IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

(APPELLATE JURISDICTION)

AT DAR ES SALAAM

COMMERCIAL APPEAL NO. 5 OF 2014

(Appeal From the Resident Magistrates' Court of Dar es Salaam at Kisutu in Civil Case No. 119 of 2013)

NATIONAL BANK OF COMMERCE LIMITED ..... APPELANT

VERSUS

LAKE OIL LIMITED ..... RESPONDENT

31st May & 30th June, 2016

JUDGMENT

MWAMBEGELE, J.:

This is an appeal from the decision of the Court of the Resident Magistrate of Dar es Salaam at Kisutu in Civil Case No. 119 of 2013 in which the appellant was ordered to pay/refund the respondent the sum of Tshs. 45,050,000/=, Tshs. 2,500,000/= as general damages and costs.

Aggrieved, the appellant has appealed to this court against that decision on four grounds of complaint; namely:

1. The learned trial magistrate erred in law and fact in holding that the appellant had a contractual duty to inform the Respondent or the insurance of the garnishee order before debiting the account;

2. The learned trial magistrate erred in law and in fact in ordering the Appellant to refund a sum of TZS 45,050,000. In doing so the learned trial magistrate failed to take into account the fact that there was no evidence brought to show that the Respondent was not liable to the judgment and decree subject of the garnishee;

3. In ordering the refund of TZS 45,050,000 the learned trial magistrate erred in law in failing to note that there was no order setting aside the decree subject of the garnishee order for the Respondent to be entitled to a refund; and

4. The learned trial magistrate erred in law and fact in ordering payment of general damages without evidence of injury occasioned to the Respondent.

For a better understanding of the present appeal, I find it appropriate to, albeit briefly, narrate the relevant background facts leading to this appeal. At all material times to this appeal, the appellant was the respondent's banker. As per evidence at the trial court, on 30.08.2012, the appellant received a Garnishee Order in respect of Civil Case No. 21 of 2010 in which the respondent and another person named Khalfan Ramadhan had lost a case against a certain Alexander F. Mwanshinga. The amount in the Garnishee Order; Tshs. 45,050,000/=, was ultimately paid to the decree holder; the said Alexander F. Mwanshinga.

It was the respondent's case that she was all along not aware of the existence of the Garnishee Order until 25.10.2012 when he received a letter by dispatch from the appellant notifying him of the same. That, at that time there was no way she could stop the process. Believing that the appellant

was under fiduciary duty to inform her of the existence of the order in good time, she successfully filed the suit the subject of this appeal.

On the other hand, it was, and still is, the appellant's case that she was under no legal duty to notify the respondent on the existence of the Garnishee Order. What she did by the letter of notification dated 05.09.2012, the appellant's counsel charged, was a mere courtesy to her customer. This question; that is, the question whether or not the appellant was legally bound to inform the respondent on the existence of the Garnishee Order immediately after receipt, was the main bone of contention at the trial and it still is the main bone of contention in the present appeal.

The appeal was argued before me on 31.05.2016. Both parties were represented. The appellant was represented by Mr. Nyika, learned counsel while Mr. Laizer, learned counsel represented the respondent. Both learned counsel had earlier filed their skeleton written arguments as dictated by rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

Arguing for the appeal, Mr. Nyika, learned counsel, submitted on the first ground of appeal that the appellant was under no duty to notify the respondent on the existence of the Garnishee Order. That was aptly stated at the trial by Elizabeth Alvin PW1 and that the report made to the respondent was so made out of courtesy and was not intended to comply with any duty required under the law, he argued. To buttress this argument, the learned counsel cited ***Rogers Vs Whiteley*** [1892] AC 118 wherein it was held that the effects of an order attaching debts owing or accruing due by the garnishee to the judgment debtor is to make the garnishee "custodier for the court of the whole funds attached" and that the garnishee was not permitted

to part with any of the funds without approval of the court. The learned counsel for the applicant also cites several authorities on the duty of a bank to its customer including a legal text titled **Ellinger's Modern Banking Law** (4th Edition) at page 127. The cases cited by the learned counsel for the appellant are ***Joachimson Vs Swiss Bank Corporation*** [1921] 3 KB 110, ***Tina Motors Pty Limited Vs Australia and New Zealand Banking Group Limited*** [1977] VR 205, ***Selangor United Rubber Estates Limited Vs Cradock*** [1968] 1 WLR 1555 and ***Tournier Vs National Provincial and Union Bank of England*** [1924] 1 KB 461. In none of the authorities the duty to notify the customer on the existence of a Garnishee Order has been stated.

He stressed that once a bank has received a Garnishee Order, its obligation is to comply with the order. Thus when the appellant received the Garnishee Order, it became responsible to the court and to the judgment debtor, not the respondent, argued the learned counsel.

With regard to ground 2, the learned counsel argues that it was an error for the trial court to order the appellant to refund the respond the amount which was paid to the decree holder in compliance with the court order. In doing so, he argues, the court failed to take into account the fact that there was no evidence from the respondent that it was not liable to the amount subject of the Garnishee Order.

On ground 3, it was Mr. Nyika's argument that in the absence of any order from the court issuing the decree or from the higher court, the respondent's liability on the decree would not have been transferred to the appellant. And in any event, he goes on, even if the decree was to be set aside the respondent would only be entitled to restitution from the decree holder under

section 89 of the CPC. The effect of the court decree was to restitute the respondent even before the same was set aside, he contended.

On the last ground the learned counsel stated that there was no evidence led to entitle the respondent to general damages.

On the other hand, Mr. Laizer, learned counsel for the respondent submitted that the appellant was under a fiduciary duty to notify the respondent on the existence of the Garnishee Order upon receipt from the court. The learned counsel stated that that duty is a fiduciary duty arising out of a customer-banker relationship; it is not out of courtesy as the appellant's counsel would like the court to believe. Had the appellant informed the respondent immediately, she (the respondent) would have taken immediate and appropriate action to stop the transaction, he argues. On this proposition, the learned counsel cites the ***Bank of Tanzania Vs Devram P. Valambhia***, Civil Appeal No. 15 of 2002 an unreported decision of the Court of Appeal.

The learned counsel insists that it is the fiduciary duty on which they hinged their claim at the trial and not a contractual duty which issue is being raised by the appellant at the appellate stage and which is not acceptable as it was not raised at the trial. He relies on ***Hotel Travertine Limited & 2 others Vs National Bank of Commerce Limited*** [2006] TLR 133 on the proposition that an issue which was not raised and argued at the trial cannot legally be raised on appeal.

On ground 2, the respondent's counsel also relies on ***Hotel Travertine*** (supra) to state that the issue of refund did not hinge on the fact that the respondent was liable to the decree holder in the case the subject of the

Garnishee Order or not but on the appellant's breach of duty of care to the respondent.

Likewise, on the third issue, the learned counsel for the respondent submits that whether the decree had been satisfied or not was not dealt with at the trial therefore it cannot be raised on appeal.

Regarding general damages which is the subject of the last ground of appeal, the learned counsel for the respondent submits that the fact that the appellant sat on the letter of notice and thus did not notify the respondent on the existence of the Garnishee Order in good time coupled with the fact that the respondent has been denied of the use of the monies to the date of judgment were enough grounds on which general damages could be awarded.

In rejoinder, Mr. Nyika for the appellant rejoined that there was no authority tendered in the trial court, neither is there one tendered on appeal in this court to show that the bank has a duty to inform a client about existence of a Garnishee Order. The learned counsel, in distinguishing the case of ***Valambhia***, stated that the case was specific that the Bank of Tanzania was not entitled to challenge the Garnishee Order. That the court said that what the Bank of Tanzania ought to have done was to just inform the judgment debtor. The learned counsel beckoned the court to note that the Bank of Tanzania is totally different from Commercial Banks in the context of fiduciary duty. In the circumstances of this case, he charged, there ought to have been evidence that the money was wrongly paid which was not the case as the same was paid in compliance with the court order.

I have closely considered the rival submissions and read between the lines the authorities cited to me by both learned counsel. The basic issue for determination in the first ground of appeal is whether the trial magistrate erred in holding that the appellant was legally bound to inform the respondent on the existence of the Garnishee Order. Admittedly, and as already alluded to above, this question was the cornerstone of the case at the trial and it still is a cornerstone of the present appeal. The learned counsel for the appellant has cited several authorities prescribing the duty of a bank to its customer and comes up with the view that the duty to avail a customer information regarding existence of a Garnishee Order is not among them. He challenges the ***Valambhia*** case as being quoted out of context. On the other hand Mr. Laizer for the respondent is of the view that the ***Valambhia*** case is an authority for the proposition that a bank is mandatorily required to inform its customer on the existence of a Garnishee Order. I have read the ***Valambhia*** case, between the lines, as already stated. As submitted by Mr. Nyika, learned counsel, in that case, the court found it as inappropriate for the Bank of Tanzania to challenge the Garnishee Order on its own. The court held that what the Bank of Tanzania ought to have done was to inform the customer on the existence of the Garnishee Order instead of taking things upon itself to challenge it. At pages 13 - 14 of the cyclostyled judgment, the Court of Appeal approved the following pertinent observation of this court:

> "... in my view, the facts as they stand, **the duty of the Bank was to inform TEL about the existence of the Garnishee Order and the effect thereof so that TEL could decide whether or not to challenge it.** I do not think that it *was* proper for the Bank to take upon itself

> the obligations of TEL. As was pointed out by the House of Lords in the case of Rogers v. Whiteley (1898) AC 118, once an account has been immobilized by a garnishee order, it is upon the customer and not the banker to apply to the court for any modification that the customer thinks he can justify in law or in fact."
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> [Emphasis supplied].

Admittedly, the court in the foregoing quote imposed the duty upon the Bank of Tanzania to inform TEL on the existence of the Garnishee Order so that the latter could take appropriate steps it would have deemed fit and in that case to take steps which the former took. I am not prepared to accept Mr. Nyika's argument to the effect that the observation is not applicable to commercial banks. I have no doubt in my mind, that that duty is applicable to instances like the one in the present case as well. That is, having subjected due consideration to the observation, I am of the view that it can be applicable to commercial banks as well.

In **Banking Laws** by Prof. Ram Naresh Chaudhary and Smt. Suman Lata Singh, explaining special features of relationship between the Banker and customer in respect of cheques, the learned authors have this to say at page 123:

> "... the Banker is prohibited from paying the amount due to his customer on the date of receipt of the *Order Nisi*. **He should, therefore, immediately inform the customer so that**

> **dishonour of any cheque issued by him may be avoided.** After the banker files his explanation, if any, the court may issue a final order, called *Order Absolute* whereby the entire amount in the account or a specified amount is attached to be handed over to the judgment creditor. On receipt of such an order the banker is bound to pay the garnished funds to the judgment creditor and his liability towards his customer is discharged to that extent."
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> [Bold supplied].

I have no doubt in my mind that the learned authors are discussing the duty to tell the customer of the Garnishee Order so as to avoid any dishonour of any cheque issued by him. However, it is my thinking that notice to the customer would not only help the customer drawing any cheque that may ultimately be dishonoured because of the existence of the Garnishee Order but also avails the customer to take any necessary steps permitted by law including to challenge its existence if he so wishes.

Flowing from the above, it is my considered view that a banker has a duty to inform its customer in good time on the existence of a Garnishee Order so that the latter may take immediate steps within the realm of the law if he so wishes. I therefore find and hold that, in the case at hand, it was incumbent upon the appellant to immediately inform the respondent on the existence of the Garnishee Order in good time so that the latter could take any step she deemed appropriate. The respondent was uncontroverted at the trial that the notice given to him, which the appellant stated at the trial and on appeal

before me that it was made out of courtesy, was written on 05.09.2012 but reached her, by dispatch, on 25.10.2012. That notice, certainly, was made in good time but was not communicated to the respondent in good time to make any necessary step to stop the transaction. This amounted to breach of fiduciary duty by the appellant to the respondent. The first ground of appeal therefore collapses.

Next for consideration are the second and third grounds of appeal which I propose to consolidate in their determination. It is complained by the appellant in the second ground that it was an error for the trial court to order the appellant to refund the respond the amount which was paid to the decree holder in compliance with the court order and that in so doing, the court failed to take into account the fact that there was no evidence from the respondent that it was not liable to the amount subject of the Garnishee Order. And on the third issue, it is argued by the appellant's counsel that in the absence of any order from the court issuing the decree or from the higher court, the respondent's liability on the decree would not have been transferred to the appellant. And in any event, he argues further, even if the decree was to be set aside the respondent would only be entitled to restitution from the decree holder under section 89 of the CPC. Both these grounds of complaint are countered by the respondent's counsel that they were not canvassed upon by the trial court and therefore the appellant is precluded from raising them at the appellate stage.

I think Mr. Laizer is right. The appellant's liability to the respondent at the trial was not predicated upon the question whether or not the appellant was not supposed to comply with the court order. Neither was it the issue that the decree the subject of the Garnishee Order had been satisfied or not. The

order of the trial court was predicated upon the fact that the appellant breached her fiduciary duty to the respondent. Those issues, having not been discussed at the trial, cannot legally surface at the appellate stage. It is now a very trite principle of law in this jurisdiction and, I think, everywhere in the Commonwealth, that an issue not raised at the trial will not be entertained on appeal. That this is the law has been stated in a number of cases. One such case is ***Hotel Travertine*** (supra); a case cited to me by Mr. Laizer, wherein, relying on the earlier decision of its predecessor the East Africa Court of Appeal of ***Captain Harry Gandy Vs Caspar Air Charter Limited*** (1956) 23 EACA 139 and its earlier decision of ***James Funke Gwagilo Vs Attorney General*** [2004] TLR 161 the Court of Appeal held at page 141:

> "The issue of acceptance by conduct, if at all available, should have been pleaded and argued before the learned trial Judge. **As a matter of general principle, an appellate Court cannot allow matters not taken or pleaded in the Court below, to be raised on appeal**".
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> [Emphasis added].

In the premises, the appellant is precluded from raising at this stage questions like whether or not the decree the subject of the Garnishee Order was satisfied or not or whether it was set aside or not which were not discussed and decided at the trial. The sum total of the foregoing discussion is that the second and third grounds of appeal fail as well.

This takes me to the determination on the last ground of appeal. This is one on general damages. The appellant complains that the trial court ought not

to have awarded general damages in that there was no evidence led to entitle the awarding of the same. On the other hand, the respondent argues that the fact that the appellant did not notify the respondent on the existence of the Garnishee Order in good time so that she could take appropriate action under the law and the further fact that the respondent has been denied of the use of the monies to the date of judgment of the trial court were enough grounds upon which general damages could be awarded. Again, I think Mr. Laizer, learned counsel, is right. Unlike special damages which must be specifically pleaded and proved before awarding, general damages does not need specific proof. An averment in the plaint to that effect would suffice to award general damages. In ***Admiralty Commissioners Vs Susqueh-Hanna*** [1926] AC 655 in which it was stated:

> "If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question [in our jurisdiction the court]".
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> [Cited in ***Kibwana and Another Vs Jumbe*** [1990-1994] 1 EA 223].

According to **Black's Law Dictionary** (Abridged 7th Edition) by Bryan A. Garner; Editor in Chief, the term "general damages" is defined at page 321 as:

> "Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained".

In the case at hand, the trial court awarded Tshs. 2,500,000/= as general damages. I think the trial court was justified to award general damages, for damages was pleaded at para 3 of the plaint and prayed for in prayer (v) as a relief. I wish to add that general damages was also awardable in the present case under the arm of "any other or further relief(s) the Court may deem just to grant" appearing as the last prayer of relief in the plaint – see: ***Gift Eric Mbowe Vs Reuben Pazia*** Commercial Case No. 67 of 2005 (unreported) and ***Zuberi Augustino Vs Anicet Mugabe*** [1992] TLR 137. The learned trial Principal Resident Magistrate, therefore, appositely granted general damages. As for the quantum, this was within his discretion. I find no reason to meddle with it.

In the end of it all, this appeal is dismissed in its entirety with costs to the respondent.

Order accordingly.

DATED at DAR ES SALAAM this 30th day of June, 2016.

J. C. M. MWAMBEGELE

JUDGE