IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., AND KEREFU, J.A.)

CIVIL APPEAL NO. 194 OF 2016

1. ZAIDI BARAKA
2. COMFORT ENTERPRISES LTD.
3. FREDELIC ALLY RASHID ..... **APPELLANTS**

VERSUS

EXIM BANK (TANZANIA) LIMITED ..... RESPONDENT

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

(Nyangarika, J.)

dated the 31st day of May, 2012
in
Commercial Case No. 38 of 2007

.....

JUDGMENT OF THE COURT

9th June & 9th October, 2020

MWARIJA, J.A.:

The respondent, Exim Bank (Tanzania) Limited was the plaintiff in the High Court of Tanzania (Commercial Division) at Dar es Salaam. It instituted a suit, Commercial Case No. 38 of 2007 (the suit) against the appellants herein, Zaidi Baraka, Comfort Enterprises Ltd and Fredelic Ally Rashid (the first, second and third appellants respectively) together with Petromark Africa Limited and Masoud El-Ameer. The last mentioned

person who was the third defendant passed away before the suit was heard. In the suit, the respondent claimed for the following reliefs:-

"*(1) Judgment in favour of the plaintiff against all five Defendants jointly and severally in the sum of Tshs. 469,767,017.36;*

(2) Interest on the aforesaid sum accruing at the rate of 25% per annum from 1st May, 2007 until Judgment or sooner payment.

(3) In default of payment of the Judgment sum and interest, an order for the sale of the mortgaged properties referred to at paragraphs 6 (i) and (ii), namely Farm No. 596 Mahenge Village, Iringa District, Title No. 6358 MBYLR and Plot no. 1 Block 'E' Sinza Area, Dar es Salaam City, Title No. 37705 and for payment of the sale proceeds to the plaintiff towards interest under paras (1) and (2) above;

(4) Such further orders or reliefs this Hon. Court deems just, equitable and convenient;

(5) The Defendants jointly and severally be ordered to pay the costs of this suit."

The facts giving rise to the suit can be briefly stated as follows:-

By a letter dated 4/7/2000, the respondent granted Petromark Africa Limited (hereinafter "the borrower") credit facility of USD 600,000.00 on

the conditions *inter alia,* that the amount was to be repaid within 12 months from 27/6/2000. The letter of offer of the credit facility (Revolving Letter of Credit) was signed by the first appellant on 14/7/2000 to signify acceptance of the terms and conditions of the credit facility. The first appellant and Masoud Al Ameer had previously, on 1/6/2000, signed a credit facility agreement (the first agreement).

The said credit facility was secured by personal and corporate guarantee of the borrower's Directors. It was also secured by mortgage of the second appellant's Farm No. 596 situated at Mahenge Village in Iringa District held under Certificate of Title (C.T.) No. 6358 MBYLR. This property was later, on 26/7/2001, transferred by the second appellant to the borrower. However, the second appellant's obligation as a guarantor remained. The credit facility was also guaranteed by mortgage of the third appellant's Plot No. 1 Block "E" Sinza area within the Dar es Salaam City held under C.T. No. 37705. In addition, on 23/2/2001, the respondent availed the borrower with a credit facility of TZS 200,000,000.00 upon execution of additional personal guarantees. The agreement to that effect was signed on 24/2/2001 (the second agreement).

In the plaint, the respondent claimed that it also provided the borrower with bank guarantees of TZS 337,500.00 and TZS 56,000,000.00 on 7/3/2003 and 10/12/2003 respectively.

On the part of the borrower and the appellants, they filed a joint written statement of defence preceded by a preliminary objection challenging the competence of the suit. The objection consisted of *inter alia,* the ground that the suit was filed out of time. In the alternative, they denied liability contending that the agreements between the borrower and the respondent was discharged by frustration attributed to the order dated 14/5/2001 by which, the Tanzania Revenue Authority (TRA) seized the borrower's petroleum products purchased out the funds which were credited to them by the respondent.

Having heard the preliminary objection, the learned trial Judge found the same to be devoid of merit and therefore overruled it. The suit proceeded to hearing at which, whereas the respondent called one witness, the borrower and the appellants relied on the evidence of three witnesses. Having heard the evidence of the witnesses for the parties, the High Court found that the respondent had succeeded to prove its claim. The learned trial Judge was of the view that, apart from failing to settle the credit

facilities of USD 600,000.00 and TZS 200,000,000.00, the borrower defaulted also to repay TZS 337,500,000.00 and TZS 50,000,000.00 which the respondent claimed to have credited to it. He therefore awarded the claimed amount of TZS 469,767,017.36 plus interest at the rate of 25% p.a. from 1/5/2007 to the date of the judgment and 7% p.a. from the date of judgment to the date of satisfaction of the decree. The respondent was also awarded the costs of the suit.

The appellants were aggrieved by the decision of the High Court hence this appeal which is predicated on the following thirteen grounds of complaint:-

"*1. That the Honourable Trial Judge erred in law and in fact not to dismiss the suit so far as it concerned the claim in respect of the facility of Tanzania Shillings (Tshs.) 200,000,000/= for being time barred as it was repayable by 24/4/2001 and the suit to complain for its non-repayment was lodged on 13/6/2007 (P.10);*

2. That the Honourable Trial Court, erred in law not to dismiss also the claim in respect of the facility of United States Dollars (USD) 600,000 for being mixed up, vague, unclear and uncertain, it being a claim on the USD currency facility but being brought in

Tshs., with no formula of conversion from USD into Tshs. Indicated and had pecuniary jurisdiction in the matter;

3. *That the Honourable Trial Court erred to proceed to give judgment instead of dismissing the suit for being outside the scheduling order at the time of judgment, without there being any order altering the same;*

4. *That the Honourable Trial Judge erred in law and in fact in holding the Appellants liable to the Respondent to the tune of Tshs. 469,767,017/= prayed by the Respondent as specific damages without any specific proof that the judgment debtors or any of them was liable, and to that extent;*

5. *That the Honourable Trial Judge erred in law by placing a burden of demonstrating records of credit advance, interest, repayment and unpaid balance on the Appellants who were not only the Defendants but bank customers/guarantors and not on the Respondent who was not only the Plaintiff but also a bank;*

6. *That the Honourable Trial Judge erred to hold the 1st Appellant liable for Tshs. 200,000,000/= as payment of the overdraft facility without any proof that the overdraft was utilized by the 1st Appellant;*

7. *That the Honourable Trial Judge erred in holding liable the Appellants for non-servicing the facility of United States Dollars (USD) 600,000 which the Respondent in evidence admitted to have been well serviced by the 1st Appellant;*

8. *That the Honourable Trial Judge erred in law and in fact by holding to the effect that the Appellants, after raising a defence of frustration, were estopped from alleging, even in the alternative, that they had discharged their liability;*

9. *That the Honourable Trial Judge erred in law and fact by holding that securities offered by the 2nd, 3rd and 4th Appellants to secure a credit of USD 600,000 advance by the Respondent to the 1st Appellant on July 4, 2000 were liable to secure also another credit facility of Tshs. Tshs. 200,000,000/= allegedly advanced to the 1st Appellant later on February 23, 2001 without any consent or even notice to the 2nd, 3rd and 4th Appellants;*

10. *That the Honourable Trial Judge erred in law and in fact by admitting the documents which were not stamped;*

11. *That the Honourable Trial Court erred in law and fact by holding the 1st Appellant liable on the two credit facility contracts dated July 4, 200 (**Exhibit P1**) and February 23, 2001 (**Exhibit P5**) which were executed neither under seal nor by two directors or one director and secretary of the 1st Appellant;*

12. *That the Honourable Trial Judge erred in law and in fact for granting the Respondent interest of 25% per annum up to the date of judgment without advancing any reason for that;*

13. That having the Respondent emerged winner in respect of two bank credit facilities and loser in respect of two bank guarantees, all the four facilities alleged in the plaint in support of the Respondent's whole claim, the Honourable Trial Judge erred in law to give full reliefs prayed in the plaint and even costs of the case to the Respondent against the Appellants and nothing to the Appellants against the Respondent."

Although the memorandum of appeal refers to four appellants, as shown above, the appeal was brought by three appellants who were the guarantors of the two credit facilities. The borrowers, Petromark Africa Limited is not a party to the appeal. We shall therefore take it that reference to the "1st appellant" in the memorandum of appeal connotes the borrower, which was the first defendant in the High Court.

At the hearing of the appeal, the appellants were represented by Mr. Audax Kahendaguza Vedasto, learned counsel while the respondent had the services of Mr. Gabriel Simon Mnyele, learned counsel. Both counsel for the appellants and the respondent had complied with the provisions of Rule 106 (1) and 106 (7) of the Tanzania Court of Appeal Rules, 2009 as amended by GN No. 345 of 2019 by filing their written submissions.

When he was called upon to make oral submission to clarify his written submission, Mr. Vedasto started by intimating to the Court that he was abandoning the third and thirteenth grounds of appeal. He then proceeded to highlight on the contents of his lengthy written submission in respect of the remaining grounds of appeal.

On the first ground, Mr. Vedasto argued in essence that, since according to the parties' second agreement, the overdraft facility of TZS 200,000,000.00 was to be repaid latest on 24/4/2001, by filing the suit on 13/6/2007 the same was filed out of time because the period of 6 years, which is the limitation period for a suit founded on contract, expired on 23/4/2007. Relying *inter alia* on the provisions of s. 3 (1) of the Law of Limitation Act [Cap. 89 R.E. 2002] (the Law of Limitation Act) and the cases of **Hashim Madongo v. Minister for Industry and Trade & 2 others**, Civil Appeal No. 27 of 2003 (unreported) and **Stephen Masato Wasira v. Joseph Warioba** [1999] T.L.R. 334, the learned counsel submitted that the High Court erred in failing to dismiss the suit for being time barred.

Responding to the arguments made in support of the first ground of appeal, Mr. Mnyele submitted that the point was not raised in the High

Court and should not therefore, be entertained at this appellate stage of the case. He states as follows at page 4 of his written submission:-

> *"... the first ground of appeal is to the effect that the claim of Tshs. 200,000,000/= was time barred. We have already submitted above that this ground ought not to be considered because the issue therein was not considered in the High Court in the manner it has been raised in the Court."*

He went on to argue that, in the first place, the claim by the respondent in the High Court did not distinguish between the two facilities. That is to say, whether the claim of TZS 469,767,017/= arose from the USD credit facility or TZS overdraft facility. Similarly, he said, in their defence the borrower and the appellants raised a preliminary objection specifically on the credit facility of USD 600,000/= (Pages 85 and 91 of the record of appeal). According to the learned counsel, there is no basis at all in law to disintegrate the claim and consider part of it as being time barred.

The learned counsel argued further, in the alternative, that it must be assumed that the suit was not time barred because, after the borrower and the appellants had failed to repay the overdraft facility on 24/4/2001, they continued to be indebted to the respondent. Thus, he said, that led to

continued breach of contract and under such circumstances, the suit was not time barred.

We wish to begin with Mr. Mnyele's contention that the ground challenging the claim of TZS 200,000,000.00 on the ground of limitation has been improperly raised because that issue was not canvassed at the trial. It is true that during the trial, the issue of limitation was confined to the credit facility granted in USD currency. Notwithstanding that fact, we are with respect, unable to agree with the learned counsel that the issue concerning limitation in respect of the claim of TZS 200,000,000.00 cannot be addressed at this stage of the proceedings.

There is consistent judicial pronouncements that a point of law can be taken into cognizance and adjudicated upon at any stage of proceedings provided that the facts admitted or proved on the record enable the court to determine the point of law in question. Since therefore, limitation is a legal issue and since in this case, the claim was based on ascertained facts, the appellants were not precluded from raising it in this appeal. In the case of the **DPP v Bernard Mpagala and 2 Others**, Criminal Appeal No 29 of 2001 (unreported) for example, the Court observed as follows:

"Admittedly, limitation is a legal issue which has to be addressed at any stage of proceedings as it pertains to jurisdiction."

-See also the cases of **Shabir Tayabali Essaji v Farida Seifudin Essaji**, Civil Appeal No. 180 of 2017 and **Venant Kagaruki v. Permanent Secretary, Ministry of Finance and another**, Civil Appeal No. 103 of 2007 (both unreported).

Next for our consideration is Mr. Mnyele's argument that since by its decision on the preliminary objection, the High Court held that the suit was not time barred, it had in effect decided also that the claim of TZS 200,000,000.00 was not time barred. He states as follows at page 4 of his written submission:-

"... it must be assumed that when the trial Judge held that the suit was not time barred, he canvassed the whole claim..."

The learned counsel stressed that the claim on the two facilities could not be disintegrated as regards the period of limitation.

With due respect to the learned counsel, we disagree with his proposition. It is clear from the record of appeal that there were two

agreements having separate terms and conditions. In the circumstances, breach of each of the terms and conditions of any of the two agreements would constitute a separate cause of action. This is more so because, each of the agreements had a specific period and time frame within which the repayment of the facility was to be made. The act of integrating the two causes of action in one suit is permissible under O.II r. 3 of the Civil Procedure Code [Cap. 33 R.E 2002] (now R.E 2019) which states that:-

> " *3-(1) Save as otherwise provided,* ***a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly****; and any plaintiffs having causes of action in which they are jointly interested against the same defendants or the same defendants jointly may unite such causes of action in the same suit."*
>
> [Emphasis added].

There is nowhere stated in the two agreements that in case of breach of payment of overdraft facility of TZS 200,000,000.00 within the agreed period, a redress for breach of that covenant would await expiry of the period of limitation for repayment of the USD credit facility.

For these reasons, we decline to agree with Mr. Mnyele that the limitation periods for repayments of the two facilities should not be disintegrated or that by holding that the claim based on USD 600,000.00 was not time barred, it should be assumed that the High Court had held also that the claim of TZS 200,000,000 was not time barred.

That said, the immediate issue for our determination is whether the claim of TZS 200,000,000.00 was time barred. Having duly considered the submissions of the learned counsel for the parties on the issue, we need not be detained much in answering that issue. As stated above, from the second agreement (the TZS 200,000,000.00 overdraft facility agreement), the amount was to be repaid within two months between 23/2/2001 and 24/4/2001. In that respect, the cause of action accrued on 24/4/2001. Thus by filing the suit on 13/6/2007, after a period of about six years and one and a half months, the claim was filed in contravention of item 7 of Part I of Schedule to the Law of Limitation Act.

With regard to Mr. Mnyele's alternative argument that the claim was not time barred because, after the appellant's failure to repay the overdraft facility on 24/4/2001, they continued to be indebted to the respondent hence the claim was not time barred, in our considered view, this

argument is misconceived. The reason is not farfetched. The legal position as regards continuity of breach of contract does not apply in the particular circumstances of the case at hand. Section 7 of the Law of Limitation Act under which, Mr. Mnyele apparently based his argument, states as follows:-

> *"7. Where there is a continuing breach of contract or a continuing wrong independent of contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues."*

Defining the expression "to continue" as used in section 22 of the Indian Limitation Act, 1963 which is similar to s. 7 of our Law of Limitation Act, the learned author of the book **Law of Limitation**, 2nd Ed; 2012 Reprint, Modern Law Publishers, New Delhi.Alliahabab, states:-

> *"This section speaks of a 'continuing breach of contract' and a 'continuing tort' without defining what those expressions mean. Therefore, one has to resort to the general law, where the expression means nothing more than that the 'breach' or the 'wrong' is not the result of single positive act but is the result of neglect or default which continues to exist over a number of days, so that fresh neglects and defaults are*

deemed to occur every day giving rise to fresh cause of action."

[Emphasis added].

In the present case, there was only one form of breach of contract; failure to repay the overdraft facility within the agreed period of two months. The nature of the agreement was not one requiring performance on periodic basis of any obligation such that the failure thereof would give rise to a new cause of action. As alluded to above, in this case, the cause of action arose once after the appellants had defaulted to repay the overdraft facility within the agreed period of two months from 23/2/2001.

On the basis of the above stated reasons, we agree with Mr. Vedasto that the claim based on overdraft facility of TZS 200,000,000.00 was time barred. We therefore allow the first ground of appeal.

Having so found, we now turn to consider the 2nd and 7th grounds of appeal which relate to the credit facility of USD 600,000.00. The two grounds of appeal challenge the trial courts finding to the effect that the appellants defaulted to repay that amount. The contention by the counsel for the appellants is that, from the evidence on record, the trial court erred in failing to find that the claim of TZS 469,767,017.36 did not include the

credit facility in USD because the same was fully serviced by the appellants.

It is noteworthy to state here that, from the plaint, it was not certain whether the claim of TZS 469,767,017.36 was based on both the USD and TZS facilities. Even if the claim was based on both facilities, yet no breakdown was made to show the actual amounts in each of the two currencies and the rate of exchange used in converting the outstanding amount, if any. Notwithstanding that uncertainty, it was Mr. Vedasto's argument that at the trial, the parties were not at issue as regards repayment by the appellants of the credit facility of USD 600,000.00. He submitted that the evidence of Athanas Wilfred Moshi (PW1) who was at the material time the Assistant Manager in the Credit and Risks Management Department of the respondent bank, was clear on that aspect. According to the learned counsel, at pages 193 -199 of the record of appeal the said witness testified to the effect that the amount "was serviced well" by the appellants. Mr. Vedasto submitted therefore, that the parties' dispute was confined to the overdraft facility of TZS 200,000,000.00. In the circumstances, Mr. Vedasto argued, the learned

trial Judge erred in holding the appellants liable in default of repayment of both credit facilities.

In reply, Mr. Mnyele submitted that the appellants were rightly held liable for having defaulted to repay the two facilities. According to the learned counsel, the appellants admitted in their joint written statement of defence that they were indebted to the respondent but pleaded frustration of the contract which they could not prove. Citing the case of **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161, Mr. Mnyele contended that the appellant's defence, that they repaid the credit facility was rightly rejected by the trial court.

In his further submission, the counsel for the respondent denied the contention that, through the evidence of PW1, the respondent admitted that the credit facility in USD was repaid by the appellants. He argued that the statement by PW1 that "this facility was serviced well" did not mean that the amount was fully paid. For this reason, Mr. Mnyele urged the Court to dismiss the 2nd and 7th grounds of appeal.

The issue which arises from the parties' submissions on the two grounds of appeal stated above is whether or not the credit facility of USD

600,000.00 has been settled by the appellants. As shown above, Mr. Mnyele's submission is that the appellant admitted in their joint written statement of defence that the debt was outstanding. That contention was based on paragraph 2 of the written statement of defence. Although in that paragraph, the appellants indicated that they were replying to paragraph 2 of the plaint, as submitted by the learned counsel, they were in fact making a reply to paragraph 5 thereto because paragraph 2 was answered in paragraph 1 of their written statement of defence in which they state that:-

> *"1. The contents of paragraphs 1, 2, 3 and 4 are not denied ...."*

In paragraph 2 of the written statement of defence, the appellants state as follows:-

> *"The contents of paragraph 2 of the plaint are not denied save that any claim by the same is barred by the law of limitation."*

Since paragraphs 1-4 of the plaint were answered in paragraph 1 of the written statement of defence, it is apparent that in paragraph 2, the appellants were responding to paragraph 5 of the plaint. This is more so

because, in their reply, they make specific reference to the substantive claim made by the respondent. In that paragraph, the respondent made the following claim:

> *"5. On or about 4th July 2000 the Plaintiff sanctioned a credit Facility of Six Hundred Thousand United States Dollars (Us $600,000) in favour of the first Defendant upon the terms and subject to the conditions stipulated in a letter dated 4th July 2000 from the Plaintiff to the first Defendant. The first Defendant is the Principal Borrower and the second, third and fourth Defendants are guarantors having extended Personal and Corporate Guarantees for the repayment of the first Defendant's indebtedness to the Plaintiff...."*

Despite that fact however, we are with respect, unable to agree with the learned counsel that the appellants admitted that the amount of USD 600,000.00 was outstanding. What was admitted by the appellants was the existence of the credit facility and that such debt was secured by personal and corporate guarantees of the Directors of Petromark African Limited, the principal borrower.

Reverting now to the issue, in his evidence at page 193 of the record of appeal, PW1 had this to say:-

"This facility was serviced well at that time .... The service of USD was serviced well at that time."

Furthermore, when he was required to explain as to why did the respondent decide to institute the suit, PW1 replied that:-

"The client Petromark Africa Limited, they have not serviced the facility as we agreed in our terms.... ***I am talking about Tanzania Shillings facility.***"
[Emphasis added].

Again, at pages 199-200 of the record of appeal, when asked by the trial court to clarify the nature of the respondent's claim, the said witness stated that the claim was based on the overdraft facility of TZS 200,000,000.00 which together with interest, the respondent claimed for a total of TZS 496,767,017.36.

From that evidence of PW1, who was the only witnesses for the plaintiff's case (the respondent), there is no gainsaying that, the credit facility of USD 600,000.00 was repaid by the appellants. This, we think, is the reason why the respondent did not tender any bank statement showing the status of the accounts of Petromark Africa Limited. Indeed, as submitted by Mr. Vedasto, the parties were not at issue as regards the

repayment of the credit facility granted in USD. In the circumstances, the issue is answered in the affirmative. As a result, we allow the 2nd and 7th grounds of appeal.

Having answered the 1st, 2nd and 7th grounds of appeal in the manner shown above, the need for considering the other grounds of appeal does not arise. In the event, the appeal is hereby allowed. Given the nature of the legal point on which the first ground of appeal has been disposed of, we order each party to bear its own costs.

DATED at **DAR ES SALAAM** this 7th day of October, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 9th day of October, 2020 in the presence of Mr. Gabriel Simon Mnyele holding brief of Mr. Audax Kahendaguza Vedasto for the Appellant and Mr. Gabriel Simon Mnyele, learned counsel for the Respondent is hereby certified as a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL