IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 125 OF 2016

CHARLES CHRISTOPHER HUMPHREY RICHARD KOMBE t/a HUMPHREY BUILDING MATERIALS.....APPELLANT

VERSUS

KINONDONI MUNICIPAL COUNCIL .....RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, (Land Division), at Dar es Salaam)

(Mutungi, J.)

dated the 29th day of September, 2014
in

Land Case No. 118 of 2007

JUDGMENT OF THE COURT

12th July, & 2nd August, 2021

MWANDAMBO, J.A.:

The appellant lost to the respondent before the High Court in a suit for compensation for the alleged unlawful demolition and confiscation of sundry items from an open space along Old Bagamoyo Road, Kinondoni District, Dar es Salaam Region. The High Court (Mutungi, J.) dismissed the suit which aggrieved the appellant and hence the appeal to this Court.

The appellant's suit, Land Case No. 118 of 2007 was triggered by events which took place on 18/2/ 2006. There was no dispute before the

High Court that, on 18/2/2006 when the respondent's officials stormed into the appellant's place of business, an open space along Old Bagamoyo Road, Msasani Butiama area within the jurisdiction of the respondent. That is the place where the appellant had erected a container and making cement bricks for sale allegedly doing so on a valid permit issued to him on 06/06/1993. The respondent disputed that the appellant had any permit to occupy the open space and operate the business and hence the forceful demolition of the structures and removal of sundry items on 18/02/2006. It was not in dispute that a number of items including the container and bricks were removed and taken away by the respondent's officials to an unknown place and that the said items had not yet been returned to the appellant at the time of institution of the suit before the High Court (Land Division). The dispute centered on the lawfulness of the respondent's act.

Whereas the appellant maintained that it had a valid permit from the respondent dating back from 1993 to operate a business, the respondent took an opposite stand. It maintained that the appellant was a trespasser at the open space in so far as it had not at any time issued any permit to him to operate the business which resulted into the issue of a notice to vacate which went unheeded to culminating into the forceful eviction and removal of the disputed items. To justify his stay,

the appellant took refuge from a permit allegedly issued to him; No. CE/M/10/95 in the year 1993. He also relied on his acquittal in Criminal Case No. 2310 of 1999 in which he stood charged before the Resident Magistrate's Court at Sokoine Drive henceforth, the City Court, on three counts; erecting a stall without permit, failure to comply with notice and failure to remit to the authority charges and fees all in contravention of the Dar es Salam City Council By Laws, 1991. In a judgment delivered on 17/12/ 2004, the City Court acquitted the appellant on all counts. On appeal to the High Court in Criminal Appeal No. 45 of 2005, Kalegeya, J (as he then was), upheld that decision.

Armed with the judgment of the City Court, the appellant instituted the suit as aforesaid claiming TZS. 2,145,000,000.00 being the value of the containers, items and materials alleged to have been unlawfully taken from the disputed land. The description of the items was contained in a list prepared by the appellant admitted during the trial as exhibit P2. He also claimed interest, costs and other reliefs.

As alluded to earlier on, the respondent resisted the suit alleging that the appellant had no valid permit to occupy and operate business at the disputed land. It discounted the appellant's acquittal in the criminal case contending that the appellant could not rely on it because it had

challenged it in Criminal Appeal No. 45 of 2005. However, as seen above, in its judgment (exhibit P4), the High Court dismissed that appeal upholding the judgment of the trial court (exhibit P1). The High Court held that the appellant had a valid permit on yearly basis which could be revoked for any reason legally deemed fit.

The High Court determined the suit upon three issues it considered proper, that is to say: the legality of the confiscation of the appellant's properties, entitlement to compensation and the reliefs. The trial court dismissed the suit upon being satisfied that the appellant had not succeeded in discharging his burden of proof to the standard required in civil cases that it had a valid permit to occupy the disputed land. At any rate, the trial court found that the appellant had failed to prove his claim for compensation in claimed amount of TZS. 2,145,000,000.00.

Not amused, the appellant has sought to overturn that judgment faulting the trial court on three grounds of appeal namely; **one**, erroneously holding that the permit issued to the appellant was on year-to-year basis and had expired thereby dismissing the suit; **two** wrong evaluation of the evidence on record thereby reaching at a wrong

conclusion and decision; and **three,** dismissing the suit against the sufficient evidence on record.

Like he did in the High Court, Mr. Julius Kalolo- Bundala learned advocate, represents the appellant in this appeal. The learned advocate appeared during the hearing to argue the appeal and did so by combining his submissions on all grounds. The learned advocate kicked off his submissions making reference to the respondent's pleadings particularly para 4 of the written statement of defence which did not deny the appellant's averments in paras 5, 6 and 7 of the plaints. He argued that instead, the respondent predicated its defence on the existence of the criminal appeal against the judgment of the City Court which acquitted the appellant of the charges involving, *inter-alia*, occupying the suit land without a permit. As it turned out, the learned advocate argued, that line of defence no longer held water upon the High Court dismissing that appeal and sustaining the acquittal.

In that regard, Mr. Bundala contended that the respondent was bound by its own pleadings admitting forceful demolition of the appellant's structures and removal of his items from the disputed land. In any case, the learned advocate contended the respondent demolished the structures at the suit land and took away the items in

exhibit P2 at a time when the criminal appeal was still pending before the High Court.

It was the learned advocate's further submission that contrary to the finding of the trial court, the appellant had a valid permit and thus it was not correct for the learned Judge to have held as she did that the appellant had not discharged his burden of proof on the unlawfulness of the demolition and thus entitled to compensation as claimed. At the Court's prompting, the learned advocate contended that the permit that the appellant had was not for any specified period as found by the High Court. He also argued that in any event, there was no evidence that the permit was revoked at any time before the impugned demolition on 18/02/2006.

With regard to compensation, the learned advocate argued that since the appellant had discharged his burden of proof with regard to possession of a valid permit, and there being no dispute that the respondent had not returned the items taken away from the appellant's place of business, the trial court should have awarded compensation for the value thereof on the basis of exhibit P2. He submitted further that the appellant discharged his burden on the existence of the items through exhibit P2 considering that the respondent took away the items

without doing any handover. Similarly, he relied on the evidence of Exavian Ndalawa (DW2) on the number of days taken to remove the items to be consistent with the appellant's claim through exhibit P2 on the quantity of the items which, according to him was not contradicted. Otherwise, the learned advocate urged the Court to award general damages in the unlikely event it will find that the evidence proving the specific claims was wanting.

Messrs. Daniel Nyakiha, Charles Mtae and Benson Hosea all learned State Attorneys teamed up to resist the appeal on behalf of the respondent. Mr. Nyakiha, who argued the appeal, took off his submissions with a contention that the appellant was a trespasser in the absence of any permit authorizing him to occupy and operate business at the disputed land. It was his argument that as found by the trial court relying on the decision of the High Court in the criminal appeal, the permit the appellant had was for year to year which had not been renewed by 18/2/2006. He thus urged the Court to sustain the finding of the trial court and dismiss ground one. In relation to the proof of the specific claim, the learned State Attorney argued that the trial court rightly rejected the claim because the appellant was not only a trespasser but also failed to discharge his burden proving a specific claim based on guess work rather than cogent evidence. The learned

State Attorney relied on our previous decisions in **Director Moshi Municipal Council v. Stanleanard Mnesi & Another,** Civil Appeal No. 246 of 2017 and **Director Moshi Municipal Council v. John Ambrose Mwase,** Civil Appeal No. 245 of 2017 (both unreported). The two decisions were cited to reinforce the proposition that demolition is a direct consequence where there is no valid permit by the authority in respect of a disputed land. That aside, the cases were cited to underscore the argument that specific damages cannot be awarded to a litigant unless there is strict proof thereof. Mr. Nyakiha invited the Court to dismiss the appeal for lack of merit.

Submitting in rejoinder, the learned advocate for the appellant argued that in the absence of any evidence that the disputed land was an open space by way of a Government Notice, the demolition was not justified. He also brushed off the reliance on the decision of the High Court in the criminal appeal for being erroneous considering that it was made years later post the impugned demolition. As to the cases referred to by the learned State Attorney, he brushed them off for being distinguishable. He did not go further explaining in what way they were inapplicable to the instant appeal.

Having heard the submissions for and against the grounds of appeal in the light of the judgment of the High Court, it is plain that the determination of the appeal turns on whether the appellant discharged his burden of proof in relation to the permit and if so, did he satisfy the trial court that he was entitled to compensation on the amount claimed.

For a start, we propose to dispose of a few aspects that featured in the oral address which we consider to have a bearing on the determination of the issues in the appeal. Mr. Kalolo- Bundala made a suggestion at the beginning of his submissions that the respondent was bound by its pleadings in para 3 of its written statement of defence with regard to the removal of items from the disputed land pegged on the existence of the unsuccessful criminal appeal. We understood the learned advocate suggesting that since the appeal was determined in the appellant's favour, the respondent's defence in para 3 was no longer valid and thus the appellant's averments in paras 5, 6 and 7 of the plaint should be taken to have been undisputed.

The learned advocate is undeniably right on the law; parties are bound by their pleadings. The rule aims at barring parties from departing from their pleadings during the trial thereby taking the opponent by surprise in line with our previous decisions, amongst

others; **James Funke Gwagilo v. Attorney General** [2004] T.L.R 161. Nevertheless, there is no suggestion that the respondent departed from the pleadings rather, it must be taken to have admitted the contents of paras 5, 6 and 7 of the plaint. We agree that the respondent did not dispute having demolished the structures and taken away the items from the disputed land but, it contended that it did so lawfully because the appellant was a trespasser. Examined closely, the respondent pegged its defence on the criminal appeal because it is the appellant who, in the first place, premised his case on his acquittal from the charges before the City Court being challenged on appeal. Granted that the appellate court upheld the appellant's acquittal but what was the relevance of it in the suit before the trial High Court? The answer can easily be found from section 43A of the Evidence Act [Cap. 6 R.E. 2019] which stipulates: -

> *"43A.* ***A final judgement of a court in any criminal proceedings shall,*** *after the expiry of the time limit for an appeal against that judgement or* ***after the date of the decision of an appeal in those proceedings, whichever is the later, be taken as conclusive evidence that the person*** *convicted or* ***acquitted was*** *guilty or* ***innocent of the offence to which the judgement relates".*** *(Emphasis added)*

The section appears to us to be too plain to admit any other construction than what it says. The judgment of the High Court was only relevant as it related to the appellant's acquittal. It was not relevant to prove that the appellant had a valid permit to occupy the disputed land. A detailed commentary on the relevance of judgments in criminal trials to subsequent civil proceedings from the selected cases in India by the learned authors of Sarkar's Laws of Evidence, 18th Edition, **M.C. Sarkar, S.C. Sarkar and P. C. Sarkar,** published by Lexis Nexis shows that neither conviction nor acquittal in a criminal case binds a trial court in a civil suit and vice versa on similar allegations. Several examples are given from decided cases and for our purpose, we prefer to pick an illustration from a suit on malicious prosecution extracted from page 1167 thus:

> *"The order of the criminal court is admissible to prove acquittal, but the conclusions drawn are not binding, though the judgment may be looked at for seeing the circumstances which resulted in acquittal. ... In deciding a suit for damages for malicious prosecution the duty of the civil court is to consider the evidence independently from the judgment of the criminal court and to come to its own finding if there is reasonable and probable cause."*

We have no slightest doubt that the above reflects a correct legal position on the correct interpretation of section 43A of Cap. 6. From the above, it will be clear that despite the High Court sustaining the appellant's acquittal particularly on the count connected with erecting a stall without permit. Such acquittal did not bind the trial court in the suit to determine an issue based on the lawfulness of the demolition. We are thus satisfied that the trial court's finding based on the judgment in the criminal appeal was erroneous in so far as it went beyond the appellant's acquittal. Undeniably, it influenced the learned Judge on such aspects as the duration of the permit and the respondent's power to revoke it for any reason it may deem fit subject to issuance of notice. Such a finding must be and is hereby set aside. Be it as it may, the acquittal aside, did the appellant discharge his burden of proof in the suit? We shall turn our discussion to that question shortly.

The first issue before the High Court related to the lawfulness of confiscation of the items. In our view, that issue ought to have followed resolution of the existence of a valid permit authorizing the appellant to conduct business at the disputed land. Nevertheless, it is clear from the impugned judgment that existence of a permit featured prominently before making a finding that the confiscation was lawful. That being the

case, was the trial court's finding erroneous as claimed by the appellants' learned advocate? To come to a conclusion this way or the other, it will be necessary to re-apprise the evidence on record which we are permitted to do by rule 36(1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

It is not in dispute that apart from reference to a permit described as Ref. No. CE/M/10/95 in para 3 of the plaint, the appellant did not annex a copy of it. Neither did he tender it in evidence during the trial. It will be recalled that through para 2 of its written statement of defence, the respondent strongly disputed issuing the alleged permit. That means that the burden remained on the appellant proving that he was issued with that permit regardless of what the respondent averred in para 3 of the written statement of defence. There was a suggestion by PW1 during the trial that all of his documents were destroyed by the respondent during the demolition exercise. Yet, in another breath, PW1 is on record at pages 68 and 69 of the record of appeal that the document proving his occupation and use of the disputed land was tendered in another case; Land Case No. 107 of 2007. It is not clear to us how could the document said to have been destroyed be available for tendering in another case. Besides, it is equally unclear to us how could the appellant skip to annex a copy of the permit authorizing him to

occupy the disputed land in a case involving a claim of a whooping sum as high as TZS. 2,145,000,000.00 and fail to produce such document in evidence or make attempts to retrieve it from the same court.

On the other hand, the evidence of DW2 both in cross examination and re-examination (at pages 93 and 95 of the record of appeal), shows that the appellant took away all his documents with him in his bag. DW2 contradicted PW1's evidence at page 68 of the record of appeal where he told the trial court that the permit was tendered in another case. By another case, we think PW1 meant Land Case No. 107 of 2007 instituted prior to the suit, subject of this appeal. Be it as it may, from our examination of the record, there is no dispute that the appellant's suit was predicated on the judgment of the City Court in Criminal Case No. 2310 of 1999 upheld by the High Court in Criminal Appeal No. 142 of 2005. It was thus contended that since the appellant was acquitted of the charges inclusive of possession of the forged permit, his stay on the disputed land was lawful and so the demolition was unjustified.

Mr. Kalolo -Bundala impressed upon us that the permit had not been revoked and so the trial court was wrong in dismissing the suit. The argument sounds attractive but, as we have already demonstrated above, the appellant did not tender any permit during the trial as part of

his evidence. The only permit is that which was a subject of criminal case No. 2310 of 1999 and Criminal Appeal No. 42 of 2005 that is; Ref. No. CE/M/10/45 dated 06/06/1993 (exhibit P6 in the criminal trial) distinct from CE/M/10/95 referred to in para 3 of the plaint. So, if parties have to be bound by their pleadings as correctly argued by Mr. Kalolo-Bundala, the relevant permit is CE/M/10/95. As we have held that the findings in the criminal proceedings were irrelevant to the suit, the learned advocate's submission on the expiry and revocation of the permit has no relevance in the instant appeal. That means, the order acquitting the appellant did not authorise him to occupy the suit land. Under the circumstances, we are constrained to agree with the trial court that the appellant failed to discharge his burden of proof that he had a valid permit to occupy the suit land.

For the sake of completeness, as the learned advocate for the appellant may be aware, it is not the law that the litigant's burden of proof in a suit is made lighter by reason of the weakness, if any, in the opponent's case. At the risk of making this judgment unduly long, we feel constrained to refer yet again to commentaries from decided cases in India referred in the works of Sarkar (supra) at page 1896 as follows: -

> *"...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. ...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...."*

There can be no better words to express our view and conclude as we do that, the appellant's evidence was too weak to discharge his burden of proof that he had a valid permit. He could not ride on the seemingly weak case of the respondent. Consequently, the trial court was right in dismissing the appellant's suit.

The above disposes the appellant's grievances in relation to the lawfulness of the impugned demolition. Ordinarily that would have been sufficient to dismiss the appeal but we think it will be necessary for the sake of completeness to discuss, albeit briefly, the second issue in relation to the claimed compensation.

There is no doubt that the claim for TZS. 2,145,000,000. 00 was in the form of specific damages which ought to have been specifically pleaded and strictly proved. The law is so settled on this that one need

not cite any authority but if any will be required, the cases referred to us by the learned State Attorney, to wit: **Director Moshi Municipal Council v. Stanleanard Mnesi & Another** and **Director Moshi Municipal Council v. John Ambrose Mwase** (supra) cannot be more apt. The two cases are relevant to the appeal despite Mr. Kalolo-Bundala's submission suggesting that they are distinguishable. Others include: **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R 137, **Stanbic Bank Tanzania Ltd v. Abercrombie & Kent (T) Ltd,** Civil Appeal No. 21 of 2001 and **Nyakato Soap Industries Ltd v. Consolidated Holding Corporation,** Civil Appeal No. 54 of 2009 (both unreported). In the latter decision, we quoted with approval a passage in **Bolag v. Hutchson** [1950] AC 515 in the judgment of Lord Mc Naughten thus:

> *"Special damages are.... such as the law will not infer from the nature of the act. They do not flow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly..."*

We are satisfied, as the learned trial Judge did, that the evidence proving the claimed monetary compensation was far below the required standard with regard to the existence of the items as well as the values attached there to per exhibit P2. It is common ground that the list was

based on guess work as admitted by PW1.The list in exhibit P2, without any other evidence in support of it was not the kind of the evidence required to prove a specific claim. Neither would the number of days taken in removing the items as argued by the learned advocate or the alleged admission could have sustained the claim for compensation on the amount claimed or at all.

The above said and save for the setting aside of the trial court's finding based on the judgment in the criminal appeal, we find no merit in any of the grounds of appeal. In consequence, we dismiss the appeal in its entirety with costs.

DATED at **DAR ES SALAAM** this 28th day of July, 2021

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 2nd day of August, 2021 in the presence of Mr. Kalolo Bundala learned counsel for the appellant and Mr. Daniel Nyakiha, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL