

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A, LEVIRA, J.A. And MASOUD, J.A.)

CIVIL APPEAL NO. 205 OF 2021

**PULSES AND AGRO COMMODITIES (TANZANIA) LIMITED..... APPELLANT
VERSUS**

BANK OF BARODA (TANZANIA) LIMITED RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
(Commercial Division) at Arusha)**

(Magoiga, J)

dated the 27th day of November, 2020

in

Commercial Case No. 8 of 2020

.....

JUDGMENT OF THE COURT

2nd & 12th December, 2024

LEVIRA, J.A.:

This is an appeal against the decision of the High Court of Tanzania, Commercial Division, at Arusha (the trial court) dated 27th November 2020 in Commercial Case No. 8 of 2020. The respondent had sued the appellant for recovery of United States Dollars (USD) 1,917,024.87 as an outstanding debt, interest on the debt at commercial rate computed from 20th March, 2020 to the date of judgement, interest on decretal amount at the court's rate from the date of judgment till full and final satisfaction of the decree, costs of and incidentals to the suit, together with other

reliefs resulting from the breach of the terms of Facility Agreement between them. The appellant denied being in breach of the terms and conditions of the said Facility advancing business expansion to be the reason of delay in servicing the loan. The trial court determined the suit in favour of the respondent. The appellant was not satisfied, hence, the present appeal.

The respondent filed a witness statement of one Joel Geoffrey Kalugendo (PW1) to prove her claim against the appellant. The said witness was eventually subjected to cross-examination during the trial. It can be gathered from his testimony that, on 10th December, 2009, the respondent approved and offered credit facilities to the appellant amounting to a total of USD 1,700,000.000 at the request of the appellant through a letter dated 17th October, 2008 and the appellant acting through her authorized directors, Rakesh Y. K. Vohora and Christian Donath Mushi accepted the offer on the terms and conditions detailed in the Facility Agreement.

According to the said agreement, USD 200,000.00 was intended for purchase of machinery and equipment for establishing Dall- Mill industry and other machinery for purpose of running the appellant's business efficiently while, the overdraft portion was a working capital to meet the appellant's day to day working requirements. The credit facility attracted

interest of 4% over 3 months per annum and the loan amount was to be paid within 36 months including moratorium of 6 months. It was further agreed that the appellant was to pay interest separately on monthly basis and overdraft facility portion was for a period of 12 months renewable. PW1 tendered in evidence the Facility Agreement and it was admitted as exhibit P1.

Through her letter dated 17th December, 2008, according to PW1, the appellant committed herself to pay the term loan portion as agreed and that he was to pay 2% rate of interest on top of the agreed rate of interest in case of default. Further, PW1 told the trial court that through a letter of the same date, the appellant reaffirmed her demand promissory note in respect of the portion that he is bound by the terms and conditions set and that they would pay on demand. PW1 tendered in evidence an affidavit verifying the electronic statement and Bank Statement of the appellant maintained by the respondent dating from 1st January, 2014 to 27th September, 2018, which were admitted and marked as exhibit P2 "A" and "B", respectively. PW1 also tendered other documents which reflected what transpired between the parties.

However, contrary to the Facility Agreement and upon demand by the respondent, the appellant failed to fulfil the agreed terms and conditions. As a result, the respondent appointed one Charles R. B.

Rwechungura as her receiver/manager in terms of the Debenture Deed executed by the appellant in favour of the respondent to secure the credit facilities advanced to the appellant through the Facility Agreement. The said receiver/manager issued a notice of enforcement of the debenture dated 21st February, 2014. Nevertheless, his appointment was successfully challenged by the appellant via Civil Case No. 24 of 2014. According to PW1, the outstanding debt by 19th March, 2020 was USD 1,917,024.84.

On her part, the appellant disputed the respondent's claims through her Written Statement of Defence (the WSD) and also called one witness, Rakesh Yoginder Kumar Vohora (DW1), a Director and Shareholder of the appellant's company handling all the company affairs and thus aware of the credit facility in question. He restated the terms and conditions of the facility letter and added that the amount of the said facility was USD 1,700,000.00 categorized into two parts; to wit, USD 200,000.00 as a term loan and USD 1,500,000.00 as an overdraft. He further told the trial court that, as a security of the loan, the appellant through her directors executed other bank documents including, bank guarantee, debenture, personal guarantees and a third-party mortgage.

DW1 testified further that, the debenture created charges on all fixed and floating, present and future, assets of the appellant's company

in which the respondent had the first ranking charge over the said debenture. According to him, the appellant did pay the term loan in full and the overdraft was being regularly serviced as required by the respondent until in October, 2013 when they received a demand notice from the respondent to repay the facility in full. The appellant communicated with the respondent with a view to looking for another bank to take over the facility. However, while in the process, in February, 2014, the appellant received a notice from the respondent's legal advisor (CRB Legal Africa) indicating the intention of appointing a receiver/manager. On 17th April, 2014, the appellant became aware of the appointment of the receiver/manager and on the same day, the said receiver manager took possession of the appellant's factory and shut it down despite the fact that it was in full operation.

Following what had transpired, the appellant rushed to the court and instituted Civil Case No. 24 of 2014 challenging the appointment of the receiver/manager and its subsequent Miscellaneous Civil Application No. 156 of 2014 seeking temporary injunction against the respondent and her agent from interfering with the appellant's property and assets pending determination of the main suit. DW1 stated further that, while those cases were pending, the respondent through her receiver/manager sold all the assets, properties and the stocks financed by the ABC Bank

Tanzania Ltd. Luckily, Civil Case No. 24 of 2014 ended in the appellant's favour as the whole processes by the receiver/manager were declared illegal. DW1 tendered in evidence a Ruling in Miscellaneous Civil Application No. 156 of 2014 which was admitted as exhibit D1, Judgment and Decree in Civil Case No. 24 of 2014 which were, as well, admitted as exhibit D2 "A" and "B".

The trial court, having heard evidence by both parties, was satisfied that the respondent had proved her claims against the appellant to the required standard. Consequently, it entered Judgment in her favour. Aggrieved by that decision, the appellant preferred the instant appeal as alluded to above. In this appeal, the appellant has presented six grounds as follows:

- 1. That, the trial court erred in law and fact in awarding the Respondent [Plaintiff] the special damages to the tune of USD 1,169,417.17 without due regard to the receivership processes triggered by the respondent.*
- 2. That, the trial court erred in law and fact in stating that there was a valid "Notice of Default" prior to the institution of Commercial Case No. 8 of 2020 referring to Exhibit D4.*
- 3. That, the trial court erred in law and fact by failing to consider the co-existence of liabilities of the sureties and or guarantors as part of the case.*

4. *That, the trial court erred in law and fact by failing to accord weight and taking judicial notice on Exhibit D2 "A" and D2 "B".*
5. *That, the trial court erred in law and fact by stating that Commercial Case No. 8 of 2020 was not res judicata and or res sub-judice.*
6. *That, the trial court erred in law and fact by failing to analyse evidence on record and thereby reaching into erroneous decision.*

At the hearing of the appeal, the appellant was represented by Mr. Salimu Juma Mushi, learned Advocate assisted by Mr. Rodgers Godfrey Mlacha, also learned advocate whereas, the respondent had the services of Mr. Sinare Zaharan, learned advocate. Both parties had filed their respective written submissions which were adopted by their counsel as part of their oral submissions before the Court.

In the first ground of appeal the appellant's complaint is based on the amount of special damages to the tune of USD 1,169,417.19 awarded to the respondent by the trial court, allegedly, without due regard to the receivership processes triggered by the respondent. Mr. Mushi argued in support of this ground to the effect that, it is undisputed fact that the appellant obtained from the respondent USD 1,700,000.00 as loan as per exhibit P1, a loan facility letter. The said loan was secured by various securities including, debenture charge, mortgage of property land and building Title Deed of 055010/26 situated at Russell Rd, Arusha Township, chattel mortgage of all existing motor vehicles of the company and motor

vehicles to be purchased in future; and, personal guarantee of the Directors of the company and third-party guarantee. Nonetheless, he argued further that sometimes in the year 2013, the respondent accused the appellant for defaulting the terms of the loan and approaching other banks, Bank M. Tanzania Limited and ABC Bank Tanzania Limited for loan. This prompted the respondent to call for the entire outstanding loan amount.

Mr. Mushi added that, as a way of recovering the outstanding loan, the respondent decided to go to the first security (debenture charges) because it was there for payment. He went on to submit that, the respondent admitted to have appointed one Charles R. B. Rwechungura of CRB Africa Legal as her receiver/manager in terms of Debenture Deed executed by the defendant (appellant) in favour of the plaintiff (respondent) to secure the credit facilities advanced to the appellant through the Facility Agreement as it can be seen at page 11 of the record of appeal. According to Mr. Mushi, since there was an allegation of breach of terms of the loan facility, it was not proper for the respondent to appoint a receiver/manager and institute a case a subject of the instant appeal, which was allegedly instituted after the failure to access the appellant's properties. He lamented that the framed issues at the trial did not address what was the issue between the parties. As such, he said, the

key issue was the recovery by the respondent but it was not addressed. He referred us to paragraph 11 of her Written Statement of Defence (WSD) found on page 90 of the record of appeal and pages 283 to 298 of the said record where the High Court through Miscellaneous Civil Application No. 156 of 2014 declined to grant an order for temporary injunction against the respondent to restrain the receiver/manager to take over the management of the company. As a result, the receiver/manager took possession of the assets of the appellant as per exhibit D2 'A' (the Judgment of the High Court in Civil Case No. 24 of 2014) at page 315 of the record of appeal.

Mr. Mushi argued vehemently that, despite his involvement in the matter between the parties, the receiver/manager was not made a party to the suit and never called as a witness, which was wrong. According to him, the receiver/manager was a necessary party as everything centred on him, but he was not joined in the suit. He thus urged us to find that the receiver/manager was a necessary party in this case and failure to join him was fatal with consequence of rendering the proceedings of the trial court a nullity; thereby proceed to nullify them, quash the judgment and order for a retrial. In support of his argument, he cited the following cases: **Jackson s/o Hakiel Msuya v. Republic**, Criminal Appeal No. 138 of 2021 [2024] TZCA 430 (11 June 2024, TANZLII); **Boniface**

Kuandakira Tarimo v. Republic, Criminal Appeal No. 351 of 2008 [2011] TZCA 194 (4 October 2011, TANZLII) and **Surya Holdings Limited & Others v. CFC Stanbic Bank Limited** [2015] & KLR also available at <http://kenya law.org/case/vies/114581>. Finally, Mr. Mushi urged us to allow the appeal on the above ground.

Replying to the first ground of appeal, Mr. Sinare, having adopted the respondents' written submissions, stated that the trial Judge is criticized by the appellant for not taking due regard to the receivership process in awarding special damages, to wit, TZS 1,169,417.19. However, he said, it is clear at page 7 of the record of appeal in the respondent's pleadings in paragraph 3 of the plaint that, the special amount was claimed to be USD 1,917,024.87 as on 19th March 2020 which was the outstanding debt and USD 1,169,417.18 was the principal outstanding sum. The respondent's claim was disputed by the appellant in paragraph 2 of her WSD requiring the respondent to strictly prove as it can be observed at page 89 of the record of appeal.

Mr. Zaharan argued that the appellant had no claim of set off or counter claim against the respondent as per the requirement of the law under Order VIII Rule 9 of the Civil Procedure Code, Cap 33 (the CPC). Therefore, the trial court cannot be faulted for not considering the receivership process while it was not the matter before it. According to

him, what was before the trial court was exhibit P2A and P2B (the Affidavit by the plaintiff and Bank Statement) which clearly reflected the amount pleaded by the respondent before the trial court. Apart from exhibit P2B, DW1 at page 569 of the record of appeal also confirmed that exhibit P2A was tendered without being objected and that he saw the amount of money (USD 1,169,417.18) in the plaint that was supposed to be paid. As regards the claim that the receiver/manager was a necessary party to the suit, the counsel for the respondent opposed this argument saying that, a mere mentioning of him does not make him a necessary party. As such, Mr. Zaharan insisted while concluding, that as parties are bound by their pleadings, evidence that has no bearing on the pleadings should be ignored. He urged us to dismiss this ground of appeal.

Having considered the appellant's claim in this ground of appeal, the submission by the counsel for the parties and the entire record of appeal, the issues calling for our determination are mainly two; **first**, whether the trial court erred for not considering receivership process in awarding the respondent's claim for special damages to the tune of USD 1,169,417.19; and **second**, whether the receiver/manager was a necessary party in this matter to the extent that the failure to join him in a suit rendered the proceedings of the trial court a nullity.

Regarding the first issue we have raised, the counsel for the appellant claimed that it was not proper for the trial court to award the respondent special damages to the tune of USD 1,169,417.19 because she had already recovered some amount of the debt through receivership process. On the contrary, the counsel for the respondent, in respect of that issues, argued that the trial Judge cannot be faulted for not considering receivership process because it was not the matter before him as the same was not pleaded and there was no counter claim to that effect. In determining this issue, we shall be guided by two main principles of the law. One, that special damages must be specifically pleaded and strictly proved - see: **Anthony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 [20145] TZCA 269 (25 February 2015 TANZLII). The second principle is that, parties are bound by their pleadings.

The respondent's plaint which was presented before the trial court, as it can be seen at page 7 of the record of appeal, states at paragraph 3 as follows:

"That, the plaintiff's claim against the defendant is for payment of United States Dollars One Million Nine Hundred Seventeen Thousand Twenty Four Cents Eight seven only (USD 1,917,024.87) as on 19th March, 2020 (hereinafter "the Outstanding

*Debt"). **USD 1,169,417.18 (United States Dollars One Million One Hundred Sixty-Nine Thousand Seventeen and Eighteen Cents Only) is the principal outstanding sum and the balance is accrued contractual interest since the account became non performing till 19th March, 2020. Also, the plaintiff claims for subsequent interest from 20th March, 2020 plus other charges thereon and costs of this suit resulting from the breach of Facility Agreement between the plaintiff and the Defendant. Photostat copies of the Facility Agreement and the Defendant's Statement of Account as on 21st October, 2014 are annexed herewith marked BOB-1 and BOB-2, respectively forming part of this plaint."***

[Emphases added]

The above claim, particularly the amount under consideration, was proved during trial by PW1 and exhibit P2-B, the appellant's statement of account, which categorically showed it to be the outstanding principal sum as it can be seen at page 268 of the record of appeal. However, we wish to note that, according to the Facility Letter (exhibit P1) executed on 15th December, 2018, the credit facility was USD, 1,700,000 whereby USD 200,000 was a term loan and USD 1,500,000 was an overdraft. The term loan was for 36 months and the overdraft was renewable annually. Both

parties agreed that the said amount (USD 1,700,000.00) was the amount which the appellant took from the respondent as per exhibit P1. Since the said loan was serviced as alleged, when PW1 was shown the bank statement (exhibit P2B) which was printed on 23rd March, 2020, he did not deny that the shown amount (USD 1,169,417.18) was the outstanding amount. The said amount was as well acknowledged by DW1 to the effect that he saw it through exhibit P2A and it was pleaded by the respondent (Plaintiff) at paragraph 3 of the plaint as is apparent at pages 554 and 569 of the record of appeal, respectively.

In his decision, the trial Judge made the following observation at page 601 of the record of appeal:

"I have gone through the testimony of the plaintiff's witness and exhibit tendered and I am certain that the plaintiff managed to prove only USD 1,169,417.19 and not USD, 1,917,024.84 claimed. To this end and without much ado the plaintiff is entitled to USD 1,169,417.19 and no more being proved outstanding debt as per exhibit P2B."

As we demonstrated above, the respondent claimed in her reliefs the amount which was above the awarded sum. We agree with the above finding of the trial Judge taking into consideration that the amount awarded to the respondent was as well pleaded under paragraph 3 of the

plaint. It is our observation that, although the appellant claimed that the trial Judge ought to have considered the receivership process (See: Civil Case No. 24 of 2014) before awarding that amount, she failed to raise that claim through a counterclaim, as rightly in our view, submitted by Mr. Zaharan. We observe further that Mr. Mushi, in a way, conceded that the receivership process was not an issue before the trial court. It is a cardinal principle of the law of civil procedure founded upon prudence that no party is allowed to present a case contrary to the pleadings – see for instance: **Martin Fredrick Rajab v. Ilemela Municipal Council & Another**, Civil Appeal No. 197 of 2019 [2022] TZCA 434 (18 July 2022, TANZLII) and **Dr. Abraham Israel Shuma Muro v. National Institute for Medical Research & Another**, Civil Appeal No. 68 of 2020 [2021] TZCA 183 (7 May 2021, TANZLII).

We had an opportunity of glancing at the decision of the High Court in Civil Case No. 24 of 2014 in which the appellant was challenging the appointment of the respondent's receiver/manager. Among others, the High Court declared his appointment as premature and illegal and that whatever he did was illegal. In the circumstances, it is our considered view, that if the appellant had any genuine claim against the respondent following what had transpired, it was upon her to properly claim for it in a proper forum. Having failed to do so, she cannot be heard now faulting

the trial Judge for not taking on board the process which had already been nullified and was not brought forth for his determination. In other words, with respect, the complaint brought before us by the appellant in that respect is nothing, but an afterthought.

We now revert to consider the second limb of the appellant's complaint in the first ground of appeal. The issue need not detain us much. We have screened through the record of appeal and we wish to note that, one, the appointment of the receiver/manager and or whatever functions he performed and the outcome thereof, were not made part and parcel of the matter at hand, as neither the appellant nor the respondent raised it as an issue during the proceedings.

We are quite aware of the requirement of the law under Order I Rule 10 (2) of the CPC for the court to order any person to be joined as a party to the suit in order to enable the court effectively and completely adjudicate upon and settle all the questions involved in the suit. See: **Mr. Hassan Ally Warsama (As Administrator of the Estate of the late Ally Warsama) v. Mr. Hybe Ahmed Dudeh (As Administrator of the Estate of the late Ahmed Haji Mohamed)** Civil Appeal No. 518 of 2020 [2024] TZCA 1193 (26 November 2024, TANZLII).

Nonetheless, we do not find how the trial Judge could *suo mottu* raise receivership process and its outcome as an issue and decide to

reduce the special damages which had been specifically proved. We note that at paragraphs 20 and 21 of the plaint, the respondent (plaintiff) had commented on appointment of Charles R. B. Rwechungura as a receiver/manager and that he issued the notice of enforcement of the debenture through a receivership. This averment was strongly disputed by the appellant (defendant) in the WSD at paragraph 9. The issue as to whether or not the said Rwechungura was a receiver/manager was not an issue because it was already resolved via Civil Case No. 24 of 2014. Therefore, it was incumbent upon the appellant to take up the matter before the trial court if she had any claim against the respondent after that decision.

Unfortunately, the only issue regarding existence of Civil Case No. 24 of 2014 brought before the trial Judge was the claim that Civil Case No. 8 of 2020, a subject of the present appeal was, res-judicata to the former case. This issue was properly determined by the trial court as the claim was confined on the appointment of the receiver/manager where only declaratory orders were sought different from the current matter. As such, we are settled that the purported receiver/manager was not a necessary party in the matter at hand as Mr. Mushi would wish us to hold. We say so because determination of the matter at hand in its completeness did not require his presence as a party. Generally, we do not find merit in the first ground of appeal. We thus, dismiss it.

The appellant's complaint in the second ground of appeal is directed towards the notice of default (exhibit D4). The trial Judge is faulted for stating that there was a valid "notice of default" prior to the institution of Commercial Case No. 8 of 2020 by referring to exhibit D4. According to Mr. Mushi, the said notice was a notice to enforce mortgage and not a notice directed to the facility letter (exhibit P1) as a demand notice. He argued that the appellant was not aware of how much was collected and what she was supposed to pay after receivership process. As a result, he said, Commercial Case No. 8 of 2020 was instituted prematurely and urged us to find so.

Mr. Zaharan's reply to this ground of appeal was to the effect that, the issue of notice of default never featured at the trial and the complaint by the appellant that she was not aware of the amount of debt she owed the respondent was equally, not an issue at the trial. He referred us to pages 539 – 540 of the record of appeal where five issues were recorded as follows:

- 1. Whether the matter before this Honourable Court in law and in equity is res judicata.*
- 2. Whether the plaintiff and the defendant entered into credit facility agreement in the form of term loan USD 200,000.00 and overdraft USD 1.5 million.*

3. *If the answer to issue No. 2 is in affirmative what were the agreed terms to the said agreement.*

4. *Whether the defendant breached the agreed terms of agreement.*

5. *What reliefs are the parties entitled.*

Finally, Mr. Zaharan urged us not to consider the appellant's complaint in this ground of appeal and dismiss it.

We have examined the record of appeal and without much ado, we wish to observe that the question as to whether there was a valid notice of default was well addressed by the trial Judge at page 600 of the record of appeal in the following terms:

"As to the arguments that no notice was issued hence the suit cannot be maintained, with due respect to the learned advocates for the defendant, this argument was raised and argued out of ignorance because in paragraph 11 (f) of the written statement of defence, they categorically stated that a notice was issued on 24th July, 2017 which was admitted as exhibit D4, hence, negating that argument."

We agree with the above reasoning of the trial Judge on account that the purpose of exhibit D4 was to enforce a mortgage security pursuant to the facility letter (the loan) following the appellant's default in her obligation to pay it. At any rate, the said notice cannot be

considered or treated in isolation since whatever efforts taken aimed at recovering the loan which the appellant had taken and defaulted in payment. In other words, the Facility Agreement is the centre of all disputes between the parties herein. As rightly, in our view, stated by the trial Judge, the issue of notice was, indeed, raised out of ignorance because the defendant (appellant) acknowledged that the same was issued on 24th July, 2017 as it can be observed at page 91 of the record of appeal. As we observed earlier, Land Case No. 51 of 2017, allegedly, prompted by the notice under consideration (exhibit D4), just like others, has a bearing on the facility letter and the appellant's failure to honour her obligation under the same. Therefore, we do not find merit in this ground of appeal and proceed to dismiss it.

In the third ground of appeal, the appellant claims that the trial court erred in law and fact by failing to consider the co-existence of liabilities of the sureties and or guarantors as party of the case. We note that at the hearing of the appeal, counsel for the parties did not highlight the arguments raised in their respective written submissions. Nevertheless, going by the record, the appellant's main argument is that, the guarantor was a necessary party to be joined in the suit (Commercial Case No. 8 of 2020) as the law provides that the liability of

surety/guarantor is as liability of the principal under section 80 of the Law of Contract Act Cap. 345 (the LCA).

On the contrary, the respondent opposed this ground of appeal on account that, the argument concerning failure to join guarantor came from the bar (in the appellants final submissions). It was neither raised in pleadings nor in the evidence by the appellant before the trial court. According to her the trial Judge was entitled to observe, as he did, at page 600 of the record of appeal, that the said argument was raised when it was too late.

We have carefully perused the record of appeal and we are satisfied that, the argument raised by the appellant in this ground of appeal was, indeed, not pleaded and there was no evidence led to that effect at the trial, as correctly, in our considered view, argued by the respondent. We further observe that despite the fact that the complaint regarding non joinder of guarantor was not among the issue framed, the trial Judge made a finding that, the guarantor in dispute was DW1 who could not be expected to give different evidence other than what he testified as a director of the appellant. If we may add, in terms of Order I Rules 9 and 10 (2) of the CPC, the suit could not be defeated by reason of non-joinder of the guarantor unless it was shown, which it is not the case that without his/her presence, the question in the suit could not be completely decided

- see for instance: **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported). In the present case, we entertain no doubt that the questions in the suit between the parties were completely determined without the presence of guarantor as a party to the suit – see: **Exim Bank (Tanzania) Limited v. Dascar Limited & Another**, Civil Appeal No. 92 of 2009 [2016] TZCA 750 (24 February 2016, TANZLII). Therefore, the trial Judge cannot be faulted for not ordering the guarantor to be made a party to the suit. This ground of appeal is unfounded. We dismiss it.

Next is the appellant's complaint in the fourth ground where the trial Judge is faulted for not giving weight and taking judicial notice on exhibit D2 "A" and "B", respectively. According to the appellant, the above exhibit came into existence after the appointment of the receiver/manager, thus the trial court ought to have taken into consideration the orders which were given against the respondent in Civil Case No. 24 of 2014 (exhibit D2 "A" and D2 "B") and get to know the status on the ground before reaching into its decision. The main argument being that had the trial Judge done so, he would have taken into consideration that although the receivership process was declared illegal, the respondent had already benefited from the proceeds of the appellant's plant/factory which was sold. This would have helped him in determining the exact amount which

the appellant was supposed to pay the respondent, but that was not the case. Instead, the trial Judge treated it as an independent matter from the suit before him, which was wrong. The appellant lamented that at the time of filing the present case, orders given in exhibit D2 "A" and "B" were yet to be executed by both parties so as to pave the way for a new claim, if any, by either party. Therefore, the failure by the trial court to accord weight to that exhibit had led the appellant to be punished twice. The appellant urged us to interfere with the findings of the trial court and allow this ground of appeal.

The claim by the appellant that the trial court ought to have taken judicial notice of exhibit D2 "A" and "B", was opposed straight away by Mr. Zaharan who firmly submitted that those exhibits were already admitted. Therefore, the court was not required to take judicial notice of documents which were already in the court record; otherwise, the trial court would have contravened section 59 of the Evidence Act Cap 6.

Having laid that foundation, Mr. Zaharan referred us to the pleadings of the parties before the trial court and the recorded issues for determination with a view of showing, and it was his argument, that this ground of appeal is totally unconnected with the impugned decision of the trial court. According to the respondent, the appellant's overreliance on exhibit D2 "A" and "B" is an attempt to escape liability despite the fact

that DW1 was recorded during cross examination regarding that exhibit stating that, he could not recall to have written a letter to the bank to comply with the court order, and he never filed an application for execution. In the circumstances, the respondent submitted that, the appellants blame to the trial court in this ground of appeal is unfounded.

The question as to whether the trial court erred by not considering exhibit D2 "A" and "B" should not consume much of our time. As it can be glanced at the record, the said exhibit was basically the judgment and decree of the High Court in Civil Case No. 24 of 2014. It was an exhibit for the purpose of this case because it was tendered and admitted to form part of the record of proceedings. In any case and as submitted by the counsel for the respondent, there was no need again for the trial court to take judicial notice. We think the claim in that respect is, but a misconception. Apart from that, we as well do not find a basis of the appellant's complaint that the trial Judge did not consider the judgment and decree in Civil Case No. 24 of 2014 (Exhibit D2 "A" and "B") in his decision. We note that, **first**, no issue pertaining to that exhibit was framed for determination by the trial court; **second**, the appellant did not raise any counter claim against the respondent regarding the proceeds of the receivership process and; **third**, normally the court acts upon being moved, therefore, the trial court cannot be faulted for not considering

exhibit D2 "A" and "B" in determining the amount of damages without specific claim in relation to the said exhibit.

We are satisfied that the trial Judge properly directed his mind on the matter which was placed before him. In our view, the appellant, if had a valid claim against the respondent following the decision in Civil Case No. 24 of 2024 (Exhibit D2 "A" and "B") ought to have presented it before the trial court for determination rather than expecting the trial Judge to assume responsibilities of a prosecutor and adjudicator at the same time. All in all, we do not find merit in this ground of appeal and we dismiss it.

Likewise, the fifth ground of appeal is, as well, misconceived in the sense that the appellant is claiming that the trial court erred by stating that Commercial Case No. 8 of 2020 was not res judicata whilst there was nothing on the record pleaded to that effect. We wish to observe in one hand that, the appellant's complaint, as submitted by the counsel for the respondent, is based on the existence of the decision of the High Court in Civil Case No. 24 of 2014 which specifically challenged the appointment of the receiver/manager. On the other hand, Civil Case No. 8 of 2020 which is a subject of the present appeal, was specifically on a claim of payment of the principal outstanding sum and interest resulting from Facility Agreement between the parties herein.

It is settled position that the principle of res judicata shall not apply unless, the parties are the same in the former and subsequent suit, the subject matter is directly and substantially in issue in both suits, the parties in the subsequent suit must have litigated under the same title in the former suit, the matter must have been heard and finally decided; and that, the former suit must have been decided by a court of competent jurisdiction – see: **Badugu Ginning Co. Ltd v. CRDB Bank PLC & 2 Others**, Civil Appeal No. 265 of 2019 [2021] TZCA 158 (3 May 2021, TANZLII).

In the instant matter, it does not require much efforts for one to notice that, the subject matter in the two cases complained about, as indicated above, are different; the first one challenged the appointment of the receiver/manager (Civil Case No. 24 of 2014) which was eventually nullified while, the second claimed on the outstanding debt vide Commercial Case No. 8 of 2020. Thus, the claim that the subsequent suit is re judicata, holds no water. We agree with the finding of the trial court and proceed to dismiss this ground of appeal.

In the sixth and last ground of appeal the appellant claimed that, the trial Judge erred by failing to analyse evidence on record and thereby reaching into erroneous decision. In support of this ground, Mr. Mlacha submitted that both PW1 and DW1 were in agreement that Charles

Rwechungura was appointed as a receiver/manager by the respondent. In cross examination, DW1 categorically stated that Rwechungura took possession and sold the properties of the appellant at page 569 of the record of appeal and there was no further cross examination in that aspect. In the circumstances, he argued that the respondent should have taken to have admitted that piece of evidence, but it was not the case. As a result, the trial court was wrong in awarding the respondent USD 1,169,417.18 basing on bank statement without considering the sold properties of the appellant. He supported his argument with the case of **Luther Symphorian Nelson v. Attorney General and Ibrahim Said Msabaha** [2000] T.L. R 419.

Finally, he concluded by condemning the trial Judge for not showing that he considered the evidence by PW1 and DW1 regarding the sold properties. He urged us to allow this ground of appeal.

Mr. Zaharan strongly opposed this ground of appeal on account that, the evidence presented before the trial court was sufficient and it enabled the trial Judge to determine the suit properly. As for him, the claim that he failed to analyse evidence is unfounded.

It is settled position, even at the expense of repeating, that parties are bound by their pleadings. The trial Judge is faulted for not properly evaluating evidence in respect of properties of the appellant which,

allegedly, were sold by one Charles Rwechungura, the receiver/manager. The record of appeal is very clear as far as the issue of receiver/manager is concerned. The respondent pleaded at paragraphs 20 through 24 of the plaint explaining his appointment, issuance of notice of enforcement of the debenture through a receivership, the appellant's acknowledgement of the outstanding debt, request for extension of time to pay it, failure of the appellant to fulfil its further promise to pay the outstanding debt and institution of Civil Case No. 24 of 2014 by the appellant against appointment of the said receiver/manager whose appointment was, eventually, declared illegal.

Responding to the respondent's claim, the appellant through WSD, particularly paragraphs 9 and 10 disputed the appointment of the receiver/manager, but did not raise any complaint regarding what allegedly, he did in performing his functions. As it was, the appellant managed to challenge his appointment and, as we said earlier, it was declared premature and illegal. Apart from declaring so, the High Court gave other orders but there is nothing on the record showing how execution took place thereafter. Indeed, as submitted by Mr. Zaharan, the appellant did not raise any counter claim against the respondent which would have moved the trial court to reduce the amount of debt as per the date of the bank statement (exhibit P2 B), which was relied upon by the

trial Judge to establish the outstanding balance (USD. 1,169,417.18) complained about by the appellant. Having so stated, we have no reason to fault the trial Judge for reaching the decision he made. This ground of appeal is equally unfounded. We therefore dismiss it.

All said and done, we find and hold that the entire appeal is unmerited. Consequently, we dismiss it with costs.

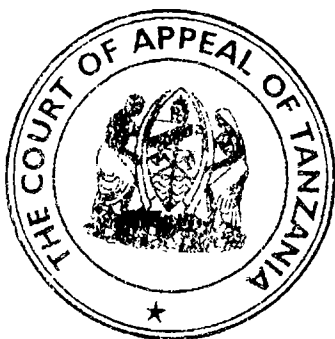
DATED at **ARUSHA** this 12th day of December, 2024.

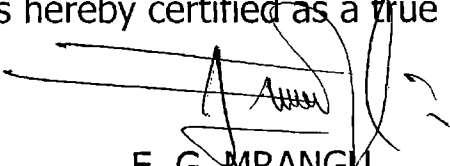
A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2024 in the presence of Mr. Rodgers Godfrey Mlacha, learned counsel for the Appellant who also holding brief for Mr. Sinare Zaharan, learned counsel for the Respondent, is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL