintained a bank account with the defendant. On 17th October 2016 she received money into her bank account. On the next day, she withdrew some amount. But she could not proceed withdrawing the money because of a prohibitoty notice issued by the Attorney General dated 18th October 2016 (exhibit P. 2). On inquiry, she was told that there was a prohibitory notice owing to criminal proceedings. The saga went on up to 17th June 2021 when the money was released through a letter issued by the Director of Public

Prosecutions addressed to the defendant. The defendant appears to have received the letter on 18th June, 2021. The plaintiff is claiming the reliefs because the prohibitory notices were illegal and the defendant enticed the same. That is the stance taken by her advocate in the written submissions.

The defendant, through DW.1 testified that the suit is bound to be dismissed with costs. The same sentiments are held by the counsel of the defendant in his final written submissions.

After I have read between the line the 1st and 2nd issues, I am of a considered opinion that it is crucial to determine the 2nd issue first, because in my view, it consists the decisive point in this case. The 2nd issue is whether the defendant was justified to block the plaintiff's account. Nevertheless, one cannot determine the 2nd issue without determining the question whether the prohibitory notices were legal though. I straight forward undertake to determine the 2nd issue.

It was pointed out by Mr. Masumbuko, learned counsel for the plaintiff, that the prohibitory notices tendered by the defendant did not concern any instructions submitted on 18th April 2017 and 2nd and 8th November 2017. He also argued that the defendant did not submit any letter from the Attorney General or the Director of Public Prosecutions showing that

there were any pending proceedings against the plaintiff. It is added that the charges and economic crimes case No. 23 of 2019 have not link because the documents have nothing to do with the disputed period which is 18th April 2018 [sic] to 28th April 2017 and 18th October 2017 to 8th November 2017 as those periods had no any prohibitory notices. He also claimed that the bank had no right to contact a third party without the prior consent of its customer. He cited the duty of secrecy/confidentiality as discussed in **Ellinge's Modern Banking Law** (OUP), 5th Edition, 2011. He also referred me to section 48 (3)(a) of the Banking and Financial Institutions Act, Cap 342 R. E. 2019. The counsel for the plaintiff did not end there, he fortified his submissions by the case of **Faraji Augustine Chombo v. Republic,** Criminal Appeal No. 346 of 2015, CAT (unreported).

It was also the view of the counsel for the plaintiff that the defendant should have prayed the Court to join the Attorney General as a Third Party if it thought the prohibitory notices were legal or brought the Attorney General as a witness to justify that the prohibitory notices were legal.

It is at this point where the counsel for the plaintiff, with extreme veneration to him, crossed the red line. It is the plaintiff who ought to have sued the Attorney General by joining him to the suit. See **Bunda**

Town Council & 4 Others v. Elias Mwita Samo & 9 Others, Civil Appeal No. 309 of 2021, CAT at p. 5 the Court held that:

> *"... an action to join a party as defendant is not available to the defendant. The reason being that, the defendant is not the originator of the case. The trial court, therefore, can give such order on application by the plaintiff or on its own motion in terms of Order 1 Rule 10(2) of the CPC where it finds that, the presence of a non-party is necessary for effectual and complete adjudication of the dispute."*

Further it was for the plaintiff to bring the Attorney General as her witness if she was advised by the Attorney General that the prohibitory notices that were issued were illegal. The reason why I hold so, is because, it is the plaintiff who has to prove her case on the balance of probabilities, see the case of **Paulina Samson Ndawavya v. Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017, CAT where it was stated that:

> *"Be it as it may, we think the success of the appellant's case did not depend on the respondent's credibility. It depended on the appellant discharging her burden of proof on the required standard in civil cases relative to the issue to be proved. ...*

It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case."

He additionally claims that the money in the account were not proceeds of crime or corruption. On this allegation and the allegation that the defendant was enticing for prohibitory notices from the Attorney General and the Director of Public Prosecutions, I think the claims and submission on these points, are with respect, outrageous. Those institutions are so prestigious or respected institutions in our country. One cannot suggest that they received advantage from the defendant and be heard without any evidence. The decision of the Court of appeal that assists the defendant is **Mujuni Joseph Kataria v. Samwel Ntambala Luangisa & Another** [1986] T.L.R. 62 CAT where it was stated that:

"Failure to call material witness, the court may draw adverse inference."

After all, the plaintiff's counsel waited until the final submissions stage to raise those serious allegations without pleading them and bringing evidence to prove them but tries to invert her burden of proof to the defendant to prove her defence by bringing the Attorney General as a

witness or at least join him as a third party. It is trite law that a party (defendant) cannot be thrown at an unwilling plaintiff, it is more so about the defendant where the plaintiff is the one who has the onus to prove her case on the balance of probabilities.

I say the allegations raised by the counsel for the plaintiff in the final submissions are overdramatic because, it has been stated times without number that the general rule is that a party is bound by his pleadings and should not be allowed to succeed on a case not made out in his pleadings **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161 CAT, cited by the counsel for the defendant, where it was stated that:

> *"The function of pleadings is to give notice of the case which has to be met. Party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the Court will be called upon to adjudicate to determine the matters in dispute."*

See also **Barclays Bank (T) Ltd v. Jacob Muro,** Civil Appeal No. 357 of 2019 CAT:

"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."

The above could be said in regard to the attempt by the counsel for the plaintiff to narrow down the contentious duration to the dates when allegedly there was no any pending prohibitory notices. As the damages so alleged are specific ones, that ought to have been specifically pleaded and strictly proved. Even in the purported particularisation of the damages which can be seen in the plaint, the alleged specific time as stated in the submissions is not indicated. The plaintiff failed to do that, she deserves her case to be thrown out.

The plaintiff, through the back door, is asking this Court to state affirmatively that the prohibitory notices issued by the Attorney General and the Director of Public Prosecutions were illegal. Which means that the plaintiff is pressing this Court to hold that the prohibitory notices were issued contrary to the law. Since the plaintiff did not join the Attorney General as a defendant, I cannot proceed to hold as such because, holding to that effect would be virtually the same as condemning the Attorney

General without affording him the very crucial right to be heard. This Court has no jurisdiction to decide as per the wishes of the plaintiff owing to the failure of the plaintiff to join the Attorney General to this suit. It would appear to me that the plaintiff and her counsel turned a blind eye to **John Morris Mpaki v. The NBC Ltd and Another,** Civil Appeal No. 95 of 2013 CAT (unreported) where it was underscored that:

> *"The law that no person shall be condemned unheard is now legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same would have been arrived at had the affected party been heard."*

Further, the submissions of the counsel for the plaintiff, are, with respect, immoderate for being not based on the pleading and evidence. It is settled law that submissions are not evidence, a court of law cannot decide a case basing on submissions which have no bearing to the evidence, see **The Republic v. Donatus Dominic @ Ishengoma & 6 Others,** Criminal Appeal no. 262 of 2018, CAT, quoted with approval the case of **Transafrica Assurance Co. Ltd v. Cimbria (EA) Ltd** [2002] 2 E.A. where it was stated:

"As is well known a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on."

I answer the 2nd issue in the affirmative because the plaintiff failed to bring a witness from the office of the Attorney General to say that the prohibitory notices were illegal and were obtained by enticement. If the plaintiff thought that the Attorney General was to blame, she ought to have joined him to the suit so that the Attorney General may be heard and a decision thereon made. That was too not done. The plaintiff's case must mirthlessly fail.

The 2nd issue having being decided in the affirmative, I will now proceed to determine the case under Order I rule 9 of the Civil Procedure Code which states that:

"No suit shall be defeated by reason of misjoinder or non-joinder and the court may in every suit deal with the matter in controversy so far as regards the right and interest of the parties actually before it."

At this point in time, should be borne in mind that even in the so-called civilized world, accounts of individuals or of their companies are blocked in the manner they call freezing, sanctions or ban. Thus, even bank accounts of individuals or companies are frozen by orders of the leaders

of those countries. In the premises, what happened is not new in the banking business as painted by the plaintiff and her advocate.

I am aware that I am enjoined to determine all the issues as per **Sheikh Ahmed Said v. The Registered Trustees of Manyema Masjid** [2005] T.L.R. 61 CAT. In this case it was held that:

> *"It is necessary for a trial court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect."*

Now, the 1st issue must follow suit to crumble to the ground against the plaintiff for the reason that it depended on the 2nd issue being decided in the affirmative. Then it cannot be said that the defendant breached its duty by failing to honour the demands/payment instructions from the plaintiff because I have answered the 2nd issue in the affirmative. I answer the 1st issue in the negative.

The third issue is whether or not the plaintiff suffered any losses. To have any meaning, this issue was dependent on the 2nd issue to be answered in the negative. But since it was decided in the affirmative, even if the plaintiff suffered any losses, the losses have nothing to do with the defendant as long as the plaintiff failed to prove that the defendant was

not justified to block the account of the plaintiff. Having stated the above howbeit in brief, the issue crumbles to the ground in disfavour of the plaintiff.

Lastly, I make a finding in regard to the 4th issue. The fourth issue is all about what reliefs are the parties entitled to. Because the plaintiff's case is a wanton failure, I dismiss it with costs.

It is so ordered.

DATED at **KIGOMA** this 19th day of February 2024.

J. F. NKWABI

JUDGE

Mr. Roman Salama Masumbuko, advocate drew final submissions for the plaintiff.

Mr. Elisa Abel Msuya, advocate drew final submissions for the defendant.