IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 149 OF 2015

(CORAM: MMILLA, J.A., LILA, J.A., And WAMBALI, J.A.)

SALMA MOHAMED ABDALLAH ..... APPELLANT
VERSUS
JOYCE HUME ..... RESPONDENT
[Appeal from the decision of the High Court of Tanzania
(Land Division) at Dar es Salaam]

(Ngwala, J.)

dated the 25th day of July, 2014
in
Land Case No. 301 of 2007

.....

JUDGMENT OF THE COURT

9th November, 2018 & 21st March, 2019

WAMBALI, J.A.:

The respondent, Joyce Hume sued the appellant, Salma Mohamed Abdallah, in Land Case No. 301 of 2007 before the High Court of Tanzania, (Land Division) at Dar es Salaam. She prayed for the following orders:

> *"(a) The defendant be ordered to give vacant procession to the plaintiff in respect of Plot No. 329 Block "A" Mbezi area Dar es Salaam City.*
>
> *(b) Payment of Tshs. 2,000,000/= from July, 2006 to the judgment date as loss of use of the disputed plot.*
>
> *(c) Payment of Tshs. 100,000,000/= as general damages.*

(d) *Payment of interest at a rate of 31% on (b) herein above from the date of filing this suit to the date of final payment.*

(e) *Payment of interest at 12% on (c) herein above from the date of judgment to final judgment.*

(f) *Costs of this suit.*

(g) *Any other relief(s) as this honorable court deems fit to grant.*

The appellant (then Defendant) lodged her written statement of defence and denied the claim of the respondent (then plaintiff). The written statement of defence also accompanied a counter claim against the respondent which was accordingly countered by a strong denial. In her counter claim, she prayed to be granted against the respondent Tshs. 17,000,000/= being a purchase price of the suit plot; Tshs. 100,000,000/= being specific damages; interest at 30% from the date of judgment to the date of payment in full; Tshs. 70,000,000/= as general damages; costs of the suit and any other relief that the trial court deemed just to grant.

We think, it is not out of place to reproduce the issues that were framed and recorded by the trial court after agreement of the parties to guide it in deciding the suit:

"1. *Between the plaintiff and Defendant who is the lawful owner of the property and plot No. 329 Block 'A' Mbezi High Density Kinondoni Dar es Salaam.*

2. *Whether the plaintiff has transferred by way of sale the suit property to the Defendant.*

3. *Whether the plaintiff is entitled to vacant possession, mesne profit and general damages.*

4. *Whether the defendant has incurred the sum of Tshs. 117,300,000/= for development of the suit property and whether she is entitled for a refund of the said amount from the plaintiff as well as general damages in the sum of Tshs. 70,000,000/=.*

5. *To what reliefs if any are the parties entitled to."*

The trial court (Ngwala, J.) then heard evidence from the parties and their respective witnesses and in the end it dismissed the counter claim and entered judgement in favor of the respondent. The trial court thus declared the respondent as the lawful owner of the suit plot and ordered the appellant to pay her a sum of Tshs. 2,000,000/= from July 2006 to the date of judgment for loss of use of the disputed plot. The respondent was also awarded interests at the court rate per annum from the date of

delivery of judgment to the date of payment in full plus the costs of the suit. The appellant was also ordered to vacate the suit plot immediately.

The appellant was not satisfied with the judgment and the decree of the High Court hence this appeal. Her dissatisfaction with the decision of the High Court is expressed in the memorandum of appeal comprising the following grounds of appeal: -

"1. That the learned Trial Judge erred both in law and

fact by condemning the appellant to pay the respondent Tshs. 2,000,000/= from July, 2006 to the date of judgment as loss of use of the disputed property without any proof of specific damages as required by law.

2. That the learned Trial Judge erred both in law and fact by her failure to resolve issue No. 4 as framed and recorded by the court which read "Whether the defendant has incurred the sum of Tshs. 117,300,000/= for the development of the suit property and whether she is entitled to a refund of the said amount from the plaintiff as well as general damages to the tune of Tshs. 70,000,000/=.

3. *That the learned Trial Judge erred in law and fact by finding that through non-objection by counsel for the appellant for tendering and admission of exhibits A, B, C and D in evidence, the Appellant admitted that, the respondent is the rightful owner of the suit premises.*

4. *That the learned Trial Judge erred both in law and fact by finding that the appellant did not conduct a thorough search of the suit property."*

At the hearing of the appeal, Mr. Wilson Ogunde, learned counsel appeared for the appellant, while the respondent had the services of Mr. Augustine Mathern Kusalika, learned counsel.

We wish at the outset to state that earlier on before the hearing of the appeal, Mr. Ogunde, learned counsel for the appellant drew our attention concerning the change of trial judges. He urged us to determine whether it was proper for Ngwala, J. to take over the hearing of the suit from Mziray, J (as he then was), without assigning reasons as required by Order XVIII Rule 10 (1) (2) of the Civil Procedure Code, Cap. 33 R.E. 2002. In his view, failure by Ngwala, J. to assign reasons as to why she took over the conduct of the suit rendered the proceedings that followed null and void and thus liable to be quashed and the orders issued thereon set aside.

Basically, Mr. Ogunde requested us to find that the proceedings and the judgment of the trial court are a nullity and direct that the suit be heard afresh before another judge.

His submission was strongly resisted by Mr. Kusalika, who stated that Ngwala, J. did not do anything wrong against the law as she took over the case while the hearing had not begun. In his opinion, the circumstances that obtained in this case did not warrant the application of Order XVIII Rule 10(1) (2) of Cap. 33 as submitted by Mr. Ogunde. Mr. Kusalika therefore asked us to disregard Mr. Ogunde's submission on the matter and proceed with the hearing of the appeal on merits.

After we heard counsel for the parties, we thought that the issue which was brought to our attention can be resolved in the cause of composing our judgment. We therefore reserved our observation for the purpose of incorporating our finding in the judgment. We allowed counsel to proceed with the hearing of the appeal. In the circumstance, we deem appropriate to start our deliberation on this matter.

Our perusal of the record of appeal leaves us in no doubt that when Ngwala, J. took over the hearing of the suit, the same had undergone mediation which was conducted by Mziray, J. (as he then was) but had

failed. It is noted that at that stage, Mziray, J, had issued an order for the suit to be placed before the trial judge for mention on 14/9/2009. On that date, the case was placed before the District Registrar who adjourned it for mention on 15/10/2009. The case was then assigned to Ngwala, J. for conducting a trial, who later mentioned the same on the scheduled date. It is on record that after several adjournments, trial of the case began on 24/7/2012 before Ngwala, J. After she heard witnesses for the parties she composed the judgment which is the subject of the present appeal.

In the circumstance, it cannot be stated that Ngwala, J took over the trial of the suit without assigning reasons while the trial had not started. This, with respect, was not against the requirement of Order XVIII Rule 10(1) (2) as submitted by Mr. Ogunde. For this provision to come into play, hearing of the suit must have started by the recording of evidence by one judge before it is taken over by a successor judge after the predecessor is prevented from concluding the suit under the circumstances provided in the said provision. For purpose of clarity, we deem it appropriate to quote the provision of Order XVIII Rule 10(1) (2) hereunder: -

(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made by him under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provision of sub rule (1) shall, so far as they are applicable be deemed to apply to evidence taken in a suit transferred under section 21".

In this regard, we have no hesitation to state that a close reading of the above quoted provision leads us to the understanding that the successor judge or magistrate assigns reason for taking over the continuation of trial after the trial has started and evidence heard partly by his predecessor who has been prevented from concluding the trial.

It is in this regard that we are of the firm view that as Ngwala, J. took over the conduct of the case after the mediator referred the same for trial, which had not started, there was no requirement for her to have assigned any reason for taking over. Indeed, she started by recording the

issues and then proceeded to record evidence of the witnesses of the parties.

In the event, we disregard the attention drown to us by the learned counsel for the appellant for lacking substance.

We now turn to consider the grounds of appeal raised by the appellant.

Mr. Ogunde submitted with respect to ground one that the trial judge awarded the respondent Tshs.2, 000,000/= from July 2006 for loss of use of the disputed property without any justification. He argued that the respondent did not prove specifically how she was entitled to the claim. Besides, she did not complete the house which she was constructing through contribution as the work stopped in the year 2003 for lack of money, Mr. Ogunde emphasized. In his view, the respondent was supposed to substantiate at the trial the tangible evidence she relied to claim compensation for loss of use of the disputed property. He further submitted that unfortunately, the trial judge did not also give sufficient reasons in her judgment why she awarded the respondent that amount of compensation while there was no evidence to support the claim. He thus prayed that the Court be pleased to find that this ground has merit.

On his part, Mr. Kusalika submitted that despite the fact that there is no direct evidence to substantiate the loss of use that the respondent suffered, it cannot be denied that she had not been in possession of the disputed premise since July, 2006. He thus argued that the trial judge was justified to award the respondent the compensation for loss of use. However, when he was pressed by the Court to explain whether the amount of money that was awarded is justified, Mr. Kusalika left upon the Court to determine the proper amount which the respondent is entitled in the circumstances of the case.

On our part, having heard the submission of the counsel for the parties and considered the evidence in the record of appeal, we are firm that the trial court was not justified to award the respondent Tshs. 2,000,000/= for loss of use of the property. This is so because the respondent did not offer any impeccable evidence to substantiate how she was entitled to that amount from July 2006 to the date of judgement. In this regard, we do not, with respect, agree with the submission of Mr. Kusalika that despite lack of direct evidence the Court should determine and reduce the amount to be awarded. We think this will be against the evidence which was placed before the trial court which did not manage to

substantiate the claim. We must emphasize that a claim of a specific value which is in a form of special damage must be strictly proved. Failure to do so disables a party from claiming what he has not specifically proved. It is in this regard that in **Masolele General Agencies v. African Inland Church of Tanzania** [1994] TLR 192, this Court stated that: -

> *"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and general one; the Trial Judge rightly dismissed the claim for a loss of profit because it was not proved."*

In the present case, we are satisfied that in view of the evidence of the respondent (plaintiff), the trial judge had no basis on which she awarded Tshs. 2,000,000/= from July 2006 to the date of judgment as loss of use of the disputed property. In the circumstance, we allow this ground of appeal.

With regard to ground two of appeal, the major complaint of the appellant is that the trial judge did not deal with issue number four which concerned the claim of Tshs. 117,000,000/= being purchase price and refund for developing the disputed premise. In support of this ground, Mr. Ogunde submitted that the trial judge did not resolve the claim of the

appellant because nothing was said in the judgment concerning the said claim. He thus urged us to remit the case to the trial court with the direction to resolve the said issue. Mr. Ogunde, was of the opinion that the appellant placed before the trial court sufficient evidence to justify the claim of the money she spent in buying the plot of land and completing the partly constructed house.

The response of Mr. Kusalika in respect of this ground was that the trial judge dealt with issue number four when she resolved issue number two. He submitted that the trial judge dismissed the counter claim which was the basis of the said claim because the appellant did not offer sufficient evidence to justify how she was entitled to the claim of Tshs. 117,000,000/=. The learned counsel was of the considered view that apart from analyzing the claims in the counter claim, the appellant did not testify how she was entitled to the amount she claimed. He therefore implored us not to remit the case to the trial court as submitted by Mr. Ogunde because issue number four was resolved as required by law. As a result, he prayed for the dismissal of this ground of appeal.

We need to observe that the trial judge was fully satisfied that the appellant did not enter into agreement with the respondent to buy the

disputed property for Tshs, 17,000,000/=, because she met a different person who purported to be the respondent. We think there is ample evidence from both sides to support this finding. The trial judge was also satisfied that the appellant did not tender the building permit and the analysis of how she utilized Tshs. 100,000,000/= which she claimed as specific damages for constructing the house. Similarly, the trial judge was not satisfied on how the appellant was entitled to the claim of Tshs. 70,000.000/=as general damages. The trial judge considered several other factors in the evidence of the appellant and the respondent and in the end she dismissed the counter claim which was the basis of the said claims.

On our part, we are satisfied that the trial judge correctly dismissed the counter claim and she therefore substantially dealt with ground four although she did not state specifically that the said ground was answered negatively. We are convinced that the appellant did not place before the trial court sufficient evidence both oral and documentary to support her claims for special damages.

We wish to state that the circumstances of this case is similar to what happened in **Future Century Limited v. TANESCO,** Civil Appeal No. 5 of 2009, Court of Appeal of Tanzania (unreported). In that appeal, the

appellant had pleaded that he suffered loss and prayed for special damages of Tshs. 59,000,000/=, but led no evidence to substantiate the claim. In its decision, the Court made reference to its decisions in **Zuberi Augustino v. Anicet Mugabe [1992] TLR 137 and Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre** [1999] TLR 165 where it was emphasized that special damages must be specifically pleaded and proved. It is worth noting that in **Zuberi Augustino** (supra) the Court specifically stated that:

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."*

In the instant case, we are of the settled opinion that although the appellant pleaded to have suffered loss of Tshs. 100,000,000/=, she did not substantiate the same in evidence. We therefore agree with the trial judge that the appellant failed to prove her claim. Indeed, most of the items claimed by the appellant to have constituted the special damages required proof by documentary evidence. However, no supporting documents were produced at the trial.

In the event, we find that this ground of appeal lacks merit and we hereby dismiss it.

In ground three of appeal, Mr. Ogunde, argued that it was not proper for the trial judge to have found that the fact that exhibits A (letter of offer), B (letter confirming payment of rent fees), C (tittle deed) and D (building permit) were tendered and admitted in evidence without objection from the counsel for the appellant proved that the respondent is a rightful owner of the suit property. In this regard, he submitted that the Court be pleased to find that this finding was not proper because the trial judge was supposed to consider the other evidence in the record before she made her finding on this matter. In his view, the appellant also tendered evidence to show how she came into possession of the suit premise. He thus asked us to allow this ground of appeal with a finding that the appellant is the rightful owner of the disputed premise.

Mr. Kusalika did not support the submission of his learned friend on this ground. He argued that the trial judge did not only consider the aspect of non-objection to the admission of the said exhibits but she also analyzed other evidence before she found that the respondent is a rightful owner of the disputed premise. In short, he observed that the trial judge looked at the evidence as a whole before she came to her conclusion. He therefore urged us to dismiss this ground of appeal.

On our part, we think that it is not disputed that the trial judge observed when she resolved issue number one, that the non-objection by the appellant to the admission of the said exhibits demonstrated that the respondent is the rightful owner of the disputed premise. Nevertheless, after going through the whole judgment, we are left in no doubt that in reaching the final decision, the trial judge analyzed and considered other evidence that were placed before her to decide the rightful owner of the disputed premise. Indeed, it cannot be disputed that the said admitted documents formed the basis of the respondent's ownership and outweighed the exhibits that were tendered by the appellant and admitted at the trial. For instance, it was rightly found that the appellant did not enter into sale agreement with the respondent through exhibit D1 which was tendered by her. The trial judge found, and the appellant admitted, to have entered into sale agreement with a different person (Joyce Mdogo) and not the respondent. The appellant also did not produce the title deed of the disputed property and the building permit. However, the respondent tendered those documents which were admitted at the trial as exhibits C and D respectively.

We therefore think that all these factors demonstrated that the owner of the property in dispute is the respondent. In the circumstance, we agree with Mr. Kusalika that the trial judge considered the evidence as a whole without basing solely on the issue of non-objection to the admitted exhibits as stated by Mr.Ogunde. In the event, we are compelled to dismiss ground three of appeal.

Lastly, in support of ground four, Mr.Ogunde, blamed the trial judge for finding that the appellant did not conduct thorough search on the ownership of the disputed property. He firmly argued that the appellant conducted the search before she bought the disputed property and it was revealed that the owner is Joyce Hume. He emphasized that the appellant obtained search report. He therefore prayed that the finding of the trial judge on this matter be reversed.

Mr. Kusalika responded by submitting that although the appellant claimed to have conducted search on the ownership of the property, she did not tender the report of the purported search at the trial. He therefore argued that the trial judge had no basis to find otherwise because no report was placed before her. Moreover, he submitted that the appellant

entered into agreement with a fictitious person who misrepresented herself as the respondent. He argued further that the appellant has to blame herself for not being careful in entering into a fictitious agreement. In the end, he prayed that this ground of appeal be equally dismissed for lacking merits.

On our part, we think that the trial judge properly found that although the appellant claimed to have conducted the search, she did not tender the search report or the exchequer receipt to substantiate her testimony. The trial judge went further and observed that there was ample evidence that the appellant did not enter into any valid sale agreement with the respondent.

We are thus of the settled view that the trial judge cannot be faulted for having made that finding on the search of the disputed property. The appellant was duty bound to place before the trial court the search report and explain its implication to her claim to be declared as the lawful owner of the disputed premise. In the circumstance, we find that ground four has no merit. We accordingly dismiss it.

In the final analysis, save for ground one which we have allowed, the appeal is dismissed with costs. We so order.

DATED at **DAR ES SALAAM** this 19th day of March, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F.L. K. WAMBALI
JUSTICE OF APPEAL

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

J. S. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL