IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A. And LEVIRA, J.A.)

CIVIL APPEAL NO. 155 OF 2017

TPB BANK PLC (Successor in Title to Tanzania Postal Bank) ..... APPELLANT

VERSUS

1. REHEMA ALATUNYAMADZA
2. LEAH NEEMA
3. LULU CARMEN **..... RESPONDENTS**

(Appeal from the Judgment and Decree of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Wambura, J.)

dated the 24th day of July, 2015
in
Land Case No. 203 of 2010

RULING OF THE COURT

9th February & 1st March, 2021

LEVIRA, J.A.:

In the High Court of Tanzania (Land Division) at Dar es Salaam the respondents instituted a suit (Land Case No. 203 of 2010) against Tanzania Postal Bank and Another (VIOVENA AND COMPANY LIMITED, hereinafter referred as VIOVENA) who is not a party to this appeal. The said suit

centered on appellant's unlawful sale of defendants' house situated at Plot No. 2051 Block "C" Kunduchi Mtongani Area in Kinondoni District within the City of Dar es Salaam and defamation connected to that sale. According to the record of appeal, the appellant instructed VIOVENA to auction a mortgaged house situated at Plot 45611 Block "A", also in Kunduchi Mtongani Area. However, on 23rd July, 2010 the workmen of VIOVENA affixed an advertisement at the premises of the respondents informing the public that the said house was to be sold in public auction to be conducted on 24th July, 2010. The respondents approached those workmen, explained and showed them documents of ownership of their house with a view of proving to them that their house was not mortgaged and that it had no relation with any loan taken from TANZANIA POSTAL BANK; and that, the quoted Plot Number (45611 Block "A") appearing in the advert was not the number of their house, but they could not listen. The respondents were not served with any notice of debt, but VIOVENA proceeded to auction the said house.

It is also on record that the workmen of VIOVENA uttered allegedly defamatory words against the respondents when the respondents were trying to explain to them that they were not indebted as they took no loan

from TANZANIA POSTAL BANK. Eventually, the respondents' house was sold by VIOVENA who worked under the instruction of TANZANIA POSTAL BANK.

Aggrieved, the respondents instituted the aforesaid Land Case against both TANZANIA POSTAL BANK and VIOVENA as introduced above claiming, among other reliefs, nullification of the sale of the house in question, that the first respondent be paid by both defendants (TANZANIA POSTAL BANK AND VIOVENA) USD 866,400 for the period between July, 2010 and July, 2011 and USD 1,003,200 for any subsequent year.

Following the respondents' claims, TANZANIA POSTAL BANK filed written statement of defence (WSD) denying all the respondents' claims under the pretext that their agents (VIOVENA) acted on their own *frolic*, against the instruction she gave them. Therefore, TANZANIA POSTAL BANK was not liable for anything done by its agents out of instructions. Upon full trial, the High Court delivered its judgment in favour of the respondents, the appellant was aggrieved and hence the current appeal.

The appellant has lodged a memorandum of appeal comprising of four grounds against the decision of the High Court as follows:-

1. *The learned trial Judge erred in law in holding that the appellant was duty bound to ensure that Viovena Co. Limited auctions the mortgaged property named in the Public Advert.*

2. *The learned trial Judge erred in law and in fact in holding that the Respondents were defamed.*

3. *The learned trial Judge erred in law in condemning the appellant to pay the respondents damages of Tshs.100,000,000/= jointly with Viovena Co. Limited.*

4. *The learned trial Judge erred in law and in fact in failing to adhere to the principles governing assessment and award of general damages.*

At the hearing of the appeal, Dr. Boniface Luhende, learned Deputy Solicitor General (DSG), Ms. Debora John Mcharo, learned State Attorney and Mr. Julius Kalolo Bundala, learned Advocate appeared for the appellant, whereas Mr. Mohamed Tibanyendera, learned advocate appeared for all the respondents.

Before commencement of the hearing, the Court *suo mottu* raised two issues regarding the name of the appellant and non-joinder of VIOVENA as party to this appeal. Upon being required by the Court to address the issues, Mr. Bundala submitted in respect of the issue of joining

VIOVENA in this appeal to the effect that, during trial VIOVENA defaulted appearance and did not file WSD; as a result, the High Court ordered ex parte proof against them. For that reason, they waived their right and it is as good as VIOVENA did not take part in the case in the High Court. Therefore, the appellant had no proper address to serve them. After all, he said, there is no law or decision of the Court compelling the appellant to join them as party in this appeal.

Mr. Bundala submitted further that, Rule 84(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) requires the notice of appeal to be served on all persons who seem to the appellant to be directly affected by the appeal. He reiterated his previous submission that VIOVENA was not involved in the suit before the High Court so there is no proper address to serve them. However, he said, if the Court will find that the address used initially suffices, then he prayed for extension of time to serve and join them as a party to this appeal so as to meet the ends of justice. His prayers were pegged under Rule 4(2) (b) of the Rules and section 3A of the Appellate Jurisdiction Act, Cap 141 (the AJA).

Submitting on the second issue regarding the name of the appellant, Mr. Bundala stated that this matter is peculiar on account that on 24th July,

2015 when the High Court delivered its decision the TANZANIA POSTAL BANK was in a transitional period of being incorporated and the Tanzania Postal Bank Act was already repealed and replaced by the Tanzania Postal Bank (Repeal and Transitional Provisions) Act, 2015 passed by the National Assembly on 29th June, 2015. However, he said, section 8 of the said new law stated categorically that TANZANIA POSTAL BANK shall remain in force until such time when the incorporation of the TPB Bank Limited under the Companies Act is complete. Therefore, on 27th July, 2015 when the appellant lodged a notice of appeal against the impugned decision of the High Court had to use the previous name (TANZANIA POSTAL BANK) which was used when the matter was before the High Court because it was in the transitional period.

Mr. Bundala submitted further that, on 29th March, 2016 the said bank was incorporated and effectively from 30th March, 2016 the new name (TPB BANK PLC) became operational. The appellant was later supplied with copies of judgment, decree and proceedings for appeal purposes, but was in dilemma which name to use in appeal between the old and the new one. Considering that the transitional period had already expired and the old name (TANZANIA POSTAL BANK) was no longer in use,

the only option on their part was to use the name which had changed by the operation of the law; which the appellant expected the Court to take Judicial notice in terms of sections 59(1) (a) of the Evidence Act, Cap 6 RE 2019Band section 22 of the Interpretation of Laws Act, Cap 1 RE 2019. According to him, those provisions prompted the appellant to use the new name. Besides, he stated that the appellant's failure to make formal application to the Court for them to be allowed to use the new name is because they were also in dilemma to choose which name, they should use between the old and new one in the said application. In the cause of his submission, Mr. Bundala made informal application before the Court under Rule 111 of the Rules to be allowed to amend all the documents which the Court will find that they are not correct so as to incorporate the changes.

In reply, Mr. Tibanyendera submitted on the first issue that Rule 84(1) of the Rules requires the appellant within fourteen days after lodging a notice of appeal to serve copies of it on all persons who seem to him to be directly affected by the appeal, unless the Court directs on ex parte application that a service need not be effected on any person who took no part in the proceedings, which is not the case here. It was his firm submission that, VIOVENA took part to the proceedings of the High Court

contrary to what Mr. Bundala has submitted. He could not find purchase on Mr. Bundala's submission that VIOVENA did not take place in the proceedings because they did not file any WSD and the High Court proceeded ex parte against them. He argued that the appellant did not make ex parte application to the Court for the Court to direct that service need not be effected on VIOVENA who took part in the proceedings in the High Court. He argued further that, the decision of the High Court on page 284 of the record of appeal recognized VIOVENA and at any rate, the idea of ex parte proof does not mean to remove a party from the proceedings. The learned counsel referred us to the appellant's first ground of appeal where the appellant faults the High Court Judge for holding that the appellant was duty bound to ensure that VIOVENA auctions the mortgaged property named in the Public Advert. He insisted that this ground alone requires that VIOVENA be in Court as he sees the intention of the appellant is to exonerate herself from liability, something which he said, is unacceptable.

In summing on the first issue, Mr. Tibanyendera submitted that Rule 4(2)(b) of the Rules and section 3A of the AJA relied upon by the counsel for the appellant to request the Court to allow the appellant to join

VIOVENA in this appeal can not cure all the appellant's faults. This he said, is because the appellant excluded VIOVENA deliberately.

Regarding the second issue, Mr. Tibanyendera argued that the appellant's notice of appeal was filed on 27th July, 2015. The appeal was filed on 20th July, 2017, one year later after the changes which took place from TANZANIA POSTAL BANK to TPB Bank PLC as submitted by the counsel for the appellant. The appellant was aware of the existence of Rule 111 of the Rules yet she did not make any application to the Court to amend the notice of appeal. He added that, the notice of appeal was supposed to be amended before filling of the appeal or even after filing it but the appellant has been negligent for all that time.

It was also his further argument that, the transitional period provided for under section 7 of Tanzania Postal Bank (Repeal and Transitional Provisions) Act, 2015 does not give automatic change of court proceedings that is why even the TPB Bank PLC was given six months to be registered with BRELA. Mr. Tibanyendera contended that, the transition Act ceased its force after incorporation of the appellant and expiration of the transition period in terms of section 8(3) of the said Act, that is on 29/3/2016; so, it cannot be used to bless acts done in the year 2017. Generally, he said,

there is nothing that the appellant can amend. According to him, there is no notice of appeal filed by the appellant and the necessary parties were not joined in this purported appeal. He thus prayed for the appeal to be struck out.

We have carefully considered the thoughtful submissions by the counsel for both sides for which we express our sincere appreciation. We now wish to resolve the two issues which we have raised. **First,** whether it was necessary for the appellant to join VIOVENA as a party in this appeal. **Second,** whether the new name of the appellant was properly used in this appeal.

Starting with the first issue, it is settled position of the law that an intended appellant shall, before or within fourteen (14) days after lodging a notice of appeal, serve copies of it on persons who seem to him to be directly affected by the appeal; unless on ex parte application the Court directs that service need not be effected on any person who took no part in the proceedings in the High Court. (See Rule 84(1) of the Rules). In the current appeal, as rightly stated in our view by the counsel for the respondent, VIOVENA is not only a party who seem to be affected by the appeal but also took part in the High Court proceedings. It should be clear

that, the mere fact that the case was decided ex parte against them does not extinguish their involvement or liability as a party in a suit. It is true as stated by Mr. Bundala that the case proceeded ex parte against VIOVENA but as it was demonstrated above, most of the reliefs sought by the respondent and granted by the High Court were sought against both defendants (the appellant and VIOVENA). No wonder why the appellant mentions VIOVENA in her grounds of appeal. This proves that VIOVENA was not only a party to the proceedings but will be directly affected by the intended appeal. Therefore, the appellant was required to serve them with the notice of appeal within fourteen days of lodging it but failed to do so. We do not agree with the counsel for the appellant that the respondents were not served with the notice of appeal because the appellant does not know their proper address. With respect, we did not expect such an argument to come from the learned counsel who knows for sure that VIOVENA was the appellant's agent whom she ought to know her address. Not only that but also VIOVENA was a party in the proceedings in the High Court; therefore, the appellant ought to have used the address for service in connection with the proceedings in the High Court as required under Rule 84(2) of the Rules and not to wait for the Court's direction as Mr. Bundala requested us to give.

It is our observation that the argument by the counsel for the respondents that the appellant should not be allowed to serve VIOVENA out of time in terms of Rule 4(2)(b) of the Rules and section 3A of the AJA because he did not do so in time deliberately is unfounded. The counsel for the respondent made that assertion barely without any proof. It is our considered opinion that justice of this matter demands that VIOVENA be served with the notice of appeal and joined as a party to this appeal. This is because the orders sought by the appellant in this appeal will legally affect VIOVENA and it is also desirable for avoidance of a multiplicity of endless cases. We are inspired by the decision of the Court while dealing with almost a similar issue, in the case of **TANG GAS DISTRIBUTORS LIMITED v. MOHAMED SALIM SAID & 2 OTHERS,** Civil Application No. 68 of 2011 (unreported) at page 29 where the Court stated that, a party can be added even at the appellate stage. Circumstances of the current matter are even more fitting as the intended party to be joined was also a party in the High Court proceedings.

Regarding the second issue, Mr. Bundala gave a long history of how the name of the appellant changed from the old name (TANZANIA POSTAL BANK) to the current name (TPB BANK PLC). In essence he was of the

argument that since the name of the appellant changed by the operation of the law, the Court ought to have taken Judicial notice of such change. With respect, we are not persuaded by that argument. We wish to state that the Court might take Judicial notice of any change brought by the operation of the law but this alone does not give the appellant an automatic right to waive her legal obligation to make an appropriate application to effect the change. We agree with the counsel for the respondent that, the appellant ought to have made formal application to the Court to effect change of the name of appellant before instituting the current appeal. However, upon reflection of the matter at hand and having taken into consideration that the appellant has already lodged the appeal under the new name, we ask ourselves which objective are we going to achieve suppose we strike out this appeal and order the appellant to lodge an application so as to formally change the name. We also reflected on how the respondent was prejudiced by the use of that name in the preliminary stages of this appeal.

Upon such reflection, it is our observations that striking out this appeal will achieve no useful propose because at the end of the day it will prolong the matter than expediting it because striking out the matter does

not mean the end of it. Had it been that the said decision would have an effect of bringing this matter to an end, that would probably change the way of our thinking. We observe further that, the counsel for the respondent only condemned the appellant for failure to apply under Rule 111 of the Rules to amend the notice of appeal so as to reflect the new name, an act which would simplify the whole process of filing the appeal. He did not state how the respondents were prejudiced by appellant's filling under that name.

All in all, we must state that it was not proper for the appellant to lodge this appeal under the new name un procedurally. However, having considered all the circumstances of this appeal we find that justice demands expeditious disposal of this appeal. Therefore, we shall not strike out this appeal, instead, in order to meet the better ends of justice we invoke the powers bestowed on us under Rule 4(2)(b) of the Rules and order the appellant to amend the notice and record of appeal to reflect the appellant's new name, join VIOVENA as a party to this appeal and serve them with the notice of appeal within fourteen days from the date of this Ruling. We order further that the amended record of appeal be filed within 45 days from the date of this Ruling and the same be served on other

parties. We have taken into consideration the inconvenience and costs incurred by the respondents in preparation of this appeal. Therefore, we further order the appellant to pay respondent's costs. In the meantime, the hearing of this appeal is adjourned to a date to be fixed by the Registrar.

It is so ordered.

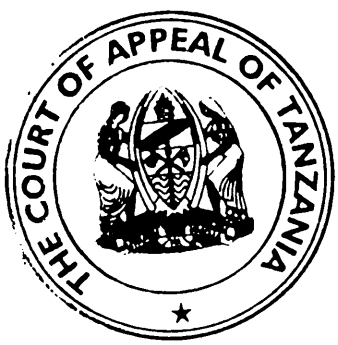
DATED at **DAR ES SALAAM** this 18th day of February, 2021

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 1st day of March, 2021 in the presence of Mr. Abubakari Mrisha, learned Principal State Attorney for the Appellant and Mr. Mohamed Tibanyedera, learned Counsel for the Respondents, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL