

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: LUBUVA, J.A., MROSO, J.A., And MUNUO, J.A.)**

**CIVIL APPEAL NO. 93 OF 2003**

**BETWEEN**

**1. TANGANYIKA CHEAP STORE LIMITED..... 1<sup>ST</sup>  
APPELLANT**

**2. HASSAN SHABAN HASSAN..... 2<sup>ND</sup>  
APPELLANT**

**3. MAGANGA SHABAN LUKANGA..... 3<sup>RD</sup>  
APPELLANT**

**VERSUS**

**THE NATIONAL BUREAU DE CHANGE LTD.  
.....RESPONDENT**

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

**(Kalegeya, J.)**

**dated the 20<sup>th</sup> day of August, 2003  
in  
Commercial Case No. 236 of 2001**

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JUDGMENT OF THE COURT**

**MUNUO, J.A.:**

In Commercial Case No. 236 of 2001 in the High Court of Tanzania at Dar-es-Salaam, the respondent-plaintiff sued for:

- a) payment of a total of Shs. 222,350,090.92 advanced to the

- appellant-plaintiffs by overdraft;
- b) interest on the principal sum at the rate of 23% per annum from the 7<sup>th</sup> August, 2001 to the date of judgement;
  - c) interest on the decretal amount at the court's rate from the date of judgement to the date of full payment;
  - d) costs of the suit; and
  - e) any other relief deemed fit by the Court.

Kalegeya, J. entered judgement for the plaintiff as prayed. Dissatisfied with the decision of the High Court, the appellants lodged the present appeal.

Mr. Marando, learned advocate, represented the appellants. The respondent bank was represented by Mrs. Kato, learned advocate.

During the hearing of the appeal, counsel for the

appellants conceded that the latter obtained an overdraft facility from the respondent bank. He, however, stated that the exact liability of the appellants was uncertain so the case should be remitted to the trial Court with direction that additional evidence be called to establish the sum of money the appellants owed the respondent bank. Counsel for the respondent conceded as well.

It appears to us that the issue of the amount of money the borrowers owe the respondent bank was raised by the learned Judge while he was writing the judgement, well after the completion of the trial. In that situation the respondent plaintiff could not have called evidence to establish the liability of the borrowers. Inserting the additional issue to the framed issues, the learned Judge observed;

“I would at this juncture pause and observe that during the composition of the judgement, I have come to a conclusion that an additional issue should be framed. This, in exercise of the powers conferred upon the Court under O.XIV, Rule 5, CPC, whereby, a court, can, at anytime before passing a verdict amend or frame additional issues. I hereby add one more issue.

This will be issue No. 4 and the current issue 4 will be 5 and 5 will be 6. The additional issue is,

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“ 4. Whether by 7<sup>th</sup> August, 2001, the 1<sup>st</sup>

Defendant's account showed a debt balance of Shs. 222,250,090.92?”

We wish to quote the provisions of Order XX Rule 5 of the Civil Procedure Code, 1966 which state, *inter alia*:

“5. (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that may appear to it

to be wrongly framed or introduced.”

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We note, here, that the provisions of Order XX Rule 5 are in *pari materia* with the provisions of Section 149 of the Indian Code of Civil Procedure. Commenting on the Court’s power to amend issues, the learned author, **MULLA, Code of Civil Procedure, Volume II, 15<sup>th</sup> Edition at Page 1432** states:

“If the Court amends an issue or raises an additional issue it should allow reasonable opportunity to the parties to produce documents and lead evidence pertaining to such amended or additional issue.

Amendment of issues is the discretion of the trial Court. No right or obligation of a party is determined, either by court refusing to delete the issues, or by court adding more to them. It is only a procedural matter. The trial court is required to determine the controversy between the parties.”

As correctly observed above by the learned author, the learned trial Judge had the power to frame an additional issue under the provisions of Order XX Rule 5 of the Civil Procedure Code, 1966. As it is, the framed additional issue

was the centre of controversy in terms of the exact amount the appellants owed the respondent bank as of the 7<sup>th</sup> August, 2001. This is the issue raised in ground four of the appeal and there was no evidence to support the learned judge's finding that the debt balance was Shs. 222,350,000/=. Having regard to the gravamen of the issue so framed, we are of the considered opinion, and we agree with the learned author, Mulla, that the parties ought to have been given a hearing on the additional issue.

The right to be heard, that is, the *audi alteram partem* rule, has been emphasized by this Court in a number of cases, among them, **Ndesamburo versus Attorney General** (1997) TLR 137 and the **National Housing Corporation versus Tanzania Shoes and Others** (1995) TLR 251.

All in all therefore, in view of the fact the framed additional issue raises a serious issue relating to breach of a fundamental principle of natural justice, and for lack of evidence to establish the amount the appellants owe the respondent bank, we quash the judgement and decree. We further order that the case be remitted to the trial court for hearing on the framed issue:

“ 4. whether by the 7<sup>th</sup> August, 2001,  
the 1<sup>st</sup> Defendant’s account showed a  
debt balance of Shs. 222,250,090.92.”

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As neither party won nor lost the appeal, we order that each party bear their costs.

DATED AT DAR ES SALAAM this 24<sup>th</sup> day of March,  
2005.

D.Z. LUBUVA  
**JUSTICE OF APPEAL**

J.A. MROSO  
**JUSTICE OF APPEAL**

E.N. MUNUO  
**JUSTICE OF APPEAL**

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

( S.M. RUMANYIKA )

**DEPUTY REGISTRAR**

