IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., KIHWELO, J.A. And MGONYA, J.A.)

CIVIL APPEAL NO. 207 OF 2017

AFRICAN BANKING CORPORATION (T) LTD ..... APPELLANT

VERSUS

T-BETTER HOLDINGS CO. LTD ..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Mwambegele, J.)

dated the 10th day of November, 2016
in
Commercial Case No. 03 of 2015

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JUDGMENT OF THE COURT

12th February & 6th March, 2024

MWANDAMBO, J.A.:

The High Court (Commercial Division) sitting at Dar es Salaam, tried a suit instituted against the appellant African Banking Corporation by the respondent T-Better Holding Co. Limited founded on breach of banker customer relationship. At the end of the trial, the trial court entered judgment against the appellant after finding her in breach of its duty to her customer. Dissatisfied, the appellant preferred this appeal.

The facts from which the suit arose and ultimately this appeal are not in dispute. It is common ground that on 2 August, 2012, the

respondent entered into a banking contract with the appellant at its Kariakoo Branch in Dar es Salaam City. Through that contract, the respondent opened two bank accounts; No. 1134205518 in Tanzania Shillings and Account No. 1134005529 in United States Dollars. It was undisputed too that the operation of the accounts was subject to terms and conditions, amongst others, authority to the appellant to honour debit instructions from the accounts. The signatory of the instructions was Zhu Jin Feng as stated in what is referred to as mandate file. In addition, through its letter dated 30 May 2013 delivered to the appellant's Kariakoo Branch on 1 July, 2012, the respondent authorised one Wang Shuang Xi to perform several duties in connection with the accounts that is to say; balance checking, withdrawal of money from the accounts through cheques to be signed by Zhu Jin Feng, collection of bank statements and transfer money from the accounts to another account

Not long after the said letter (exhibit P6), the period between 30 July and 26 August 2013 witnessed suspicious debits from the respondent's United States Dollar account facilitated by applications for funds transfers to accounts of third parties of different banks. The first of such debit was made on 30 July 2013 involving TZS 76,820,000.00 in

favour of one Alexander Kabangu with NMB Bank at Mbezi branch allegedly for purchase of spare parts. That was followed by another transaction through a similar method on 16 August 2013 involving TZS 81,000,000.00 as an outgoing telegraphic transfer to Equity Bank in favour of Godfrey Wilson Mroso allegedly for purchase of spare parts. The third one occurred on 28 August 2013 involving TZS 17,000,000.00 transferred to an account with ECO Bank Limited in favour of Educational Financial Aid allegedly as a grant to purchase educational books. Earlier, on 20 August 2013, a sum of TZS 62,000,000.00 was debited from the respondent's account but was subsequently reversed.

The respondent's case before the trial court was that, none of the transfers was with her authorisation through the authorised signatory. Neither did the appellant's officers verify the suspicious funds transfer instructions from her account to unknown third parties' accounts by calling the authorised signatory through a mobile phone provided in that behalf. The respondent thus claimed that the appellant breached its contractual duty and acted negligently in honouring funds transfer instructions without any authority from her through the authorised signatory. The respondent's further contention was that the dubious debits were not accompanied by cheques duly signed by the authorised

signatory contrary to the mandate. The respondent thus prayed for judgment and decree for; a declaration that the appellant breached the contract, special damages by way of refund of the amount wrongfully debited amounting to TZS 176,020,000.00 and TZS 73,980,000,000.00 representing loss of expected projects from the said amount, general damages, interest and costs.

The appellant denied the respondent's claims and prayed for the dismissal of the suit. It contended that the funds transfer instructions debiting the respondent's account with the corresponding amounts had her authority through the authorised signatory and duly verified through the mandate file followed by phone calls in each transaction. It denied having breached her contractual duty to the respondent neither did it act negligently in honouring any of the instructions.

The trial of the suit was based on four issues. The first was whether the respondent authorised any money transfer from her account. The second and third issues meant to interrogate whether the appellant breached the banking contract and if so, whether the respondent suffered any damage. The fourth issue was dedicated to reliefs.

From the trial by way of witness statements of one witness for each of the parties, documentary exhibits and oral testimonies in cross examination and re-examination, the trial court found the respondent's case established on the required standard applicable in civil cases. It found no satisfactory evidence proving authorisation of funds transfer from the respondent's account. Hence, the appellant was found to be in breach of her contractual duty resulting in damages. As for damages, the trial court found no satisfactory evidence to prove special damages for loss of profits from TZS 176,020,000.00 unlawfully debited from the account. It disallowed the amount of TZS 73,980,000.00 from TZS 250,000,000.00 claimed as special damages. Consequently, it awarded TZS 176,020,000.00 on account of the amount of money wrongfully debited from the respondent's account without its authorisation plus TZS 40,000.00 in commission charges for the dubious transactions. The amount was ordered to be payable with interest of 22% per annum from the date of accrual of the cause of action to the date of institution of the suit. The respondent suffered damages as a result of the breach, the trial court condemned the appellant to pay TZS 100,000,000.00 as general damages. The decretal amount attracted interest at 7% per annum from the date of judgment to satisfaction in full.

The appellant's memorandum of appeal was predicated upon 3 grounds but, at the hearing of the appeal, the Court marked ground 2 abandoned upon a prayer to that effect by Mr. Peter Kibatala, learned advocate who represented the appellant. It is remarkable that, the respondent lodged a notice of cross-appeal faulting the trial court for not awarding her costs upon a successful trial of her suit.

Mr. Kibatala prosecuted the appeal on the two remaining grounds. The first ground faults the trial court for holding that the appellant breached the banking contract with the respondent. The renumbered ground 3 after abandoning the original ground 2 is against the trial court's award of general damages claimed to be excessive and exorbitant. Counsel's arguments on ground 1 were predicated on 2 main aspects, that is to say; shifting the burden of proof from the respondent to the appellant on the making of calls to her authorised signatory and on the failure to give evidence on the outcome of the investigation on the fraudulent transactions reported to the police by PW1. Counsel argued that since it was PW1 who made positive assertions on the two aspects, the burden was on him to prove that DW1 did not make any calls to him on the material dates surrounding the suspicious transfers that resulted into the debits in the respondent's account. The learned

advocate similarly argued that, since it was PW1 who reported the fraudulent transactions to the police for investigation, the duty was on him to prove the outcome of such investigation. We understood Mr. Kibatala suggesting that, as a result of trial court's approach, it came to an erroneous finding on the first and second issues.

Next, Mr. Kibatala criticised the trial court for drawing adverse inference against the appellant for failure to call officers who received the suspicious transfer forms at the counter presented by one Edwin Mbuko (exhibit P2) and James Mwamkinga (exhibit P2) alluded to by DW1 in her evidence in cross-examination as the persons who received the transfer of funds application forms. It was contended that the said persons were not material witnesses as their role was limited to receiving the forms rather than being the persons who processed them. It was strongly argued that, adverse inference was wrongly drawn against the appellant who had no burden of proof. Instead, Mr. Kibatala argued, the trial court should have drawn adverse inference against the respondent for her failure to call Wang Shuang Xi to explain lack of authorisation on the said debits.

Responding, Mr. Edward Peter Chuwa, learned advocate assisted by Ms. Anna Lugendo, learned advocate, argued that, the burden of

proof was on the appellant who asserted that the debits were authorised by the respondent. In addition, it was argued that the claim that the appellant verified the suspicious transactions was made by DW1 and so, the burden was on her to prove that she indeed made the calls before entering the debits based on applications for transfer of funds to third parties. Mr. Chuwa pointed out that, despite DW1's bare assertions that she made the calls, there was no such proof. On the other hand, counsel argued that, by DW1's own testimony, she had knowledge of the fraud resulting into a report to the police for investigation. However, counsel argued, no evidence on the outcome of the investigation was tendered by DW1 and so, the trial court was right in finding as it did that the appellant did not discharge her burden of proof in that regard.

In relation to adverse inference, Mr. Chuwa argued that, by DW1's own admission, it is not her who received the forms for application for transfer but her fellow staff after presentation by one Edwin Mbuko and Mwamkinga. It was contended that the staff who received the transfer forms were not called as a witness. Secondly, there was no evidence that DW1 verified the transfer forms against the instructions in the mandate file. To buttress his submission, Mr. Chuwa sought reliance from **Bute (Marquess) v. Barclays Bank Ltd** [1955] QB 202. On the

other hand, Mr. Chuwa pointed out that, there was no evidence from DW1 that, apart from the transfer forms, there were any cheques duly signed by PW1 to support the debits in the respondent's account in terms of the instructions contained in exhibit P6. He thus invited the Court to dismiss this ground for being baseless.

In his rejoinder, Mr. Kibatala reiterated his arguments that the positive assertions on the making of calls was made by PW1 and not DW1 who had no burden of proof. He argued further that, the appellant's duty to its customer is not absolute and in this case, it acted reasonably in dealing with the respondent's instructions. In his further address, counsel argued that there was nothing to suggest that the respondent's instructions in exhibit P6 were limited to drawing cheques excluding others such as transfer of funds.

Upon hearing arguments from the learned advocates on the first ground, it is plain that, this ground is directed at the trial court's findings on the first and second issues. The two issues were interrelated but in our view, the answer to the second issue was dependent upon the answer to the first issue. According to the plaint, the respondent alleged that the appellant debited her account with the sum of TZS 176,020,000.00 by way of funds transfer to unknown third parties'

accounts without her authorisation. To that claim, the appellant contended that the debits were done with the respondent's authority and verified by calling the authorised signatory one Zhu Jin Feng who testified as PW1.

Our starting point is on the law regarding burden of proof which characterises the discussion in this ground. The law under section 110(1) of the Evidence Act is that he who alleges must prove his allegation to succeed in a suit. It is equally the law that, unlike in criminal trials, the burden of proof in civil cases is not static. This rule is long settled as can be seen from the decision of the defunct Court of Appeal for East Africa in **Henry Hidaya Ilanga v. Manyama Manyoka** [1961] EA 705 referred in **Co-operative and Rural Development Bank (1966) Ltd v. M/s Desai and Company Limited,** Civil Appeal No. 51 of 1995 (unreported) and **Bright Technical Systems & General Supplies Limited v. Institute of Finance Management,** (Civil Appeal No. 12 of 2020) [2023] TZCA 17284 (30 May 2023, Tanzlii), amongst others.

It is also trite that, a party who has the burden of proof must discharge his burden on balance of probabilities regardless of the weakness in the case of his opponent. For this proposition, the Court's

decision in **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 and **Charles Christopher Humphrey Richard Kombe t/a Humphrey Building Materials v. Kinondoni Municipal Council,** Civil Appeal No. 125 of 2016 (both unreported) amongst others are instructive on this principle. It is significant that, in **Paulina Samson Ndawavya,** the Court drew inspiration from the distinguished authors of commentaries in the works of Sarkar's Laws of Evidence, 18th Edition, **M.C. Sarkar, S.C. Sarkar and P. C. Sarkar,** published by Lexis Nexis and extracted an excerpt to the effect that, the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it for a negative is incapable of proof.

The position in the instant appeal is that, while the respondent maintained that the debits from her accounts were entered without her authority, the appellant contended that such debits had been authorised by the respondent as evident in paras 4, 5 and 6 of her written statement of defence at pages 25 and 26 of the record of appeal. The same assertions were repeated by DW1 in her witness statement appearing at pages 43 and 44 of the record of appeal. It is significant that, through the appellant's witness statement, DW1 made a positive

assertion that she made calls to the respondent through her cell phone before honouring the transfer of funds to third parties.

Subjecting the facts to the authorities referred to shortly before, the appellant had a burden to prove that the disputed debits were indeed entered with the respondent's authority. Similarly, whereas PW1 maintained that no calls were made by the appellant to verify the instructions, DW1 asserted that she made calls to PW1 through her cell phone. However, PW1's evidence was that he received no such calls from DW1 considering that his phone was not working during the material time. That means, therefore, that, it was incumbent upon DW1 to lead evidence on the calls she made. Her attempt to tender call details statement from Zantel hit a snag as the trial court rejected its admission (at page 39) because that statement was sneaked in evidence without it being pleaded in the first place. That left DW1's assertions on the calls unsubstantiated and so, the burden could not shift to PW1 to prove a negative. The burden never shifted to PW1 to prove that his phone was not working at the material time. The upshot of the foregoing is that, unlike the learned advocate for the appellant, his claim that the trial court shifted the burden of proof is, with respect, misconceived. The appellant had the burden of proof on the authority in

support of the disputed debit entries as well as calls allegedly made to PW1. The respondent had no duty to prove a negative and we find no basis to differ with the learned trial judge.

We shall now turn our attention to the complaint on adverse inference. The trial court is faulted for drawing adverse inference against the appellant for failure to call the persons who received the disputed transfer of funds forms presented by Edwin Mbuko and James Mwamkinga mentioned by DW1 and failure to adduce evidence on the outcome of the investigation on the fraud involving the disputed transfer forms. Despite Mr. Kibatala's urging, we agree with Mr. Chuwa that, the trial court was entitled to draw adverse inference against the appellant in the manner it did. For a start, we wish to make it clear that by DW1's own evidence in her witness statement, she stated in no uncertain terms that she received the funds transfer forms from the plaintiff. She never said that she received the forms from her fellow staff whose names were not disclosed when answering questions in cross examination.

Be it as it may, we are not surprised by Mr. Kibatala's argument which appears to have been premised on his stance, mistaken as it is, that the respondent had a burden of proof on the first issue. Secondly, the trial court's finding on the first issue was not based on the adverse

inference rather on the failure by the appellant to discharge her burden of proof. Reference to adverse inference was, in our view, a remote factor which could not have been conclusive in itself to support a conclusion the trial court arrived at in finding against the appellant on the first issue. There is no doubt the answer to the first issue had a direct bearing with the answer to the second issue. Indeed, as the Court held in **Aziz Abdallah v. Republic** [1991] T.L.R 71, where the trial court draws adverse inference against a party, that by itself does not ruin that party's case. The court is enjoined to evaluate the evidence as a whole before arriving at its conclusion. It is undeniable that, this is exactly what the trial court did before arriving at its conclusion now challenged in this appeal. We find no merit in this complaint and reject it.

The foregoing aside, we find it necessary to consider two pieces of evidence not discussed in the judgment but with significant bearing on the determination of the second issue before the trial court which is quite relevant to the determination of this ground. The first of such evidence relates to the appellant's branch at which the respondent opened her account. Through para 3 of the respondent's witness statement, PW1 stated that she had a place of business at Kariakoo

adjacent to the appellant's Kariakoo branch. On the other hand, in para 10 of the witness statement, PW1 stated that at all material time, the respondent operated her banking transactions at Kariakoo Branch only and from no other branch. It was also stated in paragraph 11 that, PW1 not only knew the appellant's officers but also he was well known by such officers at the branch as he was the one responsible for the banking transactions. That evidence was not controverted.

It is common ground that all the questionable transactions occurred at Quality Plaza branch away from Kariakoo branch where the respondent had her accounts and her officers well familiar with PW1 and the accountant; one Wang Shuang Xi. It defies logic and common sense for one to have transacted from Quality Plaza branch away from Kariakoo branch just a stone's throw away from the respondent's place of business. That alone should have put any prudent banker to inquiry which was not done in this case. Whilst we may agree with Mr. Kibatala's argument that a banker has no absolute duty to its customer, the evidence on record is such that the appellant did not discharge its primary duty of care to the respondent by allowing questionable transactions from a branch other than where the respondent operated her accounts against her instructions. Besides, while answering

questions in cross examination, PW1 stated and was not controverted that the provided specimen signatures were different from signatures in the funds transfer forms (page 36). DW1 for her part stated in cross examination that there was a possibility that PW1's signatures in the transfer forms were forged. These pieces of evidence militate against the claim that the appellant was not in breach of banking contract.

The second piece of evidence relates to the debit of TZS 62,000,000.00 which occurred on 20 August 2013. That amount was credited back into the respondent's account upon inquiry with PW1 that the respondent had not authorised it. That notwithstanding, no sooner than the appellant credited that amount than it allowed another debit of TZS 17,600,000.00 at the same branch. In our view, unlike Mr. Kibatala, allowing the said debit in such circumstances speaks volumes of the appellant's claim that it discharged its duty of care to the respondent.

In the light of the foregoing, we are satisfied that the trial court's finding on the breach of the banking contract was in accordance with the weight of evidence. We find no justification to disturb that finding. Ground one is devoid of merit and we dismiss it, which takes us to ground 2.

Addressing the Court in ground 2, Mr. Kibatala contended that the award of TZS 100,000,000.00 general damages was excessive considering that the trial court's award of special damages of TZS 176,020,000.00. The learned advocate introduced a novel argument that the general damages awarded should have been a small proportion of the special damages. Our decision in **Dar es Salaam Water and Sewerage Authority v. Didas Kameka & Others,** Civil Appeal No. 233 of 2019 (unreported) was cited to argue that, the Court can interfere in the award made by the trial court where such award is, on the face of it, inordinately low or high. On the basis of the above decision, Mr. Kibatala invited the Court to find the award as excessive and intervene.

Mr. Chuwa downplayed the appellant counsel's argument as baseless and argued that, the trial court properly exercised its discretion in awarding TZS 100,000,000.00 as general damages and so, in the absence of any material to prove that such discretion was not exercised judiciously, there is no basis for interfering with that award.

In awarding general damages, the trial court took into account the fact that the respondent as a business person must have suffered general damages in addition to special damages. In para 24 of his

witness statement, PW1 stated that the appellant breached the banking contract entitling the respondent to damages for the breach. That was a repetition of what the respondent had stated in para 14 (b) of the plaint no doubt in line with what the Court stated in **Cooper Motor Corporation Ltd v. Moshi/Arusha Occupational Health Services** [1990] T.L.R 96; general damages need not be specifically pleaded but may be asked for by a mere statement or prayer or claim. The learned advocate for the appellant complained that the award of TZS 100 million had no basis and at most, over half of the amount awarded as special damages making it exorbitant and excessive award. In **A. S. Sajan V. CRDB** [1991] T. L.R 44, the Court reiterated the rationale behind award of damages; ***restitutio in integrum*** which means that, the law will endeavour, so far as money can do it, to place the injured person in the same situation as if the contract had been performed.

Having found that the debits were wrongful, the trial court ordered the appellant to refund that amount together with the corresponding commission charges as well as interest. That, in our view was perfectly in accord with the maxim; ***restitutio in integrum.*** Consistent with the above principle, for all intents and purposes, the respondent was placed in the same position she was immediately before the breach. However,

there is no suggestion that the respondent's account has been credited with the amount wrongfully debited from her account. That means that the respondent has not yet been been placed in the position she was immediately before the breach; a period of over 3 years on the date of judgment which is now over 11 years.

There can be no doubt as the trial court did that, the money in the amount adjudged must have caused inconveniencies and loss to the respondent's business. It was not suggested by Mr. Kibatala that the trial court took into account irrelevant factors or principles in awarding the impugned sum in general damages as to conclude that it failed to exercise its discretion judiciously. Mindful of the fact that the appellant resented the trial court's award, it could not have not refunded the amount wrongfully debited and, the rationale behind the award of damages and guided by case law on the subject, we do not agree that the award of TZS 100,000,000.00 in general damages was inordinately high warranting our intervention. We too find no merit in this ground and dismiss it.

Finally on the notice of cross appeal which faults the trial court for not awarding costs to the successful respondent. Mr. Chuwa argued and rightly so that, the general rule is that a successful party to litigation

must be awarded costs unless there are good grounds to the contrary. In this case, Mr. Chuwa argued, although the trial court said nothing on costs, there are no reasons why the respondent was not awarded costs in a judgment entered in her favour. According to him, that was an oversight on the part of the trial court and urged the Court to step into its shoes and make an award for costs.

Mr. Kibatala came up with a suggestion that an oversight awarding costs could not have been a subject of an appeal but review. We do not think the learned counsel is right.

Everything considered, we think we should not be detained on this ground more than necessary. Having considered the arguments made, we are satisfied that the omission to award costs to the respondent was an oversight warranting our intervention by stepping into the shoes of the trial court in pursuance of section 4(2) of the Appellate Jurisdiction Act (the AJA), Mr. Kibatala's argument notwithstanding. Accordingly, we make an order for costs in favour of the respondent as prayed. The sole ground in the notice of cross appeal succeeds.

The above said, the appeal stands dismissed. On the other hand, the notice of cross appeal is hereby allowed. The respondent shall have her costs both in this Court and the High Court.

DATED at **DAR ES SALAAM** this 05th day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of March, 2024 in the presence of Ms. Faith Mwakikoti, learned counsel holding brief for Mr. Peter Kibatala, learned counsel for the appellant and in the absence of the counsel for the respondent; is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL