

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CIVIL APPEAL NO. 59 OF 2015

RUNWAY (T) LIMITED ..... APPELLANT

VERSUS

1. WIA COMPANY LIMITED }  
2. CASCADE COMPANY LIMITED } .....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania  
(Commercial Division) at Dar es Salaam)

(Nyangarika, J.)

dated the 18<sup>th</sup> day of December, 2014

in

Commercial Case No. 87 of 2011

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RULING OF THE COURT

31<sup>st</sup> October 2018 & 1<sup>st</sup> February, 2019

**MKUYE, J.A.**

The appellant, Runway (T) Limited is challenging the decision in Commercial Case No. 87 of 2011 in which Nyangarika, J. (as he then was) dismissed her suit with costs.

In the said suit, the appellant/plaintiff had sued the respondents/defendants for failure to install, supply and test hardware and software

systems known as point of sales (POS), payment and inventory systems to be used for the provision of services in operating, monitoring and controlling its stock and financial transactions in the appellant's club. For that reason the appellant sued the respondents complaining that they have breached the contract and prayed for the trial court to order the following:-

*i) A declaration that 1<sup>st</sup> and 2<sup>nd</sup> defendants [respondents] are jointly and severally in breach of the agreement entered into by and between the appellant and respondents;*

*ii) The Honourable Court order the defendants [respondents] to pay the plaintiff [appellant] for the following:-*

*(a) A total sum of United States Dollars two thousand one sixty hundred (US\$ 2,160) being refund of money paid by the plaintiff to the 1<sup>st</sup> defendant as payment for the supply of WIAMAX Standard fee, Internet bandwidth and purchase of CISCO Router.*

(b) A total sum of United States Dollars forty five thousand seven hundred (US\$ 45,700.00) being refund of money paid to the 2<sup>nd</sup> defendant as payment for the purchase, installation, testing and commissioning of the hardware and software for the POS payment and inventory system; and

(c) Payment of other resultant costs and expenditure incurred by the plaintiff;

(iii) Order for payment of delay in interest ("penalty interest"), computed at the rate of 2.5% compounded and accruing daily on the purchase price of United States Dollars forty seven thousand eight hundred and sixty (US\$ 47,860.00), agreed to be paid to the plaintiff by the defendants in respect to the defendant's failure to supply, install, test and commission of the hardware and software for the POS payment and inventory system,

- (iv) *Order for payment of specific, general and punitive damages suffered by the plaintiff as a result of the defendant's failure to heed to the terms and conditions of the agreement for the supply, installation, testing and commissioning of the hardware and software for the POS, payment and inventory system, and payment of other costs and expenses incurred by the plaintiff as a result of the defendant's failure and breach;*
- (v) *Order for payment of interest on the decretal sum at Court's rates from the date of judgment till full satisfaction of the decretal sum;*
- (vi) *Costs of this suit; and*
- (vii) *Any other relief(s) the Honourable Court may deem fit to grant."*

In reply, the defendants/respondents filed a joint written statement of defence together with a counter claim claiming for:

- 1) *Payment of US\$ 43,235.50 or its equivalent in Tanzania shillings being the amount due and payable to the respondents by the appellant for the services and goods supplied to her.*
- 2) *Payment of general damages to be assessed by court.*
- 3) *Payment of interest at the commercial rate in (i) above from the date of agreement to the date of judgment.*
- 4) *Payment of interest on decretal sum at the Court's rate from the date of judgment to the date of final payment.*
- 5) *Costs of the suit.*

Upon a full trial, the High Court **dismissed the suit** for lack of sufficient evidence.

On what the trial court stated, we take the liberty of reproducing the portion of the decision as follows:

*"There is enough evidence on record that the whole amount for work done was not fully paid by the plaintiff (appellant) as agreed. There is also enough evidence that the biometric system was partly*

*installed and completed by 75% only by the defendants. Therefore, there is nothing to be awarded to either party."*

Aggrieved with that decision, the appellant lodged this appeal on 13 grounds of appeal which for a reason to follow shortly we shall not reproduce them.

When the appeal was called on for hearing, the appellant was represented by Mr. Nduluma Majembe learned counsel; whereas the respondent enjoyed the services of Mr. Juvenalis Ngowi also learned counsel.

At the hearing of the appeal, we required the parties to address us as to whether there was a valid decree or rather whether or otherwise it tallied with the judgment. We raised this issue because we observed that in the reply to the plaint the respondents filed a written statement of defence together with a counter claim but neither the claim in the counter claim nor its decision were reflected in the said decree.

Mr. Majembe was the first to respond react. He contended that though the respondent raised a counter claim there was no evidence that was led to prove it. For that reason, he said, since the decision of the trial court pivoted on the dismissal of the suit, the decree appearing at page 364 of the record of appeal was quite proper. He added that, the content of the decree was sufficient for the disposal of the appeal at hand. At any rate, he argued that, even if there is a defect in the decree for not showing the counter claim and the decision thereof, such defect did not prejudice the interests of the respondent who, in fact did not appeal. When his attention was drawn to ground No. 12 which hinged on a counter claim, he asked the Court to abandon it. He ultimately, prayed to the Court to find the decree properly before the Court and proceed with hearing of the appeal on merit.

In reply, Mr. Ngowi prefaced by arguing that the decree did not comply with Order XX Rule 6(1) of the Civil Procedure Code, Cap 33 RE 2002 (the CPC) for not agreeing with the judgment. He pointed out that the decree does not include the determination on the counter claim. He added that, since Rule 96 requires a decree to be included in the record of

appeal, inclusion of a defective decree renders the record of appeal incomplete. On top of that he said that, since the appellant was the one who prepared the appeal, she ought to have noted the defect and request the trial court to rectify it. Regarding ground no 12 of appeal, Mr. Ngowi argued that so long as the appellant raised a ground of appeal in respect of the counter claim and submitted on it, he cannot now ask for its abandonment. He implored the Court to strike out the appeal for being incompetent with costs.

In rejoinder, Mr. Majembe reiterated that Order XX rule 6(1) of the CPC was complied with as the decree agrees with the judgment. As to the prayer to abandon the ground of appeal, he argued that it was allowable during hearing of appeal. He maintained that the decree was quite proper and the defect was not material enough.

From the submissions by both counsel it is evident that the parties from either side acknowledge that before the trial court the suit was encountered by the counter-claim raised by the respondents in their joint written statement of defence appearing at pages 33 to 50 of the record of appeal. At page 40 of the record of appeal through paragraphs 21 to 24 of



the counter claim the respondents claimed against the appellant the sum of US\$ 43,235.50 being the unpaid amount for the services and equipment provided to the appellant, despite the fact that she was enjoying the goods and services they had rendered to her. They also claimed for payment of general damages to be assessed by court; payment of interest at the commercial rate on the decretal amount from the date of Agreement to the date of judgment; payment of interest on decretal sum at the court's rate from the date of judgment to the date of final payment; costs of the suit; and any other relief as the Court may deem fit.

In reply to the respondent's joint written statement of defence the appellant filed a rejoinder along with the written statement of defence as shown at pages 54-55 of the record of appeal. In particular, in reply to the counter claim, the appellant alleged in paragraphs 33 and 34 that:-

*"33. The contents of paragraph 23 of the counter*

*claim are disputed. The plaintiff disputes that*

*the Defendants is entitled to any payment of*

*US\$ 43,235.50 being consideration for the*

*services and equipment's supplied to the*

*Plaintiff as alleged or at all. The Defendants are put to strict proof of the allegations made under paragraph 23 of the counter claim.*

34. *The defendants are not entitled to the reliefs sought by way of counter claim or at all. The Plaintiff states further that the Defendant's claim are frivolous, vexatious and an abuse of court process."*

Besides that both parties made final submissions in relation to the counter claim as shown at pages 69 and 82 of the record of appeal. For instance, the appellant stated as follows:

*"The defendants also filed a counter claim along with their WSD which they have for reasons best known to them failed or refused to prosecute and prove to the satisfaction of the court. **The plaintiff will pray to the Court that the said counter-claim be dismissed for want of prosecution with costs to be awarded to the plaintiff."***

[Emphasis added]

On their part, the respondents submitted as follows:-

*"The defendants in their counter claim pray that the plaintiff be ordered to pay the sum of USD 43,235.50 unpaid amount for services provided by the defendants to the plaintiff. As submitted earlier, the plaintiff did not pay the full amount invoiced by the defendants and this is not disputed. The defendants are entitled to be paid the unpaid amount as per exhibits PE3 and PE4. The plaintiff should pay for the services of internet which were provided to it by the defendants.*

*Based on evidence tendered in Court, it is our humble submission that there is no consideration paid to the 1<sup>st</sup> defendant and at the same time the plaintiff paid only part of the consideration but despite such failure the defendants proceeded to execute the contract and the same was full installed*

*but part of the system of biometric has not been utilized and this is due to plaintiff's own problems. We humbly pray that the plaintiff's suit be dismissed with costs and the court be pleased to grant prayers as prayed in the counter claim."*

At page 349 of the record of appeal, the trial court acknowledged the claims raised by the defendants in the counter claim and after having considered all the material before it, it dismissed the suit with costs. For clarity we find it appropriate to quote what the trial court stated as follows:-

*"In the upshot and for the foregoing reasons the suit is hereby dismissed with costs".*

The extracted decree thereof which is the center of our inquiry, reads as follows:

*"IN THE HIGH COURT OF TANZANIA*

*COMMERCIAL DIVISION*

*AT DAR ES SALAAM*

COMMERCIAL CASE NO. 87 OF 2011

RUNWAY (T) LIMITED ..... PLAINTIFF

VERSUS

1. WIA COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT

2. CASCADE COMPANY LIMITED..... 2<sup>ND</sup> DEFENDANT

**DECREE**

**WHEREFORE** the Plaintiff had filed a suit against the defendants praying as follows:-

- i. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant are jointly and severally in breach of the agreement entered into by and between the Plaintiff and the Defendants.
- ii. The Honourable Court order the Defendants to pay the Plaintiff for the following:-
  - (a) A total sum of United States Dollars Two Thousand One Hundred and Sixty (US\$ 2,160) being refund of money paid by the Plaintiff to the 1<sup>st</sup> Defendant as payment for supply of WIAMAX Standard fee, Internet bandwidth and purchase of CISCO Router;

(b) *A total sum of United States Dollars forty five Thousand Seven Hundred (US\$ 45,700.00) being refund of money paid to the 2<sup>nd</sup> Defendant as payment for the purchase, installation, testing and commissioning of the hardware and software for the POS, payment and inventory system; and*

(c) *Payment of other resultant costs and expenditure incurred by the Plaintiff;*

iii. *Order for payment of delay interest, ('penalty interest') computed at the rate of 2.5% compounded and accruing daily on the purchase price of United State Dollars forty Seven Thousand Eight Hundred and sixty (US\$ 47,860.00), agreed to be paid to the Plaintiff by the Defendants in respect to the Defendants' failure to supply install, test and commission of the hardware and software for the POS, payment and inventory system.*

iv. *Order for payment of specific, general and punitive damages suffered by the Plaintiff as a result of the Defendants' failure to heed to the terms and conditions of the agreements for the*

- supply, installation testing and commissioning of the hardware and software for the POS, payment and inventory system, and payment of other costs and expenses incurred by the Plaintiff as a result of the Defendants' failure and breach.*
- v. Order for payment of interest on the decretal sum at Court's rate from the date of judgment till full satisfaction of the decretal sum;*
- vi. Costs of this Suit; and,*
- vii. Any other relief(s) the Honourable Court may deem fit to grant.*

*The matter coming up for Judgment on this 18<sup>th</sup> day of December, 2014, before K.M. Nyangarika, J. in the presence of Mr. John Muhozya counsel for the Plaintiff, but in the absence Defendants and their counsels.*

**THIS COURT DOTH HEREBY DECREE AS FOLLOWS:-**

*The suit is hereby dismissed with costs.*

*Given under my hand and the seal of the court, this 18<sup>th</sup> day of  
December, 2014.*

**REGISTRAR**

*Extracted on 18<sup>th</sup> December, 2014*

*Issued on 13.3.2015"*

We have given such a long background so as to enable us explain why we think the decree was not properly extracted. As it can be vividly gleaned from the pleadings, evidence, final written submissions and judgment, the issue of the counter claim was acknowledged. The manner a counter claim can be dealt with by the court is well explained under Order VIII rule 12 of the CPC which provides as follows:

*"12. Where a defendant has set up a counter claim the court may, if it is of the opinion that the **subject matter of the counter claim ought for any reason to be disposed of by a separate suit order the counter claim to be struck out or order it to be tried separately or make such other order as may be expedient.**"*



[Emphasis added]

Our understanding of the above provision is that, it presupposes the counter claim to be dealt together with the suit. However, if the court considers that such counter claim ought to be dealt with separately, it has to make a specific order either striking it out; directing it to be tried separately, or any other order it deems appropriate.

In this case, as we have elaborated above, neither an order for trying the counter claim separately or striking it out was made by the trial court. This explains why even in the judgment the trial court made reference to the claim in the counter claim. Under normal circumstances, as the trial court acknowledged its existence, it was duty bound to make a finding on it. That, the trial court did not do. Of course, Mr. Majembe forcefully argued that the counter claim and its finding could not be reflected in the decree as the respondents failed to prove it. We are, however, of the considered view that even if the respondents might have failed to adduce evidence to prove the counter claim, that did not relieve the trial court from the duty of making a decision thereon.

This stance was taken by the Court of Appeal of Uganda when faced with a situation like the one at hand in the case of **Lwanga v. Centerary Rural Development Bank** [1999], 1E.A. 175 (CAU). In that case, the respondent had included in a counter claim, a claim seeking to recover a sum of Ushs. 5,576,987/= as principal and interest on money allegedly loaned to the appellant but the trial court did not make a ruling on the said counter claim. On appeal to the Court of Appeal, the Court found merit in the ground of appeal and it held as follows:-

*"It is an elementary principal that **the respondent had the duty to prove its claim in the counter claim to succeed. As it adduced no evidence in proof of the claim, the trial judge ought to have made appropriate finding thereon. Unfortunately, she did not. I think this was an error. There is merit on this complaint and the ground would succeed.**"*

[Emphasis added]

On our part, we subscribe to that decision. Even in this case, we are settled in our mind that, though the respondents might have not led evidence to prove their counter claim, since the parties at various stages acknowledged it and the trial judge highlighted it in the judgment, he ought or rather was duty bound to make an appropriate finding on it. As it is, he left the issues raised in the counter claim unresolved. On the other hand, we think that this might have had an impact on the decree we have reproduced earlier on. Order XX rule 6 (1) of the CPC which deals with the contents of the decree states as follows:

*"The decree shall agree with judgment; it shall contain the number of suit, the descriptions of the parties and particulars of the claim and shall specify the relief granted or other determination of the suit."*

In this case, the appellant had filed a suit and the respondents filed a joint written statement of defence together with a counter claim which according to Order VIII rule 6 (2) of the CPC was a cross suit. In its decision the trial court dismissed the suit with costs and said nothing in

relation to the counter claim raised by the respondents. The decree which was extracted reflected only the reliefs sought in the plaint and its outcome which was dismissal with costs. It did include the reliefs sought by the respondents in their counter claim and their outcome. Though Mr. Majembe argued that the decree at page 364 of the record of appeal was in compliance with the law so long as it suits his appeal, we think that, such claim could have been relevant if no counter claim was raised and dealt with to the extent we have endeavored to show herein above. Since, there was a counter claim with its reliefs sought, they ought to have been decided and their outcome reflected in the decree as required under rule 6(1) of Order XX of the CPC. In the absence of the citation of the reliefs sought in the counter claim for which no order of the court was made in terms of Order VIII rule 12, we think it contravened the provisions of Order XX rule 6(1) of CPC with the effect of rendering the decree invalid. We find that this was a fatal irregularity.

Given the circumstances, we invoke our revisional powers vested on us under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 and nullify the proceedings, quash the decision and set aside the order of

the High Court dated 18/12/2014. We further direct the High Court to rehear the suit and the counter claim in accordance with the law. We make no order as to costs.

It is so ordered.

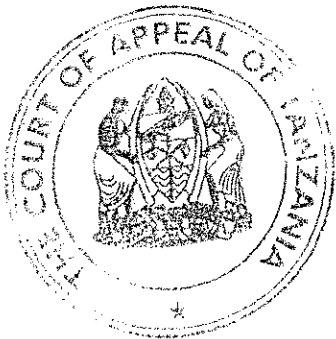
**DATED at DAR ES SALAAM this 30<sup>th</sup> day of January, 2019.**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**