IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CIVIL APPEAL NO. 23 OF 2020

(Appeal from the judgment of the District Court of Nyamagana at Mwanza in Civil Case No. 16 of 2017 dated 23rd of December, 2019)

LETSHEGO BANK (T) LTD ..... APPELLANT

VERSUS

SARAH D/O MAGINGA ..... 1ST RESPONDENT

MASHOKA AUCTION MART (T) LTD ..... 2ND RESPONDENT

JUDGMENT

5th May, & 23rd July, 2021

ISMAIL, J.

The appellant, a losing party, is aggrieved by the decision of the District Court of Nyamagana at Mwanza, before which a suit was instituted by the 1st respondent, for multiple orders against the appellant and the 2nd respondent. The dispute was in relation to the seized properties, allegedly seized from a shop constituting part of Plot No. 76 Block T, Rwegasore Street within Mwanza city. The shop allegedly belonged to the 1st respondent, and that the seizure or attachment was a recovery measure instituted by the appellant, through the 2nd respondent, following what is alleged to be a

default by a certain Mr. Muhsin Mahamoud Ruhinda, who was advanced a loan by the appellant, to the tune of TZS. 65,000,000/-. The contention by the appellant at the trial was that the said shop belonged to Mr. Ruhinda, who is said to be the 1st respondent's husband. It was further alleged that the shop was one of several other business entities which were pledged as a security for the loan amount. The 1st respondent's contention is that this was her shop, arguing that the merchandise seized and removed, the total value of which was ZS. 95,160,500/- and the cash sum of TZS. 53,489,500/- seized from the shop were all hers. She contended that none of it was pledged to secure any loan.

At the end of the trial proceedings, the trial magistrate *inter alia* ordered the appellant to make good the sum of TZS. 95,160,500/-, constituting the value of the seized goods; general damages to the tune of TZS. 2,000,000/-, plus interest on the principal sum at the rate of 12% per annum. This decision was an intolerable arrow in the appellant's flesh. She decided to impeach the trial magistrate's wisdom by preferring an appeal which has five grounds of appeal, reproduced in verbatim as follows:

1. *That the court grossly erred in law and fact for its failure to analyse the evidence for which wrongly found (sic) the case in favour respondent (sic).*

2. *That the trial Magistrate erred in law and fact by disregarding the cogent evidence adduced by the appellant in respect of her power as a lender to exercise the right of attachment of mortgaged shop stock which was among the mortgage properties that had secured the loan advanced to the respondent's husband.*
3. *That the trial court grossly erred in law and facts for award special damages which were not proved to the required standard.*
4. *That the trial court grossly erred in law and fact by holding disputed facts as undisputed and wrongly finding in favour of the respondent.*
5. *That the trial court erred in law and facts for admitting documents omnibusly (sic).*

When the matter came up for orders, the counsel for the parties were in attendance. In order to expedite the disposal of the matter, it was unanimously agreed that the appeal be argued through written representations, the filing of which conformed to the schedule drawing by the Court. Credit to the counsel, this schedule was duly conformed to.

Mr. Stephen Kaswahili, learned counsel for the appellant, set the ball rolling. With respect to ground one, his contention is that the 1st respondent failed to prove that the disputed shop was hers. The failure was demonstrated in her failure to tender a lease agreement for the premises the shop was located, or a certificate to exhibit ownership of the premises;

a Taxpayer Identification Number (TIN), or even a business license. This means that ownership of the business was yet to be proved. On the other side DW1 and exhibit D1 proved that the 1st respondent's husband had been advanced a loan and that the shop was mortgaged to secure the loan. The counsel contended further that DW1 proved that a spousal consent was obtained prior to disbursement of the loan. Citing section 110 (1) of the Evidence Act, Cap. 6 R.E. 2019 and the Court of Appeal's decision in ***Abdul-Karim Haji v. Raymond Nchimbi Alois & Another*** [2006] TLR 414, the counsel argued that the trial judgment fell short of the prerequisites of proving the case.

The appellant's counsel further argued that the impugned judgment shifted the burden of proof from the plaintiff and bstowed that duty on the defendant. The counsel further contended that there was no dispute on the issue of attachment, as PW2 and DW1 were unanimous in their testimony that the attachment of the shop was witnessed by local leaders. It was on the basis thereof, that the appellant took the view that the trial court misdirected itself on the issue of ownership of the shop. The counsel argued that Order XX Rule 4 of the Civil Procedure Code, Cap. 33 R.E. 2019 was not complied with.

Mr. Kaswahili further contended that there was also a failure to frame proper issues for determination of the suit, including the question of ownership of the shop and whether the same belongs to the 1st respondent or her husband. Such failure, the counsel argued, was a violation, and the counsel cited the decision in ***Astpro Investment Co. Ltd v. Jawinga Company Ltd***, CAT-Civil Application No. 8 of 2015 (unreported). The appellant cited similar irregularities with respect to award of general damages which were ordered while there was no proof that the appellant suffered any injury to be compensated through general damages. Proof of injury is an important ingredient as stated by the Court in ***Vincent Joshua Malucha v. NMB PLC & 2 Others***, HC-Land Case No. 424 of 2016.

He urged the Court to hold that the trial court's decision was not supported by any evidence and that the testimony adduced was not analysed.

With regards ground two of the appeal, the complaint is that the testimony adduced by the appellant, on the right and powers to attach the mortgaged properties was disregarded. The evidence in question was that of DW1 and exhibit D1, constituting the list of mortgaged properties which was signed by the 1st respondent as the borrower's spouse. The testimony was also to the effect that the borrower defaulted on the repayment of the

loan, thereby necessitating the decision to exercise the right of recovery through attachment. This, the counsel argued, was preceded by notices which were admitted as exhibits D2 and D3. It was Mr. Kaswahili's contention that this testimony was sufficient to enable the trial court make a finding in the appellant's favour.

As regards ground three of the appeal, the appellant's consternation is that the trial court awarded special damages without proving that the same existed. The appellant's counsel argued that what PW1, the 1st respondent, did was to tender exhibit PE1, an affidavit and a list of commodities allegedly taken from the shop. In the counsel's view, a recent stock taking report, a stock register, a stoke bin, purchase receipts and delivery notes would serve to prove the case. In the counsel's view, their absence meant that the 1st respondent failed to prove her case. The counsel's view was predicated on ***Hosia Lalata v. Zumbe Mwasote*** [1980] TLR 154; ***Abel Maligisi v. Paul Fungameza***, HC-Civil Appeal No. 10 of 2018; and ***CRDB Bank PLC LTD v. South Freight and Export Co. Ltd*** (both unreported). In the latter, it was held that no liability for damages can arise where there is no contractual liability. Mr. Kaswahili contended that award of damages by the trial court occasioned a miscarriage of justice.

Regarding ground four, the contention is that facts which were disputed were considered to be undisputed. This related to the contention that the seized goods and the shop belonged to the 1st respondent, a fact which was disputed by the appellant. The appellant took the view that this confusion led to a wrong conclusion by the trial magistrate.

The argument in ground five of the appeal is that exhibits D1 and D1 were irregularly tendered and admitted in an omnibus way. He argued that such admission had the potential of denying the opponent an opportunity of challenging or commenting on the exhibits. To cement his position, Mr. Kaswahili cited the case of ***Tanzindia Assurance Company Ltd v. Farid Amour Khalfan & 2 Others***, HC-Civil Appeal No. 20 of 2019 (unreported), in which the abhorrent conduct was held to have the effect of having the trial defective. He prayed that the appeal be allowed with costs.

The appellant's submission was strenuously opposed by the 1st respondent. Mr. Anthony Nasimire, learned counsel for the 1st respondent, argued that the appeal is lacking the necessary cutting edge to make it succeed. With respect to ground one, the argument is that the summary of evidence was given, and this is clearly seen at pages 2 and 3, and 4 to 7 of the judgment. In the counsel's view all framed issues were exhaustively dealt with, and that the same meets the threshold contemplated under Order XX

rule 4 of the CPC. With regards to the contention that general damages were not pleaded, Mr. Nasimire took the appellant to paragraph 11 of the plaint wherein the reason for praying for damages was stated to be the psychological torture allegedly suffered by the 1st respondent. The counsel took the view that the award of TZS. 2,000,000/- was, in the circumstances of the present case, reasonable.

Regarding the alleged failure to frame issues, Mr. Nasimire made reference to page 23 of the typed proceedings which reflect the business of the court on 18th December, 2018, on which date four issues were framed. He took the view that the appellant's contention is hollow and he prayed that ground one be dismissed.

Submitting on ground two, the 1st respondent's counsel argued that, whereas the 1st respondent's husband was advanced the loan and the 1st respondent gave a spousal consent in respect of the Ilemela property, registered vide CT No. 44911, and stocks in three shops (as per exhibit D5), it is not clear, from the appellant's evidence, if the said three shops include the 1st respondent's shop at Plot No. 76 Block T Rwagasore. The counsel argued that the 1st respondent was emphatic that the shop in question was hers and with nothing to do with the loan between the appellant and the 1st respondent's husband. Referring to the defence testimony, the learned

counsel argued that none of DW1, DW2 and DW3 was able to tell who the owner of the shop was. Mr. Nasimire singled out DW3's testimony (the street executive officer) and contended that she too, did not know the owner of the shop. In the absence of any such evidence, the counsel asserted, credibility of the 1st respondent's testimony remained unimpeached.

With regards to ground three, the learned counsel's view is that the evidence on record was sufficient as the basis for the award of general damages. Mr. Nasimire further argued that, besides the evidence, the appellant conceded that it invaded the 1st respondent's shop and made away with a number of items as found in exhibit D5. This went along with the 1st respondent's exhibit PE1 which showed the items which were taken by the appellant from the shop. The learned counsel contended that the uncontroverted evidence is that the appellant offered the 1st respondent a sum of TZS. 60,000,000/- as a settlement package, an offer which was declined by the 1st respondent who wanted full compensation. He also contended that the appellant was, at one time in the course of the proceedings, ordered to return the goods from the shop. It was the counsel's view that there was sufficient evidence to support the award of special damages and that the case was proved on the balance of probabilities.

Ground four of the appeal was not responded to by the 1st respondent's counsel on the ground that the same was incomprehensible.

Submitting on ground five, the counsel argued that the scathed exhibits were tendered by the appellant who enjoyed the services of counsel during the trial. It was Mr. Nasimire's argument that the complaint on the tendering of the evidence in that fashion would be raised by the party who was denied a fair hearing who, in this case, turned out to be the 1st respondent. He took the view that no prejudice was suffered by any party, adding that this was a technical hitch curable by invoking the overriding objective principle. He prayed for dismissal of the appeal with costs.

The appellant's rejoinder was, by and large, a reiteration of what was submitted in the submission in chief. On the analysis of evidence, its counsel argued that the 1st respondent's denial was casual, without any specificity. He contended that the judgment fell short of the judgment contemplated under Order XX rule 4 of the CPC. Rejoining on the general damages, the counsel refuted the contention that the same were pleaded in paragraph 11 of the plaint. He maintained that the trite position, as enunciated in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113 is that damages must be enumerated.

On the framing of the issues, the appellant's counsel maintained that the question of ownership of the shop which was central to the dispute was not raised for determination. Denied as well, was the contention that the appellant offered the sum of TZS. 60,000,000/- in order to settle the matter out of court. The appellant's counsel added that such offer would not spare the 1st respondent from her obligation of proving the case to the required standard.

With regards to strict proof of special damages, the counsel's contention is that the requirement is not new, it having been underscored in ***Balog v. Hutchson*** [1950] AC 515, which defined special damages with an emphasis that the same must be specifically pleaded and proved strictly. The appellant insisted that the 1st respondent only tendered a list of items without indicating the source from which the said list was prepared and the value of each item. He maintained that this fell short of the required standard of proving special damages.

From these rival submissions, the broad issue for determination is whether this appeal carries any merit to justify the appellant's prayer for reversing the trial court's decision.

The first ground of appeal has brought up several complaints and I will address them one after the other. The appellant's contention is that the question of ownership of the shop whose goods were seized was not proved sufficiently. In the appellant's view, the burden of proof set in civil cases was not discharged. As I address this contention, it behooves me to remind the parties of the cardinal principle in civil cases that requires the alleger of any fact to prove existence of such fact. This is in terms of section 110 (1) of the Evidence Act, Cap. 6 R.E. 2019. This legal requirement has been emphasized in numerous decisions. They include the decision in ***Godfrey Sayi v. Anna Siame (as legal representative of the late Mary Mndolwa)***, CAT-Civil Appeal No. 114 of 2012 (unreported), wherein it was held:

> *"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on balance of probabilities."*

The quoted excerpt emboldens the reasoning by Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis (at p.* 1896). The learned authors remarked on this cherished principle in the following words:

> ***"... 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 negative is usually***

> ***incapable of proof***. *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

See: ***Paulina Samson Ndawavya v. Theresia Thomas Madaha***, CAT-Civil Appeal No. 45 of 2017 (unreported).

Glancing at the testimony adduced by the parties during trial, it comes out that the testimony of PW1, PW2, and exhibit PE2 proved not only that some goods were seized and taken from the shop, but also that the shop from which the said goods were taken belonged to the 1st respondent. This testimony was more credible and cogent than that of the appellant. This testimony was corroborated by the testimony of DW3 who testified that he did not know who the owner of the shop was, meaning that she did not know if the shop belonged to the 1st respondent's husband, a defaulting borrower against whom the recovery was intended.

The appellant has contended that the 1st respondent failed to tender any semblance of the documents which would either prove tenancy/ownership of the premises or documents such as a business licence

which would prove ownership of the business. The argument by the 1st respondent is that all of what would constitute the documentary evidence on the ownership were seized by the appellant, a contention that was not seriously contested by the appellant. I take the view that the 1st respondent's account of facts and the testimony that supported her case was enough to discharge the burden of proof. I find the appellant's contention in this respect hollow.

The appellant's other point of disquiet is the trial court's failure to evaluate and analyse evidence adduced by the parties. Order XX rule 4 of the CPC has been cited in that respect. The settled position is that the presiding judicial officer is under a duty to evaluate evidence adduced by the parties' witnesses (See: ***Deemay Daati & 2 Others v. Republic***, CAT-Criminal Appeal No. 80 of 1994 (unreported). This duty is reflected in a judgment that is composed and pronounced, and it has been emphasized in numerous decisions. In ***Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji***, CAT- Civil Appeal No. 25 of 2006 (unreported). The Court guided as hereunder:

> *"One of the basic principles is the duty of the court to determine one way or another an issue brought before it. This is the principle which finds expression in rule 4 of Order*

XX of the Civil Procedure Code, 1966. The rule states as follows with regard to contents of a judgment:

> ***"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."***

Though the rule refers to judgments, the principle therein is applicable in any type of decision in a court following the hearing of a matter. Among the cases cited by counsel for the appellant is the case of ***Kukal Properties Development Ltd v. Maloo and others*** *– (1990-1994) E. A. 281which we find to be relevant to the case before us. The Court of Appeal of Kenya in this case had an opportunity to discuss the effect of failure by a judge to decide on issues framed."* [Emphasis is added]

In ***Shabani Amiri v. Republic***, CAT-Criminal Appeal No. 18 of 2007 (unreported), a deficient judgment was given a thumbs down when it was observed:

> *"This 'decision' does not show the points or issues which were to be determined, the decision on those issues and the reasons for the decision thereon. It was, in short, not a judgment at all."*

See also: ***Tanga Cement Company Limited v. Christopherson Company Limited***, CAT-Civil Appeal No. 77 of 2002 (unreported).

While the impugned decision may not the best that one could have wished, it cannot be said that the same is anywhere close to those that were reprimanded in the cited decisions. It contained all the hallmarks of a compliant judgment in which analysis of issues and evidence was done. I find nothing blemished in that respect.

Moving on to the alleged failure to frame issues, the noteworthy point is that trial proceedings are guided by issues framed before commencement of the hearing. Issues help in guiding the parties and the court in identifying areas of contention and resolve them. They are also guard the proceedings against going astray and avoid arriving at a conclusion which was not desired. The contention by the appellant, in its submission on ground two, is that the question of ownership of the suit property, which is considered to be crucial in the trial proceedings was not penciled as one of the issues to be determined at the trial. Besides citing the ***Astepro Investment Co. Limited's case***, the appellant has not stated what exactly is the fate of the proceedings in which issues were not framed. In ***Tuungane Workshop v. Audax Kamala*** [1978] LRT n. 21, it was held:

> *"Omission to frame issues is not fatal unless it results in a failure to decide properly the point in question amounting to a failure of justice. Such an omission should amount to a*

mis-trial, entitling the appellate court to remit the suit for retrial."

The foregoing position echoes an earlier position accentuated by the defunct East African Court of Appeal in ***Norman v. Overseas Motor Transport*** [1959] EA 131, in which it was held:

"Failure to frame issues is an irregularity, the question would appear to be whether notwithstanding the failure to frame issues the parties at the trial knew what the real question between them was, that the evidence on the question had been and the court duly considered it."

The latter case brings some similarity with what obtains in the instant matter. While it is generally agreed that the question of ownership was not specifically deliberated on during the trial, the parties were pretty aware of what was at stake in the trial proceedings. This is discernible from the pleadings filed by the respective parties. In view of the parties' awareness of the real contention between them, I hold that such failure was nothing more than a mere harmless irregularity. Thus, unlike non-consideration of issues which would constitute a fatal omission, non-framing of issues is a lesser 'evil' that I choose to tolerate.

See also: ***Leonard Salala v. Geita Gold Mine & 2 Others***, HC-Civil Appeal No. 29 of 2019 (MZA-unreported).

In the totality of the foregoing, I hold that ground one of the appeal is devoid of any merit and I dismiss it.

Ground two of the appeal decries the trial magistrate's decision to disregard the appellant's cogent evidence on the lenders' power under the loan agreement and the exercise of the right of attachment of the mortgaged property.

With respect to the instant matter, establishment of whether this principle was observed entails casting an eye on the testimony adduced by the appellant. What comes out of this testimony is that, there are no qualms that the 1st respondent's husband was lent some money by the appellant, and that the borrower defaulted in servicing the loan. Undisputed, as well, is the fact that the three of the borrower's shops were pledged as security and that after the default, the appellant enlisted the services of the 2nd respondent to enforce the former's contractual rights. In proving all this, the appellant relied on the testimony of DW1, DW2 and DW3. None of these witnesses stated, with any semblance of precision, that the shop that was emptied by the appellant, through the 2nd respondent, belonged to the borrower, the 1st respondent's husband. Not even DW3 was clear on this, despite holding a position in the street in which the emptied shop was

located. In her testimony found at page 65 of the typed proceedings, she stated:

"I didn't know the owner of the shop."

On the contrary, the cogency and clarity that appellant boasts of was exhibited by 1st respondent who, along with PW2 and DW3 and exhibit PE1, demonstrated that the seized goods came from the shop that does not belong to the borrower, meaning that what was thought to be a recovery measure by the applicant was a case of mistaken identity. PW2's testimony was more pinpointing on the 1st respondent's ownership of the shop in question. He was quoted as stating as follows at page 47 of the typed proceedings:

"... The owner of the shop I was, Sarah Maginga because I knew her for a long time."

This plain reality would not be blurred by exhibits D1 and D2, both of which are only relevant in proving the 1st respondent's husband's indebtedness and the fact that he pledged his shops as security for the loan. No specifics were given to link him with the shop that the 1st respondent claimed ownership thereof. In my considered view, this is a fit case in which the reasoning in ***Hemed Said v. Mohamed Mbilu*** (supra) is applicable. The Court held:

> *"**According to law the person whose evidence is heavier than that of the other is the one who must win**. In this instance each party called two witnesses in addition to himself at the hearing of the case in the Court of first instance. In measuring the weight of evidence in such cases as the present one it is not, however, the number of witnesses whom a party calls on his side which matters. It is the quality of the said evidence. In this connection the evidence of a single witness may be a lot heavier than that of ten witnesses."* [Emphasis is added]

In my unflustered view, the 1st respondent's evidence was heavier or more cogent than that of the appellant, and it was quite in order that the trial court handed victory to her. I find nothing blemished in this respect, and I dismiss this ground of appeal.

The appellant's ground three has decried the trial court's award of damages in the sum of TZS. 95,160,500/- without any strict proof. The contention is that, since these are said to be the value of the goods which were taken from the shop, then these were specific damages which required specific proof. The 1st respondent has based her defence on what is alleged to be the appellant's offer of TZS. 60,000,000/- for an out of court settlement of the matter. Whilst it is not denied that goods were taken from the shop, it is not evident that the seizure of the goods from the shop was irregular.

That fact, however, does not exonerate the 1st respondent from proving what she alleged. This is that the goods seized are worth the amount claimed in her statement of claim. This is consistent with numerous court decisions. These include the famous ***Hosia Lalata v. Zumbe Mwasote*** (supra), **Zuberi Augustino v. Anicet Mugabe** [1992] TLR 173; ***Director Moshi Municipal Council v. Stalenard Mnest & Another***, CAT-Civil Appeal No. 246 of 2017; and ***Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited***, CAT-Civil Appeal No. 21 of 2001 (both unreported). In the ***Director Moshi Municipal Council v. Stalenard Mnest & Another*** (supra), the Court of Appeal stated that *"Once such claim is neither pleaded specifically nor strictly proven, it fails."* The upper Bench went further and held as follows:

> *"There would be no point of requiring such a claim to be specifically pleaded and strictly proven if, upon failure to establish it, the claimant would still be awarded a reduced quantum of special damages as was the case in the instant appeal. The trial tribunal had no discretion to do so."*

In the instant case, the 1st respondent has pleaded what she considers to be special damages, arising out of what she alleged. She did that by coming up with figures which purportedly represent the value of each of the seized items. No receipt has been issued to prove, demonstrate and clarify

if the quoted figures are unit costs for procurement of each of the items or the selling value of each of them. A stock taking report, a stock register or even receipts would shed some light which would give credence to this claim.

Absence of any semblance of evidence to justify the value of the seized goods renders the claim of the sum of TZS. 95,160,500/- lacking the tackiness that would make it legitimate and recoverable. The appellant, through DW1, stated that the seized goods were sold at an auction and they fetched a paltry TZS. 4,730,000/-. It is not clear if what was sold at an auction is all what was seized from the 1st respondent's shop. Thus, while it would be unsafe to rely on the 1st respondent's self-declared value of the goods, it is equally devastating to rely on the appellant's auction figure as the actual value of the seized goods, knowing as well, that sales in auctions fetch much lower prices than they would normally fetch in normal competitive markets.

In view of all this, I take the view that the arguments by the appellant on this ground are legitimate, and this ground of appeal is allowed. I set aside the award of TZS. 95,160,500/- granted by the trial court on the ground that its accrual is not proven. The 1st respondent is at liberty, subject to the law, to institute a suit on the alleged damage and prove her claim of special damages.

With regards to award of general damages, my hastened remark is that these damages were justifiably granted as the same were pleaded in paragraph 11 of the plaint, and the they arose from what was alleged as a mental torture that came with the appellant's action. I see nothing untoward in the trial magistrate's reasoning and assessment of the said damages.

The appellant's contention in ground four is that there is a mix up of facts in the proceedings and the impugned judgment. The contention on this revolves around the ownership of the shop. The appellant's argument is that facts which were contentious were recorded as being undisputed, and this has led to a wrong decision against the appellant. The 1st respondent has chosen not to say a word on this. While there may be a few lapses - here and there – considered to be a mix up, I take the view that the appellant is trying to make the most of it and create a mountain out of a molehill.

Nothing indicates that the decision of the trial court was premised on non-contentious matters. This explains why the 1st respondent marshalled witnesses who testified in support of her case. These included PW2 whose testimony corroborated that of the 1st respondent herself. The case was also determined by exhibit PE1, a list of the items allegedly impounded by the appellant. All this proves that what the appellant considers to be disputed facts-turned undisputed-did not hold any sway or hold any decisive

importance worth the complaint raised in this ground. In the premises, I consider this ground to be flimsy and baseless. I dismiss it.

The appellant's disgruntlement in ground five of the appeal is that an assortment of documents constituting exhibits D1 and D2 were tendered in their collective form, fondly referred by the appellant's counsel as an omnibus tendering. The contention by the learned counsel is that such conduct was a fatal indulgence that renders the trial defective. While it is settled that admission of exhibits in their collective form is a flawed conduct, the pertinent issue to be resolved is, whether the consequence is to have the trial adjudged defective. As I resolve that issue, it is quite true that exhibits D1 and D2 were tendered by the appellant's witnesses and admitted in their collective form. This is an abhorrent conduct which has been extensively discussed in numerous decisions including ***Tanzindia Assurance Company Ltd*** (supra), which borrowed a leaf from the reasoning in ***Anthony Masanga v. Penina (Mama Mgesi) & Another***, CAT-Civil Appeal No. 118 of 2014 (unreported). In this case, the culpable party is the one that is crying foul. I would resolve this issue by stating that such flaw ought to have affected the 1st respondent who, in this case, is least bothered by any adverse consequence arising from such admission. But even assuming that the adverse consequences were felt by the parties, the settled

position is that the remedy for such erroneous conduct is to have the irregularly tendered exhibits expunged from the appellant's evidence, and I so order.

In the upshot of all this, I hold that the appeal partly succeeds to the extent stated with respect to ground three, while the rest of the grounds are dismissed.

It is so ordered.

DATED at **MWANZA** this 23rd day of July, 2021.

M.K. ISMAIL

JUDGE

Date: 23/07/2021

Coram: Hon. C. M. Tengwa, DR

Appellant: Innocent Ndangu, Advocate

Respondents: 1st - Mr. Nasimire, Advocate

2nd - Absent

B/C: P. Alphonce

Court:

Judgement delivered in the presence of both parties.

C. M. Tengwa

DR

At Mwanza

23rd July, 2021