IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MUGASHA, J.A. And MWANGESI, J.A.)

CIVIL APPEAL NO. 59 OF 2013

MIC TANZANIA LIMITED.....APPELLANT

VERSUS

COMMERCIAL BANK OF AFRICA (T) LTD.....RESPONDENT

(Appeal from Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Makaramba, J.)

dated the 15th day of May, 2012
in
Commercial Case No. 72 of 2009

JUDGMENT OF THE COURT

13th& 28th June, 2017

MUGASHA, J.A.:

The respondent **(COMMERCIAL BANK OF AFRICA (T) LTD)** sued the appellant (**MIC TANZANIA LIMITED)** for payment of outstanding amount of Tshs. 130,467,434/= plus interest being the sum of personal loans which were not repaid by the appellant's employees. In her plaint, the respondent alleged that, sometimes in November, 2007 they entered into an agreement with the appellant who undertook to channel to the Bank (the respondent), monthly salaries of the employees who were to be provided with personal loans by the respondent Bank. The appellant issued to the

respondent letters of undertaking to among others, to channel the salaries of its employees to the respondent Bank to enable her to recover the loans.

Between June and September, 2008 forty six (46) employees of the appellant applied and were granted the loan facility by the respondent. The appellant confirmed and certified their status by providing their respective identity cards, employment contracts and pay slips. Also the appellant remitted to the respondent, one month salaries to the respective accounts of the employees and undertook to forward subsequent salaries. This made the respondent to grant the credit facility to the appellant's employees. However, the appellant did not forward the salaries of its nine employees which made the respondent to raise a claim that this resulted into a breach of obligation and the respondent had lost a sum of Tshs. 130, 467, 434/= which was advanced to the nine employees.

The respondent sought among others following reliefs: **One,** a declaration that the appellant breached its obligation under the Agreement or in the alternative, is liable for fraudulent conduct occasioning loss to the

Plaintiff. **Two,** payment of Tshs 130,467,434,00 being the amount due as at 2nd June 2009 and **three,** General damages, interests and costs thereon.

In the written statement of defence, the appellant denied each and every claim of the respondent. She refuted to have concluded any agreement with the appellant in respect of loan facility extended to her employees by the respondent. As such, the appellant claimed that there was no breach of any obligation or duty on her part to the respondent's detriment.

At the trial the controlling issues were: **One,** whether there was an agreement between the parties in respect of granting personal loans to the appellant's employees. **Two,** whether the appellant undertook to guarantee repayment of the loan in case of default on part of her employees and **Three,** and what reliefs are the parties entitled to.

At the end of the trial, the High Court entered judgment in favour of the respondent after the trial Judge answered the two first issues in the affirmative. He concluded that: **One,** by issuing the letters of undertaking, the appellant committed and/ or guaranteed itself to perform such

obligations to the respondent Bank and **Two,** omission by the appellant to channel the salaries of its employees to the respondent Bank caused loss to the respondent. The appellant was thus, found liable to have breached its obligation under the agreement and she was condemned to pay the principal sum, interest, damages and costs.

Aggrieved, the appellant has preferred an appeal to the Court. The appellant was represented by Mr. Cuthbert Tenga, learned counsel whereas the respondent was represented by Mr. Thomas Sipemba learned counsel. Both counsel filed written submissions for and against the appeal.

The hearing of the appeal was preceded by preliminary points of objection, to the effect that the record is incomplete and the appeal is rendered incompetent.

Mr. Sipemba pointed out that, the missing documents are letters containing contracts of employment which were part of annexure wholl 2 as pleaded in the plaint which ought to have been at pages 6 to 48 of the record of appeal. He argued that, the omission to include entire pleadings in the records of appeal is fatal and renders the appeal incompetent. He

referred us to the case of **BANK M (TANZANIA) LIMITED VS ENOCK MWAKYUSA**, Civil Appeal No. 109 of 2012 (unreported).

Secondly, in another point of objection, the learned counsel for the respondent submitted to the effect that, the record of appeal has missing pages of the proceedings. He pointed out that, from pages 935 to 936 and 976 to 976 there is no continuity of the proceedings as they are incomprehensible. As such, the Court and the parties cannot know what transpired at the High Court. The learned counsel urged us to find the record incomplete, and proceed to strike it out.

On the other hand, Mr. Tenga challenged the preliminary point of Objection. He submitted that, annextures are not part of the pleadings in terms of order 6 rule 1 of the Civil Procedure Code [**CAP 33 RE: 2002**]. However, the missing documents collectively marked Exhibit P2 can still be found from pages 136-225 of the record of appeal. Pertaining to the missing pages, Mr. Tenga argued that, the objection is based on mere assumption and it is not backed by any proof.

In rejoinder, Mr. Sipemba argued that, exhibits come to be admitted in the evidence at the trial. As such, the chronological listing of the documents which should accompany the appeal as per Rule 96(1) of the Rules, necessitates the placement of pleadings as they were in the plaint and the record of appeal. On the missing pages of the record of appeal, he argued that, it was incumbent on the appellant to ensure the completeness and correctness of what is contained in the record of appeal.

The preliminary points of objection need not detain us. Pleadings are defined under Order VI rule 1 of the Civil Procedure Code as follows:

> *"Pleading" means a plaint or a written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII".*

A similar definition is found in **MULLA**, The Civil Procedure Code Seventeenth Edition Volume 2 as follows:

"Pleading shall mean plaint or written statement of defence"

Rule 96(1) (c) and (d) of the Rules, require among other things, the record of appeal to be accompanied by the pleadings and the record of proceedings. The employment contracts appear at pages 136 to 225 of the record of appeal. Initially, they annextures and became exhibit after being tendered and admitted in the evidence at the trial. In this regard, failure to place them next to the plaint is not fatal since they still constitute part of the record and it is not incomplete as asserted by Mr. Sipemba. Moreover, what obtains in the present situation is distinguishable from the referred case of **BANK M (TANZANIA) LIMITED VS ENOCK MWAKYUSA** (supra) where the Court was confronted with a situation whereby, the record of appeal lacked the order giving leave to appeal.

The second limb of objection it is on the alleged missing pages on the record of appeal. We are as well satisfied that, the objection is without merit. Apart from disarrangement, the record of appeal contains all the proceedings from: pages 836 to 850; 851 to 935; 936 to 940 and 944 to 977. As such, it is unsafe to conclude that the disarrangement renders the

record of appeal incomplete. In this regard, the points of objection raised by the respondent are hereby dismissed with costs.

This takes us to the determination of the appeal contained in the Memorandum of Appeal with eight grounds. However, from the submission of the counsel and the evidence on the record, the main issue for our consideration is mainly one namely: *whether an agreement to channel an employee's salary through the Bank is a contract of guarantee entitling the Bank to recover the unpaid loan from the appellant.*

The parties filed written submissions for and against the appeal. The submissions were adopted by learned counsel. Before we proceed we wish to state the obvious that this is a first appeal. It is trite law that, it is in a form of a re-hearing and the Court has the right and duty to re-consider and re-evaluate the evidence and draw its own conclusions. (See **D.R PANDAYA VS R [1957] E.A.336 and OKENO VS REPUBLIC [1957] E.A. 32.**) However, the jurisdiction must be exercised with caution; it can be exercised if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong (See

PETERS VS SUNDAY POST LIMITED [1958] EA 123. In this regard, the appellant is entitled in law to have our considerations and views of the entire evidence on our decision thereon.

After stating the above principles we now turn to consider the appeal. It was submitted for the appellant that, in the entire documentary evidence tendered at the trial, the appellant did not undertake to repay the loans granted to its employees. The counsel for the appellant faulted the trial Judge for not initially, deciding if the appellant guaranteed to repay the loan before proceeding to conclude that she is liable for her employees default to repay the loan. Moreover, he submitted that, the appellant not being a party to the loan agreement facility was not bound by its conditions. The learned counsel further argued that, if the respondent so desired, she ought to have demanded a warranty or guarantee agreement to secure loan advanced to the employees. However, since the said loan was unsecured as stated in the credit facility at page 1183 of the record, those liable were the borrowers and not the appellant. Mr. Tenga added that, since there was no clear clause in the loan agreement on the liability of the appellant in case of employees' default, the trial Judge was not justified to hold the appellant liable.

On the other hand, the learned counsel for the appellant submitted that, the appellant did not dispute that the recipients of the loan were its employees. However, she did not proceed to remit their salaries to the respondent or inform the respondent that some of employees would be leaving duty. He argued that, such omission entitled the trial judge to conclude that, the letter of undertaking constituted appellant's commitment and or guarantee to perform an obligation. He added that the loans would not have been granted without appellant's assurance in the letters of undertaking.

On prompting by the Court as to why the respondent Bank did not sue individual employees, Mr. Sipemba urged us to ignore the issue because it did not arise at the trial. Pertaining to liability created by the loan agreement in case of default, Mr. Sipemba was of the view that, the letter of undertaking was a contract and in addition, the appellant undertook to identify her employees and their respective places of domicile.

The two Bank Officials **PW1 DOREEN ABISAI** and **PW2 BENEDICT HAMIS** testified for the respondent. Their evidence was to the effect that,

forty six (46) employees of the appellant were given the loan facility by the respondent while the role of the appellant was to identify individual employee and issue letters of undertaking guaranteeing to channel salaries in the accounts. According to PW1, the employees completed Commercial Bank Personal Loan Overdraft Application Form (exhibit P1). Then, the appellant issued in respect of each employee a letter of undertaking (exhibit P collectively) which included: pay slips for the three previous months, Bank Statement, Original Copy of the identity Card, letters of Introduction, employment contracts and confirmation and three passport size photographs. Upon request, the employees opened personal accounts subsequent to which the respondent granted the credit facility of a total sum of Tshs. 800,000,000/=. The employees withdrew sums of money credited in their accounts as personal loans. However, the appellant did not channel to the respondent salaries of nine (9) employees. Besides, the appellant did not inform the respondent if the defaulters were no longer her employees.

During cross examination, PW1 stated that the facility was unsecured and the collateral was not necessary. However, they relied on the appellant's acceptance to channel the salaries through the Bank to be some

sort of a guarantee. She also told the trial court that, they could not sue the defaulters since they were not aware if they were no longer employees of the appellant. She insisted that, they would not have gone beyond the letters of undertaking.

DW1 TUMAINI SHIJA was the only defence witness for the appellant. Apart from testifying that, in the absence of the Board of Director's authorization the Letters Of Undertaking were not properly issued, he told the trial court that the letters of undertaking were issued after the conclusion of the agreement between the employees and the Bank.

From the outset, without prejudice, we wish to point out that, as rightly found by the trial Judge, the appellant was bound by the deeds of her employees who issued letters of undertaking. This is irrespective of the authorization of the Board of Directors of the appellant. Moreover, that was a purely internal arrangement which was not in the knowledge or within reach of the respondent.

From the evidence on record, it is not in dispute that the nine employees were among the appellant's employees granted loan facility by the respondent. However, they defaulted to pay. The taxing question is

whether the appellant is liable having issued a letter of undertaking. It is imperative to know what the obligations of the appellant were in the respective letters of undertaking. The same are similar in every respect except for the names of the employees and the date of issue:

" MIC Tanzania
Limited
P.O. Box 2929
Dar es Salaam.

September 19th, 2008

The Managing Director,
Commercial Bank of Africa Limited,
PPF House, Conner of Morogoro Road/Samora Av.
P.O. Box 9640,
Dar es Salaam.

Dear Sir,

UNDERTAKING TO CHANNEL STAFF SALARY AND TERMINAL BENEFITS:

In consideration of the Commercial Bank of Africa Limited ("the Bank") having made available a personal unsecured facility to our staff with the name of ***CATHERINE MSEKE*** *for purpose of School Fees we* ***MIC Tanzania Limited****, hereby undertake:*

1) *To channel salary for the aforementioned staff to* ***his****/her account maintained with the Commercial Bank of Africa Limited once a confirmation of having approved the said loan is received by our office.*

2) *To channel the employee's final benefits in case of staff termination or resignation from the job for any reasons.*

3) *To inform you the new employer (if known) of the leaving employees who will still have un-cleared loan balances.*

This undertaking is binding on our heirs and successors and shall not be overturned or rendered null and void by any prior agreement, commitment or undertaking or other documents or verbal agreements.

Yours faithfully
For MIC Tanzania Limited

Signed:
Evelyn L. Dillip
Personnel & Administration Manager

Signed:
Rashid Kakungu
For:Treasury Manager."

In terms of the letter of undertaking, the appellant had three obligations to perform namely: One, to channel the salary of an employee in her account after respondent's confirmation of the loan approval. **Two, Two,** channel employees' terminal benefits in case of termination of employment or resignation. **Three,** inform the respondent the new employee of the employees who ceased to be appellant's employees. The appellant did not guarantee to repay in case of default.

We have gathered in ***www.first globalbank.com*** the following:

> *" A letter of undertaking is a service whereby the Bank guarantees a customer's payment obligation of a specified amount to a third party in accordance with terms and conditions"*

Apart from there being no terms and conditions binding the appellant on payment obligation in case of default, the trial Judge concluded the letter of undertaking to be the appellant's commitment and or guarantee to repay the loan in case of default. **JAMES O'DONOVAN AND JOHN PHILLIPS** in a Book titled " The Modern Contract of Guarantee" Third edition at page10 , they cited the case of **JOWITT VS CALLAGHAN (1938) 38 SR (NSW) 512** in defining what constitutes a contract of guarantee where it was held:

> *"The contract of guarantee or surety ship is a contract between two persons which is intended by them to secure the performance of the obligation of a third party to one of them. The existence, present or future, of the obligation of a third person, and an intention in the parties to the contract to secure performance of that obligation, are essential features of a contract of guarantee. If these elements are*

present, the contract is one of guarantee..."

In the case of **NATIONAL BANK OF COMMERCE LTD VS UNIVERSAL ELECTRONICS AND HARDWARE LTD AND TWO OTHERS (2005) TLR 257**: Defendants were offered and accepted a renewal of an overdraft facility in the sum of Tshs. 200,000,000/= for a period of twelve months expiring on 18/12/1997. Among the securities included, a 2nd and 3rd defendants who provided a personal guarantee. Also the 1st defendant's property was mortgaged. Following default lawyers of the Bank were instructed to take debt recovery measures. The Court among other things, held that:

"The guarantee document by the second and third defendants guaranteed to the Bank to pay all sums of money owing to the bank by the principal debtor and section 80 of the law of Contract provides that the surety is co-extensive with that of principal debtor....."

In the present matter, there was no written contract of guarantee whereby the appellant guaranteed to repay the respondent in case of the default of its employees (the Principal debtors) to repay the respondent Bank. The indication of guarantee is not in the letter of undertaking where the obligations of the appellant are expressly stated. They do not guarantee payment in case of default.

Failure to channel the salaries of nine employees or inform the respondent that they were no longer in the employment of the appellant does not in any way constitute a commitment and or guarantee to repay the loan in case of default. Besides, the appellant was not required to deduct the repayable sum and remit it to the respondent Bank. As such, the appellant had no obligation to pay the respondent and as such there was no breach on the part of the appellant in respect of loan repayment.

The manner of respondent's recovery of the loan was in the credit facility where it is clearly stated that, the loan is unsecured and the borrower was obliged to do the following:

*"**Please Note that:** Your current and future employment shall act in lieu of security of this loan facility until the expiry of the same. Upon the signing of this contract you hereby promise to notify your future employer in the event of termination or resignation from the current employment) of the existence of this facility and abide to the same terms of repayment as it was during the disbursement of the facility".*

According to the credit facility agreement, it is the borrower who was duty bound to pay the loan. This was regardless of whether or not he continued to be in the employment of the appellant. Moreover, the loan agreement and the credit facility are silent on existence of any guarantee by the appellant to repay the loan in case of default. The clause on default in the credit facility targets the borrower and not the appellant because she is not privy to the credit facility. Therefore, the trial judge misdirected himself to hold that, the appellant committed herself and or guaranteed to

repay the loan in case of default. This is not backed by the evidence on record.

Since nine appellant's employees defaulted to repay the loan, the respondent ought to proceeded against the borrowers(employees) having invoked conditions and terms in the credit facility to recover the loan. The respondent had no justification to drag into litigation the appellant who was neither a party to the credit facility nor had not guaranteed to repay in case of default. In this regard, we are satisfied that, the respondent had no cause of action against the appellant. He was neither recipient nor guarantor to repay the loan of the borrowers.

We are in agreement with the appellant that, in the absence of a clear clause on the liability of the appellant, in case of default be it in the loan agreement or the letter of undertaking, the trial judge was not justified to have held that the appellant breached obligation to repay. As earlier such obligation to repay was not in existence.

In a nutshell, with respect there was no evidence to support the conclusions of the trial Judge who in our considered view did not

appreciate the weight or bearing of the circumstances proved.(See **PETERS VS SUNDAY POST LIMITED** (supra).

In view of the aforesaid, we find the appeal merited. We accordingly allow the appeal with costs.

DATED at **DAR ES SALAAM** this 22nd day of June, 2017.

M.S.MBAROUK
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL