IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 133 OF 2015

1. RUNGWE FREIGHT & CONSTRUCTION CO. LTD. .....APPELLANTS
2. JIMMY BROWN MWALUGELO

VERSUS

INTERNATIONAL COMMERCIAL BANK (T) LTD.....RESPONDENT

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

(Songoro, J.)

dated the 17th day of July, 2015
in
Commercial Case No. 105 of 2013

JUDGMENT OF THE COURT

30th October, 2018 & 20th Feb. 2019

MWARIJA, J.A.:

The respondent, International Commercial Bank (T) Ltd filed a suit in the High Court of Tanzania (Commercial Division) against *inter alia*, the two appellants herein, Rungwe Freight & Construction Co. Ltd and Jimmy Brown Mwalugelo (the 1st and 2nd appellants respectively). The appellants were jointly sued with two other persons, Ladislaus Mpokwa and Burton Joram Lemanya who, together with the 2nd appellant, were the directors of the 1st appellant.

The facts leading to institution of the suit are simple. On 4/6/2005, the appellants obtained from the respondent an overdraft facility (the overdraft) of TZS 20,000,000.00 on the terms and conditions stipulated in the Secured Overdraft Facility agreement signed on 4/6/2005 (herein after "the Overdraft Agreement"). The overdraft, which was repayable within a period of one year, was secured by a mortgage over the appellants' landed property comprising of farms No. 857, 838, 839 and 840 held under Certificate of Title No. 57256. The overdraft which attracted an interest of 18% p.a. was also secured by personal guarantee of the said directors of the 1st appellant company.

Until the contractual period of repayment of the overdraft expired on 3/6/2006, the appellants had not paid any amount in settlement thereof. As a result, the respondent instituted the suit claiming for the following reliefs:

> *"(a). A declaration that the Defendants are in breach of the loan agreement.*

(b). Payment of Tshs. 113,094,908.11 being the principal sum; as per paragraphs 6 and 12 [of the plaint].

(c). Payment of Tshs. 50 million being special damages as per paragraphs 6 and 13 [of the plaint].

(d). Payment of general damages to the tune of Tshs. 35 million per paragraphs 6 and 14 [of the plaint].

(e). Interest on (2), (3) and (4) above at the rate of 21% per annum.

(f). Interest on the decretal sum at the court rate from the date of judgment to the date of full satisfaction of the decree.

(g). Costs of the suit.

(h). Any other relief(s) may this Honorable Court deem fit to grant."

During the hearing of the suit in the High Court, the respondent company led evidence through its consumer banking manager, John Ngasa (PW1). It was his evidence that, after the appellants' failure to repay the overdraft in accordance with the terms of the Overdraft Agreement, the respondent issued a default notice to them and later on, initiated the process of auctioning the landed property that was mortgaged by the appellants.

According to PW1's further evidence, following that move, the appellants initiated negotiations with the respondent aimed at agreeing on new terms of settling the outstanding debt without resort by the respondent, to recover it through auctioning of the appellants' mortgaged property. He said that the negotiations resulted into a settlement agreement signed on 19/9/2011 (Exhibit P.5). According to that document, the appellants acknowledged that they were indebted to the respondent a total amount of TZS 83,168,253.65 being an outstanding amount of the overdraft plus accrued interest. They agreed on the modality on which the appellants would pay that amount by instalments starting with two equal monthly instalments of 20,000,000.00 followed by monthly payments of 10,000,000.00 monthly till final settlement of the debt. They did not

however make any payments as agreed and as a result, the respondent instituted the suit.

On its part, the appellant also called one witness to testify. The witness, Jimmy Brown Mwalugelo (DW1) who was at the material time the 1st appellant's managing director, did not dispute that his Company obtained the overdraft from the respondent bank on the terms and conditions stipulated in the Overdraft Agreement. He testified however that, upon the appellants' failure to make payment in accordance with the terms and conditions set out in the Overdraft Agreement, they made an application vide a letter dated 2/6/2011 requesting the respondent to change the overdraft into a long term loan. It was his evidence further that the request was accepted by the respondent but despite such acceptance, on 3/7/2011, it initiated the process of auctioning the appellants' property. He said that, through an auctioneer, the respondent issued a publication in the Daily News and Mwananchi Newspapers advertising for sale, the appellants' mortgaged property.

DW1 testified further that, in a bid to save the property from being auctioned, the 2nd appellant was compelled to sign Exhibit P.5

acknowledging that the appellants owed the respondent the amount shown in that document and for the same purpose, agreed with the conditions of repayment set out therein. The witness went on to state that, later on however, after having signed Exh. P.5, the appellants paid a total amount of TZS 22,300,000.00 in three instalments, the payments which according to him, settled the whole amount of the debt.

Having heard the evidence tendered by both sides and after having considered the submissions made by the respective counsel for the parties, the learned trial judge found firstly, that there was no evidence showing that the overdraft facility was converted into a long term loan as contended by the appellants. Secondly, he found that, since until the expiry of the contractual period for settlement of the overdraft, there had been no any repayments made, the appellants breached the contract. As a result, the trial court awarded the respondent the principal sum claimed, that is; TZS 113,094,908.11, interest at the rates of 5% per annum from the date of filing the suit to the date of judgment and 4% from the date of judgment to the date of full payment plus the costs of the suit. The respondent was also awarded special and general damages of TZS 2,000,000.00 and TZS 4,000,000.00 respectively.

Aggrieved by the decision of the High Court, the appellants preferred this appeal which is predicated on five grounds as follows:

"1. *That the learned Trial Judge erred in law and fact for failure to analyse the tendered evidence that the whole loan as per overdraft facility has already been repaid.*

2. *That the Learned Trial Judge erred in law and fact for failure to evaluate exhibit P4 and P5 that were influenced by coercion and undue influence.*

3. *That the Learned Trial Judge erred in law and fact for failure to evaluate exhibit D4.*

4. *That the Learned Trial Judge erred in law and fact for failure to evaluate the evidence that no letter of refusal was ever issued by the Respondent after accepting to change (sic) from overdraft to term loan.*

5. *That the Learned Trial Judge erred in law and fact for failure to analyse how the overdraft of Tshs. 20,000,000/= of annual interest rate of 18% reached the claimed amount of Tshs. 113,094,908.11".*

At the hearing of the appeal, the appellants were represented by Mr. Samwel Shadrack, learned counsel whereas the respondent had the services of Mr. Gaudiosus Ishengoma, learned counsel.

Submitting in support of the 1st, 2nd, 3rd and 4th grounds of appeal which are mainly based on the trial court's evaluation of evidence, Mr. Shadrack argued that, the appellants proved that the respondent had agreed to and converted the overdraft into a long term loan. Relying on the respondent's letter dated 24/8/2006 (Exh. D.4) written in reply to the appellants' letter of request dated 8/8/2006, the learned counsel argued that the respondent approved the appellants' requested to that effect. He argued further that, as at the date of the respondent's letter of acceptance of the requested change of the overdraft, that is on 24/8/2006; the outstanding debt was TZS 22,327,464.44 as shown in Exhibit D.4. For that

reason, Mr. Shadrack went on to argue, since the appellants had paid that amount between 6/9/2011 and 6/10/2011 as shown by deposit slips tendered as Exhibit D6 collectively, they have settled the whole of the outstanding amount as far as the overdraft is concerned.

With regard to the contents of Exhibit P.5, the learned counsel maintained that the same was signed by the 2nd appellant under undue influence. He explained that the 2nd appellant was compelled to sign the document so as save the mortgaged property from being auctioned.

On the 5th ground of appeal, the appellants' counsel submitted that, in calculating the interest, the respondent used the rate which was not agreed upon by the parties. He stressed that, the agreed interest rate was 18% and therefore, the respondent was not entitled to calculate the accrued interest by using a different rate of 29%. Mr. Shadrack argued further that the amount of TZS 40,506,798.07 shown in the default notice (Exhibit P.2) as being the debt which was outstanding as at 29/3/2007, is incorrect because, according to the respondent's letter dated 24/8/2006, the amount was 22,237,465.44 and could not have thereafter, increased as shown in the said notice within a short period of about five months. He added that,

even if the outstanding amount would have attracted a penal interest of 5%, the chargeable interest rate should have been 23%, that is; 18% + 5%. He insisted that the interest rate of 29% was wrongly used by the respondent.

Responding to the arguments made in support of the 1st, 2nd, 3rd and 4th grounds of appeal, Mr. Ishengoma started by opposing the appellants contention that the 2nd appellant signed Exhibit P5 under undue influence. The learned counsel argued that, the contention is an afterthought because, after the appellants had defaulted in repayment of the debt, in the exercise of its contractual right, the respondent started the process of auctioning the mortgaged property after it had issued a default notice to the appellants. He added that, at the time of taking that move, the amount of the outstanding debt stood at TZS 40,506,798.07. He stressed that, after the respondent had shown the intention of exercising its contractual right of selling the mortgaged property so as to recover its money, the appellants committed themselves to pay the debt and agreed with the respondent on the modality of payments as stated in Exhibit P.5.

As to the arguments made in support of the 5th ground of appeal, the learned counsel submitted in reply that, according to the Overdraft Agreement, the chargeable interest rate was 18% and on default of repayments as per the agreed terms and conditions, the appellants were to pay a penalty of 5%. He submitted further that the Overdraft Agreement entitled the respondent to charge such other interest and that therefore, after the appellants' default, instead of charging the interest rate of 18%, the respondent decided to charge the outstanding debt the interest rate of 24% plus penalty at the rate of 5% per annum. He added however that, in any case, since during the trial, the parties were not at issue as regards the rate of interest applied by the respondent on the outstanding debt, this ground of appeal was improperly raised.

In rejoinder, Mr. Shadrack submitted, firstly, that Exhibit D.4 had the effect of binding the respondent and secondly, that the appellants were entitled to be notified of the change of the interest rate used by the respondent in calculating the accrued interest. As to the argument that the 5th ground is not tenable on account that it raises a new issue (the defence of undue influence) which was not pleaded, Mr. Shadrack argued that, although that matter was not pleaded, the same was raised in evidence

during the hearing and the trial court considered the issue and made a decision thereon.

Having considered the parties' rival submissions made through their respective learned advocates, to start with, we think that the 1st – 4th grounds of appeal give rise to three issues: **Firstly**, whether or not the overdraft facility was converted into a long term loan, **secondly**, whether or not the debt has been fully paid and **thirdly**, whether or not the 2nd appellant signed Exhibit P.5 under undue influence. With regard to the 1st issue, it is not disputed that there were negotiations between the appellants and the respondent regarding extension of the period of repayment of the overdraft by converting it into a long term loan. The relevant part of the appellants' letter of proposal to that effect dated 8/5/2006, reads as follows:

> *"We have enjoyed your overdraft accorded to us of TZS 20 million of todate amount stands at (TZS 22,327,464.44). The purpose of our (this) letter is to ask your bank to change the above amount (TZS 22,327,464.44) to a loan.*

We have requested so in order to enable our cash flow cope with the facility. Our security valid (sic) (TZS 187m) will continue to serve as security for the loan."

The respondent's response to that proposal was communicated to the appellants through a letter dated 14/8/2006. By that letter, they were informed as follows:

"We are agreeable with your proposal provided that you service all the interest due and 10% of the principle (sic) balance, which is about 4,327,464.44 to enable our Bank update the facility as required. We are looking forward to your immediate compliance."

The appellants did not comply with the conditions for grant of the requested updating of the overdraft facility. On 18/8/2006, they wrote a letter to the respondent informing it that they were not in a position to pay the required amount immediately because their liquidity had been affected by the problems which they had with the TRA. After other subsequent

correspondences (Exhibit P.4), through its letter dated 24/8/2006 (Exhibit D.4), the respondent informed the appellants as follows:

> *"The bank has considered your problem with TRA that has unfavorably affected the performance of your business with a side effect to the relationship between your company and the Bank.*
>
> *To redress the above situation the bank* ***considers extension of a term loan of TZS 100.00 million (one hundred million only). However, upon the disbursement of the new loan, the overdraft exposure of TZS 22,237,464.44 shall first be deducted****.*
>
> *Approval of this loan is dependent on the assets held by the bank being revalued to confirm the value of TZS 187 million that you advance to the bank. This statement means that the security shall continue to be held by the bank as security thereof."* [Emphasis added]

As stated above, Mr. Shadrack has placed much reliance on that letter contending that the appellants' request to change the overdraft to a long term loan was approved by the respondent. With respect, we are unable to agree with the learned counsel. By that letter, the respondent informed the appellants that it was considering the request. As pointed out above, by its earlier letter dated 14/8/2006, the respondent informed the appellants about the conditions for the requested change of the overdraft, the conditions which they did not comply with. Compliance with those conditions was a prerequisite for disbursement by the respondent of TZS 100,000,000.00 out of which the amount of TZS 22,237,464.44, being the principal amount of the overdraft plus the accrued interest, was to be deducted.

In the circumstances, the contention that the respondent should have issued a letter of refusal does not in our view, hold water. The appellants lost the opportunity by failing to comply with the necessary conditions for approval by respondent, of their proposal. For the foregoing reasons, the appellants' submission that the overdraft was changed into a long term loan is unfounded. We therefore agree with the finding of the learned trial judge that the overdraft facility was not changed into a long term loan.

Having answered the 1st issue in the negative, we need not be detained much in answering the 2nd issue. It is undisputable fact that the amount of TZS 22,300,000.00 was paid by the appellants between 6/9/2011 and 6/10/2011 after expiry of the contractual period of repayment of the overdraft. It is also not disputed that the outstanding debt as at 24/8/2006 was TZS 22,327,464.44. Since therefore, the respondent did not grant extension of a term loan requested by the appellants, we agree with the learned trial judge that the amount continued to attract interest. As a result, the paid amount did not settle the whole debt which the appellants owed the respondent. The 2nd issue is thus also answered in the negative.

The 3rd issue arises from the 2nd ground of appeal. The appellants are faulting the learned trial judge contending that, had he properly evaluated the evidence, he would have found that the 2nd appellant signed Exhibits P.5 under undue influence. Mr. Ishengoma opposed that ground of appeal on account that the plea of undue influence was not raised by the appellants in their plaint. Having considered the submissions of the respective counsel for the parties, we agree with the learned counsel for the

appellants that although the issue was not pleaded, since the matter was canvassed by the parties and at the end the trial court made a finding thereon, the appellants were entitled to raise a ground of appeal challenging that finding - See for example, the case of **Agro Industries Ltd. v. Attorney General** [1990-1994] 1EA1. In that case, the Court held as follows on that point:

> *"A Court may base its decision on an unpleaded issue if it appears from the course of the trial that the issue has been left to the Court for decision...So long as a Court allows the counsel to address it on certain issues, then the judge has to conclusively decide them."*

As stated above, in the case at hand, after having heard the parties on the issue, the High Court rendered its decision thereon. In the circumstances therefore, although the finding arose from unpleaded issue, the ground of appeal challenging that finding does not raise a new issue. For that reason, the argument by Mr. Ishengoma is with respect, devoid of merit.

Having so found, we now turn to consider whether or not the 2nd appellant signed Exhibits P.5 under undue influence. The circumstances leading to the making of Exhibit P5 have been shown above. It was after the appellants' default in the payment of the Overdraft that the respondent notified them of the default and proceeded to cause the mortgaged property to be advertised for sale. As submitted by Mr. Ishengoma, the respondent was exercising its contractual right of recovering the outstanding debt from the appellants. It was after the respondent had taken the said steps that Exhibit P.5 was prepared and signed by the 2nd appellant and the respondent's representative.

In our considered view, the appellants' contention that the acknowledgment was made under undue influence, meaning that they did so without their own will is not meritorious. The appellants acknowledged the amount of the debt as stated above and committed themselves to pay it by instalments. The respondent agreed with them thereby suspending the move which it had taken to auction the appellants' property. Paragraphs 1 and 2 of the settlement agreement reads as follows:

"1. Rungwe acknowledges that it is indebted to ICB to the tune of Tshs. 83,168,253.65 as of 20th June 2011 as an overdraft facility.

2. Parties agree that Rungwe will pay a sum of Tshs 20,000,000 within 30 days from signing of this agreement. It will further deposit Tshs 20,000,000 within 30 days from the initial deposit further to that, after the initial deposits of Tshs 40,000,000 in total, Rungwe will deposit Tshs 10,000,000 monthly until satisfaction of the whole debt."

On the basis of the above stated reasons, we hold that the appellants did not establish that exhibit P5 was signed under undue influence.

In our considered view, the answer to the third issue above suffices to dispose of the 5th ground of appeal. By acknowledging that as at 19/9/2011, they owed the respondent TZS. 83, 168,253.65, the appellants agreed with the calculation applied in arriving at that amount. It was after they had paid the amount TZS. 22,327,464.44 that the balance was reduced to the

principal sum claimed by the respondent in the suit. We thus find that the 5th ground of appeal is also devoid of merit. In the final analysis we find that the appeal has been brought without sufficient reasons. The same is hereby dismissed with costs.

DATED at **DAR ES SALAAM** this 8th day of February, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL