IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MZIRAY, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 241 OF 2018

STRABAG INTERNATIONAL (GMBH) ..... APPELLANT

VERSUS

ADINANI SABUNI ..... RESPONDENT

(Appeal from the Judgment and decree of the High Court of Tanzania, at Tanga)

(Msuya, J.)

dated the 4th day of July , 2016
in
Civil Appeal No. 3 of 2006

.....

JUDGMENT OF THE COURT

19th February & 20th May, 2020

MWAMBEGELE, J.A.:

This is a second Appeal. It emanates from the decision of the District Court of Korogwe (K. S. Mkwawa, SRM) in Civil Case No. 17 of 2014 wherein the respondent instituted a suit against the appellant in which he claimed for Tshs. 30,889,040/= as special damages for the tort of negligence. He also prayed for general damages. The respondent claimed that the appellant, who was rehabilitating the Mombo - Same Road,

negligently and without taking reasonable care, allowed the rain running surface water into his farm (about 5,600 square metres) situated at Mombo Township, thus causing destruction of his crops, mainly maize and *ocrapus sawan*. That suit proceeded in the absence of the appellant. The respondent lost.

Dissatisfied, the respondent successfully appealed to the High Court. He was awarded Tshs. 30,889,040/= special damages and Tshs. 2,000,000/= general damages as well as costs of the suit. Aggrieved, the appellant has now come to the Court on six grounds of grievance; namely:

1. *That, the Appellate Court erred in law and facts, when it failed to observe that, in circumstances of the lodged case, the issue of "ownership" was relevant and should have been considered first and proved by the Respondent as it was done by the trial court;*

2. *That, the Appellate Court erred in law, when it failed to observe that, since the Respondent's claim of Tshs 30,890,040/= was specifically pleaded it should have been strictly and adequately proved by the Respondent;*

3. *That, the Appellate Court erred in law and facts, when it failed to observe that, there was no evidence showing that, the*

Appellant negligently channelled the road rain running water, to the Respondent's farm;

4. *That the Appellate Court erred in law, when it failed to observe that, the issue of negligence ought to have been pleaded in the plaint and given sufficient particulars as regards to the Appellant's negligent acts, while constructing the Mombo-Mkumbara road High way; and*

5. *The Appellate court erred in law and facts when it failed to observe that the trial court was correct and perfect when it dismissed the Respondent's claim, on ground that, it was not proved to the standard required.*

The appeal was argued before us on 19.02.2020 during which both parties were represented. The appellant and respondent appeared, respectively, through Messrs Stephen Leon Sangawe and Phillemon Raulencio, learned advocates. The learned advocates had earlier on filed their respective submissions for or against the appeal which they sought to adopt as part of their oral submissions. They simply made some clarifications on them as required by the Tanzania Court of Appeal Rules.

In the written submissions in support of the appeal, it was submitted by Mr. Sangawe that on the first ground that the issue of ownership was

relevant and therefore it ought to have been proved first. He added that the question of ownership was not among the framed issues but it was apparent in the pleadings. He submitted that the provisions of Order XIV rule 5 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (the CPC) permits the course taken by the trial court to frame an additional issue or issues at any time before passing a decree. The learned counsel submitted further that the evidence adduced at the trial did not sufficiently establish that the respondent was the owner of the farm whose crops were allegedly destroyed. He added that Exh. P1 did not establish that the farm belonged to the respondent.

On the second ground, the appellant submitted that the respondent specifically pleaded in the plaint loss of Tshs. 30,889,040/= but did not specifically prove it. He added that the trial court was quite right to challenge Bale Makuli (PW2) who prepared the report on how he arrived at that amount. The learned counsel challenged the first appellate court that it erred in holding that the trial court based its decision on the question of ownership only as evident at pp. 94 – 95 while it was clear that the trial court stated also that the special damages were not specially proved. He relied on **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R. 137, at 139

and **Masolele General Agencies v. Africa Inland Church Tanzania** [1994] T.L.R. 192 to buttress the proposition that specific damages must be specifically proved.

On the third ground, the learned counsel submitted that the respondent led no evidence to show that the appellant negligently channeled the road rain running surface water to the respondent's farm. He added that though the respondent pleaded negligence in the plaint, he did not lead sufficient evidence nor give adequate particulars on how the appellant company negligently allowed rain running surface water to the respondent's farm resulting into the destruction of his crops. This failure, he submitted, makes the **Donoghue v. Stevenson** [1932] AC 562 distinguishable.

On the fourth ground, the appellant submitted that the first appellate court failed to observe that negligence ought to have been pleaded and particulars thereof given as regards the negligent acts which led to the destruction of the respondent's crops. He submitted further that the trial court properly directed its mind to this ailment and relied on **Bolam v. Frein Barnet Hospital Management Committee** [1957] 2 All ER 118 to

hold that there was no particulars of negligence brought to the fore by the respondent showing how the appellant was negligent. He thus submitted that the first appellate court erred in holding that the appellant had a duty of care to make sure that the respondent's crops were not destroyed by water which was negligently channeled to the respondent's farm. He added that the respondent ought to have led evidence to show that the appellant had a duty of care towards the respondent and that she breached that duty resulting into the damage of the respondent's crops. In the circumstances, he submitted, **Donoghue v. Stevenson** (supra) was wrongly applied by the first appellate court. Thus, he contended, the trial court was quite right to hold that the respondent did not prove the existence of a legal duty imposed on the appellant to prevent surface road running water during rainy seasons, to flow into the respondent's farm.

The last ground is a general one, it states that the first appellate court was in error when it failed to observe that the trial court was quite correct to dismiss the respondent's case on the ground that it was not proved to the required standard. The learned counsel cited the provisions of section 110 of the Evidence Act, Cap. 6 of the Revised Edition, 2019 to

buttress the proposition that the respondent was under legal duty to prove the existence of the facts he alleged existed.

For the respondent, Mr. Raulencio submitted that the question of ownership was not at issue and the subject matter was not land itself. That is perhaps why no issue regarding ownership was framed, he submitted. That notwithstanding, he argued, there was enough evidence to prove that the farm under discussion belonged to the respondent. That evidence came from the respondent himself who testified as PW1 and the Village Chairman of Majingo Kati who testified as PW3.

Regarding the second ground of appeal, the learned counsel submitted that the evidence of the three witnesses as well as Exh. P1 sufficiently established that the respondent's crops were physically destroyed. He added that the respondent involved the professional services of Joseph Makuli (PW2) who visited the farm and made a professional report which was admitted as Exh. P1. That amounted to proof of specific damages, he argued.

On the third ground, he submitted that the respondent has pleaded at para 3 of the plaint that the appellant acted negligently to channel the

rain running water to the respondent's farm thereby destroying his crops. He argued that the destruction was not caused by an act of God because the respondent had a duty of care to foresee his action of channelling rain running surface water was likely to injure the respondent who was a neighbour. He submitted that in the letter appearing at p. 20 of the record of appeal and para 3 of the written statement of defence the appellant admitted that she was acting on instructions of the TANROADS Resident Engineer. The learned counsel contended that the principle in **Donogue v. Stevenson** was rightly applied.

The learned counsel concluded that the appellant's acts of blocking surface rain running water outlets to accumulating water and channelling them to flow to the respondent's farm was an act of negligence which destroyed the respondent's crops.

Regarding the fourth ground, the respondent submitted that it was not raised in the first appellate court. That notwithstanding, the learned counsel submitted that negligence was pleaded at para 3 of the plaint that the appellant's negligence was channelling road rain running water into the

respondent's crops. That kind of pleading complied with Order VI rule 3 of the CPC which prescribes how pleading should be, he contended.

With respect to the fifth ground, the respondent simply stated that the respondent proved the suit to the required standard that the appellant negligently channelled road rain running surface water to the respondent's farm and destroyed his crops.

In a short rejoinder, Mr. Sangawe submitted that loss was not proved. He complained that Exh. P1 was addressed to the court; it was prepared by PW2 and it is not clear if he was asked by the court so to do. Regarding reference to a letter appearing at p. 20 of the record of appeal the learned counsel contended that that was an annexture to the written statement of defence and has never been an exhibit. The learned counsel submitted that it should not be relied upon. Regarding Exh. P1 and Exh. P2, Mr. Sangawe argued that they were discredited by the trial court and the appellate court ought not to have relied upon this evidence.

We have considered the contending arguments by the trained minds for the parties. We shall determine the appeal in the manner addressed by the learned counsel for the parties.

The subject of complaint in the first ground of appeal is that the first appellate court erred in not observing that the issue of ownership was relevant and should have been considered and proved first by the respondent as happened in the trial court. This ground will not detain us much. Surely the issue of ownership of the farm on which the crop were supposedly destroyed was not at issue in the trial court. The trial court embarked on it in the judgment without hearing the parties on it. Understandably, the suit proceeded *ex parte*; without the appellant who, allegedly, defaulted appearance for quite some time after filing her defence. However, it is not clear on the record if the appellant was notified of that day's hearing.

Be that as it may, we think it was incumbent upon the trial court to summon the respondent to hear him on the question of ownership after the trial court realised that it will base its decision on that aspect. Deciding as it did was tantamount to condemning the respondent unheard thereby abrogating the principle of *audi alteram partem*, one of the basic principles of natural justice. We have more often than not, held that once a magistrate or judge discovers an issue of law after the closure of evidence and submissions which might be decisive of the case, the interest of justice

dictates that parties must be given opportunity to air their views before the court make a decision on the point – see: **Ibrahim Omary (EX.D 2323 Ibrahim) v. The Inspector General of Police and 2 others,** Civil Appeal No. 20 of 2009, **Mire Artan Ismail & Another v. Sofia Njati,** Civil Appeal No. 75 of 2008 and **John Morris Mpaki v. NBC Ltd & Ngalagila Ngonyani,** Civil Appeal No. 95 of 2013 (all unreported decisions of the Court). In **John Morris Mpaki**, we articulated that any decision affecting the rights or interests of a party is a nullity even if the same decision would have been arrived at had the affected party been heard.

Under normal course of things, having found and held that the *audi alteram partem* rule was affronted, we would have proceeded to nullify the proceedings and ordered its compliance. However, we agree with Mr. Raulencio and the first appellate court that the question of ownership was not at issue. Even though the question of ownership was not at issue, we think the respondent sufficiently pleaded that he was the owner of the farm under discussion. We are fortified in this view by **Mogha's Law of Pleadings in India, with precedents** by S. N. Dhingra and G. C. Mogha,

18th Ed., wherein at p. 89 it is provided how title to property should be pleaded. It is stated:

> *"In cases when a party alleges himself to be the owner of land, he need not give any particulars of his title if he is in possession, but may simply allege his title, unless he admits the legal title of the other party and relies only on some specific title in himself."*

In addition to the above, we are increasingly of the view that, upon proof, the respondent would be entitled to relief even if the farm did not legally belong to him. If anything, what was relevant was proof that the destroyed crops belonged to him. It is common practice in this jurisdiction that people hire farms for cultivation for a certain season or seasons. The trial court thus erred in pegging ownership of land as the basis of reliefs prayed.

Be that as it may, as Mr. Raulencio rightly put, there was enough evidence to prove that the farm belonged to the respondent. The respondent himself who testified as PW1 gave evidence that the farm belonged to him as he bought it from one Juma who was then deceased. That evidence found support in the testimony of Nurdin Idd Sechonge

(PW3); the Chairman of the village in which the farm is situate and owned a farm close to the respondent's. PW3 testified that the farm belonged to the respondent after buying it from a certain Juma Hotel.

The above said, we think there was sufficient evidence to prove that the respondent owned the farm under discussion. Thus the High Court was quite in right track to decide the way it did. We find no merit in the first ground of appeal and dismiss it.

Next for consideration is the second ground of appeal which is a complaint that since the respondent's claim of Tshs 30,890,040/= was specifically pleaded, it should have been strictly proved. The learned counsel for the parties are at one on the standpoint of the law that special damages must be specially pleaded and proved as consistently held by the Court in, for instance, **Zuberi Augustino v. Anicet Mugabe** (supra) and **Masolele General Agencies v. Arfica Inland Church Tanzania** (supra); the cases cited by the appellant and **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001, **Arusha International Conference Centre v. Edward Clemence**, Civil Appeal No. 32 of 1988 and **Anthony Ngoo & Another**

v. Kitinda Kimaro, Civil Appeal No. 25 of 2014 (all unreported decisions of the Court), to mention but a few. The issue on which the parties have locked horns is whether the respondent specially proved the special damages. We think the appellant is right on the contention that the respondent did not specially prove the loss. We shall demonstrate.

First, the respondent's allegedly specifically proved the special damages through himself and Exh. P1. In his testimony, the respondent testified that his crops were destroyed and that the damage stood at Tshs. 889,040/= according to the valuation of crops done by PW2. We do not think this testimony of the respondent met the threshold of specific proof.

Secondly, the testimony of PW2 who made the valuation, and prepared a report, of the destroyed crops is that the damage was worth Tshs. 889,040/=. That valuation is contained in a letter dated 26.03.2014 from the Mombo Township Authority to the District Magistrate, Korogwe. The letter is titled:

> *"REF: ESTIMATE OF CROP DAMAGE/DESTRUCTION BELONGING TO ADINANI SABUNI CAUSED BY STRABAG CONSTRUCTION COMPANY (T) CHANNELLING SURFACE RUN OFF*

WATER FROM ROAD ***TO MY FARM*** *WITHOUT NOTICE".*

[Emphasis supplied].

That letter was addressed to the District Court. We wonder, as Mr. Sangawe did, whether the trial court requested for that document and how it came into possession of PW2 who tendered it as an exhibit. Surely, the possibility that the report was prepared on the request of the respondent for the purpose of the case the subject of this appeal cannot wholly be overruled. Be that as it may, the valuation was made on the basis that each plant would produce two maize cobs and each maize cob would produce how many kilograms of maize and how many kilograms the farm would eventually produce and how much would it ultimately fetch in the market. The like was an assessment in respect of *ocrapusa sawan*. At the end of the day, the report shows that the destroyed maize and *ocrapus sawan* would have, respectively, fetched Tshs. 1,769,040/= and Tshs. 29,120,000/= which make a total of Tshs. 30,889,040/=. We highly doubt if this amounts to specific proof of the special damages. We so doubt because the prices are determinant upon several factors including using proper manure or fertilizers, the market fluctuation in prices,

assurance that the crops would grow up to harvest, etc. In the circumstances, we do not think the valuation report by PW2, which based on assumptions, amounted to specific proof of the claim of special damages.

It may not be irrelevant to discuss, at this juncture, what strict proof entails in cases of special damages. As bad luck would have it both the trial and first appellate courts did not address the issue. Understandably for the trial court, it did not go into that detail because it found that the appellant had no duty of care to the appellant. The first appellate court simply faulted the finding of the trial court which supposedly pegged its decision on the issue of ownership and, thereafter, addressed the neighbour principle enunciated in **Donoghue v. Stevenson** and allowed the appeal and ended up awarding the appellant, *inter alia*, Tshs. 30,899,000/=. In this jurisdiction, as it is in most commonwealth jurisdictions, the law on specific damages is settled. Special damages, in accord with the settled law, must be specially pleaded and strictly proved as demonstrated by decided cases – see: **Zuberi Augustino v. Anicet Mugabe**, **Masolele General Agencies v. Arfica Inland Church Tanzania**, **Stanbic Bank Tanzania Limited v. Abercrombie & Kent**

(T) Limited, **Arusha International Conference Centre v. Edward Clemence** and **Anthony Ngoo & Another v. Kitinda Kimaro**; decisions of the Court cited earlier when dealing with the second ground of appeal. In the premises, we think the first appellate court fell into an error in awarding special damages as prayed by the respondent without specific or strict proof.

Thirdly, the respondent did not state anything about how much was spent on cultivation of the farm, buying of seeds, weeding and other expenses incurred before the alleged destruction. He has just burnt a lot of fuel on how much the destroyed crops would have fetched if they would have reached the market after harvest. We are of the view that the prices indicated in Exh. P1 are speculative; they cannot be used to justify an award of general damages. At this juncture, we find it irresistible to associate ourselves with the decision of the High Court (Samatta, J. – as he then was) in **Harith Said & Brothers Ltd v. Martin s/o Ngao** [1981] TLR 327 in which it was faced with an identical situation and stated:

> *"... unlike general damages special damages must be strictly proved. I cannot allow the claim for special damages on the basis of the defendant's*

bare assertion, when he could, if his claim was well founded easily corroborate his assertion with some documentary evidence. For all one knows, the defendant might have been incurring losses when he was running the bus. The claim for special damages must be, and is dismissed ...."

For the avoidance of doubt, when the matter came on appeal in **Harith Said Brothers Company v. Martin Ngao** [1987] TLR 12, the Court allowed the appeal but concurred with the High Court on assessment of special damages in the foregoing excerpt. The Court observed at p. 16:

"The trial judge dealt with the claim for special damages by the Company but came to the conclusion that no special damages had been satisfactorily proved. We concur with that view."

In the case at hand, the respondent, apart from merely throwing figures in Exh. P1 on how much would the alleged crops have fetched in the market after harvest, no evidence at all was led in support of the alleged figures. We subscribe to the position taken by the High Court in **Harith Said & Brothers** (supra) and endorsed by the Court that the respondent should have corroborated the assertion with some documentary or other evidence. We have in mind here evidence like what

were the prices in the market for that season, how much was spent up to the moment of the destruction, how much would have been spent to transport the crops to the market and how much was the actual loss? Short of these details, the loss remains speculative which cannot support an award for special damages.

Fourthly, we do not find any admission on the appellant's part to have committed the act complained of as the respondent would want us believe. As already alluded to above, the respondent relied in part on the letter appearing at p. 20 of the record. As rightly put by Mr. Sangawe, that letter was an annexture to the appellant's written statement of defence. It was never tendered in evidence. It is not evidence. It cannot therefore be relied upon – see: **Japan International Cooperation Agency (JICA) v. Khaki Complex Limited** [2006] T.L.R. 343 and **Godbless Jonathan Lema v. Mussa Hamisi Mkanga & 2 others**, Civil Appeal No. 47 of 2012 (unreported); both decisions of the Court.

In view of the above, we are of the considered view that the respondent did not strictly prove the special damages claimed. The second ground of appeal succeeds.

We now turn to determine the third ground of appeal which is a complaint that the first appellate court erred in law and facts when it failed to observe that there was no evidence showing that the appellant negligently channelled the road rain running water to the respondent's farm. In respect of this ground, the appellant submitted that the respondent led no evidence to show that the appellant negligently channeled the road rain running surface water to the respondent's farm resulting into the destruction of his crops. According to the appellant, this failure makes **Donoghue v. Stevenson** distinguishable. On the other hand, the respondent contends that the case at hand falls within the scope and purview of **Donoghue v. Stevenson**.

We have considered the contending arguments of the learned counsel for the parties on this point. Having so done, we think it is apposite to expound what is the law as enunciated in the most cited case on the point; the case of **Donoghue v. Stevenson**. As rightly submitted by Mr. Raulencio, the case established what is known as the neighbour principle. Lord Atkin's neighbour principle in **Donoghue v. Stevenson** was summarized in the following words:

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

We admit that the principle in **Donoghue v. Stevenson** is applicable in the present case. But that will be subject to proof that the appellant acted negligently; the subject of the fourth ground of appeal to which we now turn.

The fourth ground of appeal seeks to challenge the first appellate court that it erred in law in failing to observe that negligence ought to have been pleaded in the plaint and given sufficient particulars as regards the appellant's negligent acts. Admittedly, the respondent simply stated that the appellant negligently channelled the rain surface running water to the appellant's farm thereby destroying crops worth the amount stated above. No acts of negligence were particularised. The learned authors of

Mogha's Law of Pleadings in India, with precedents (supra) at p. 78, relying on a number of English and Indian decisions, guide us on how negligence should be pleaded:

> *"In an action for negligence, the plaintiff must give full particulars of the negligence complained of and of the damages he has sustained. Without a pleading and proof, negligence cannot be countenanced and the decree for damages cannot be awarded. The plaint must clearly allege the duty enjoined on the defendant with the breach of which he is charged."*

The foregoing said, we are firm that the respondent did not plead negligence by giving particulars in the manner articulated above. This ground is thus meritorious and we allow it.

As for the last ground of appeal, we are of the considered view that the respondent did not prove the case to the required standard; on the preponderance of probabilities. He was not entitled to the reliefs granted by the High Court on first appeal. Despite the fact that we affirm the decision of the trial court, we are firm that it is apparent in this judgment that it is for somewhat different reasons.

For the reasons we have endeavoured to give, we are constrained to allow this appeal with costs.

DATED at **TANGA** this 20th day of April, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 20th day of May, 2020 in the presence of Mr. Sangawe learned Advocate for the Appellant and Ms. Nodina Bippa Advocate holding brief of Mr. Philemon Laurenio, learned Advocate of the Respondent.

I certify as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL