**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MWARIJA, J.A., GALEBA, J.A, And KENTE, J.A.)**

**CIVIL APPEAL NO. 45 OF 2020**

**STANDARD CHARTERED BANK (T) LTD..... APPELLANT**

**VERSUS**

**SAMWEL NYALLA NGHUNI.....RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)**

**(Rumanyika, J.)**

**dated the 10th day of July, 2019**
**in**
**Civil Case No. 27 of 2018**

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# JUDGMENT OF THE COURT

21st & 28th February, 2023

## KENTE, J.A.:

This appeal is against the judgment and decree (ex parte) of the High Court (sitting at Mwanza) (the trial court), in respect of a suit instituted by the respondent Samwel Nyalla Nghuni against the appellant Standard Chartered Bank (T) Limited upon allegations of breach of contract and professional negligence.

Briefly, the facts giving rise to the suit before the High Court and subsequently the appeal before this Court, were to the following effect. The appellant and respondent were respectively a banker and customer. It was common grounds that, in 2016, the respondent was operating a forex bank

account (No. 87501114119500) at the appellant's Mwanza Branch. From the 1st June, 2016 to 13th March, 2017 the respondent travelled to Dar es Salaam and later on to India for a medical check-up and treatment. It was alleged before the trial court that, during his absence, some of the respondent's dishonest employees took advantage of his absence due to illness and made several unauthorised withdrawals out of his account by forging his signature. The respondent alleged that, while he was in India, he went to withdraw some money with a view of footing his medical bills, only to find that he had no sufficient funds in his account. He claimed that, the appellant's act made him physiologically (sic) unstable as it caused him embarrassment and a lot of misunderstandings between him and the members of his family. It was further contended that, to exacerbate the already embarrassing situation, the appellant had kept him in the dark by cutting off the short message service alert which are usually sent to customers alerting them to essential information.

As a result of all this, the respondent claimed that, he suffered tremendous damage and loss as he suddenly and unexpectedly found himself impecunious in a foreign country where he had gone to seek medical treatment. He went on claiming that, he came to know about the unauthorised withdrawals sometimes in May, 2017 when the appellant allegedly admitted their occurrence and advised him in writing that

investigations had been initiated and that, he would be contacted in due course.

Dissatisfied with the appellants action, he filed a suit in the trial court claiming, among other reliefs, general damages amounting to TZS. 350,000,000.00. He also asked the trial court to make a specific finding and judicial pronouncement that, the appellant bank was liable for breach of contract and professional mismanagement of his bank account.

However, on being served with a plaint and a summons for orders, the appellant did not file any written statement to traverse the respondent's allegation within twenty-one days in compliance with order VIII of the Civil Procedure Code, 1966 (the CPC) or appear before the trial court to resist the suit. Following the appellant's unexplained inaction, which must have baffled everyone, the respondent prayed for and was subsequently granted leave to prove his claim ex parte.

In his evidence, the respondent referred fleetingly to what he had pleaded in the plaint. He claimed that, during his absence, the appellant's officials forged his signature and fraudulently withdrew some cash from his bank account and that, after his account was left with no sufficient funds, he had no reliable means to settle the medical bill in India. He asserted that, a total of USD 24,000 was withdrawn from his account and, that the appellant's act caused him major embarrassment hence the claim for a

considerable amount of general damages. He also said that, having returned to Tanzania, he could not go back to India within the next six months for another check-up as prescribed by his doctor. Without leading any documentary evidence, the respondent claimed, that at last the appellant paid him his money by crediting it back into his account in September, 2018 and that, the appellant's fraudulent officers were subsequently charged in a criminal case which was still pending in court.

In his judgment, the learned trial Judge was satisfied and he accordingly found that, indeed a total of USD 24,000 was fraudulently withdrawn by the appellant's officials from the respondent's bank account and that, upon complaint, the said amount of money was subsequently paid back by the appellant. Without specifically addressing himself to the pertinent question which he had himself identified as the first issue to be determined that is, whether or not, whatever the appellant did in this case, amounted to a breach of contract, the learned trial Judge went on holding that, the respondent had suffered damage not because of the appellant's professional negligence but rather because of her employees who were not trustworthy. Undecisively, the trial Judge concluded that, the respondent might have suffered mental and psychological torture but the claim for TZS 350,000,000.00 as general damages was, for all purpose and intents, on the

high side. He then trimmed down the amount claimed to TZS. 20,000,000.00.

The appellant was not satisfied with the decision of the trial court. Deploying the professional legal services of IMMMA Advocates, she appealed to this Court, citing four grounds of complaint, thus:

1. That, after holding that the respondent did not suffer damage as a result of the appellant's conduct, the trial court erred in law and in fact in condemning the appellant to pay damages.
2. That, the trial Judge erred in law and in fact for awarding damages to the respondent on the basis of unproven mental psychological torture.
3. That, the trail Judge erred in law and in fact for awarding interest at the court rate for the period prior to the date of judgment, and
4. That, the evidence on record does not support the finding by the trial court.

In these proceedings, whereas Ms. Miriam Bachuba learned advocate appeared for the appellant, the respondent was represented by advocate Alex Lwoga.

Submitting in support of the first and second grounds of appeal and expounding on the written submissions which the appellant had filed earlier on in terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (hereinafter the Rules), Ms. Bachuba premised her argument on the well –

established principle that, general damages are damages that the law will presume to be direct, natural or probable consequence of the act or omission complained of. (Vide **Tanzania Saruji Corporation Vs. African Marble Company Limited** [2004] T.L.R. 155. Moreover, the learned counsel referred us to the case of **Alfred Fundi Vs. Geled Mango and two Others,** Civil Appeal No. 49 of 2017 (unreported), in support of the proposition that, while a Judge has discretion in awarding general damages, he is enjoined by law to assign reasons in awarding such damages.

Coming to the specifics of the present case, the learned counsel challenged the trial Judge for allegedly not assigning any reason for awarding TZS 20,000,000.00 as general damages for what she called "unproved" psychological torture. Ms. Bachuba contended further that, having found that the respondent had suffered damage not due to the appellant's professional negligence, the trial Judge ought not to have condemned the appellant to pay him general damages. The learned counsel faulted the learned trial Judge for allegedly relying on assumptions in arriving at the conclusion that the respondent had been subjected to mental and psychological torture. To that end, Ms. Bachuba strongly contended that, the award of general damages by the trial court was erroneous for want of supporting evidence. She thus invited us to sustain the first and second grounds of appeal as a foundation for her subsequent prayer that,

the appeal be allowed and the judgment and decree of the trial court be set aside.

Regarding the third ground of appeal which challenges the trial Judge for awarding interest on the decretal sum covering the period before delivery of judgment, Ms. Bachuba contended, and this was readily conceded by Mr. Lwoga that, the trial Judge should not have awarded retrospective interest on general damages. The second limb of Ms. Bachuba's contention on that aspect which was likewise conceded by Mr. Lwoga, is the award of interest beyond the prescribed rate contrary to Order XX Rule 21 of the CPC. In augmenting the submission on the third ground of appeal, Ms. Bachuba referred us to the case **of Saidi Kibwana and General Tyre E.A Limited Vs. Rose Jumbe** [1993] T.L.R. 175 where we held that:

> "Interest on general damages is only due after the delivery of judgment because before then the principal amount due is unknown".

In support of ground four, which was that the evidence on record did not support the finding by the trial court, Ms. Bachuba contended that; **one**, throughout the plaint, the appellant did not plead the amount of USD 24,000 which was allegedly withdrawn from his account; **two**, the respondent did not lead evidence to prove every occasion when the alleged money was withdrawn from his account and; **lastly**, whereas the suit was filed on 30th

October, 2018, the respondent produced print out of bank statements covering the period from March to December, 2016 (exhibit P4). It was contended that, the respondent should have produced bank statements for September, 2018 to show that indeed, the allegedly withdrawn money was finally credited into his account by he appellant. Ms. Bachuba invited us to draw an adverse inference against the respondent for his seemingly deliberate omission to produce the bank statement for September, 2018 which was very material in view of the issues obtaining in this dispute. On the strength of the foregoing grounds and arguments, the learned counsel beseeched us to allow the appeal.

On the other hand, in opposing this appeal, Mr. Lwoga was relatively very brief. In response to the first and second grounds, he submitted orally that, the learned trial Judge was correct to find the appellant liable because the evidence on record shows that the respondent had suffered damage as a result of unauthorised withdrawals of money from his account by the respondent's employees who had fraudulently accessed the respondent's account.

In response to the third ground, it was submitted very briefly that, the learned trial Judge was on firm ground when he rested his findings on the sole evidence of the respondent. It was argued that, the learned Judge's assessment of evidence was proper as it showed that indeed a substantial

amount of money was withdrawn from the respondent's account and subsequently paid back by the appellant after two years. According to Mr. Lwoga, the respondent had proved his claim following the appellant's failure to file defence and lead evidence to counter the respondent's averments. On the strength of the above arguments, Mr. Lwoga implored us to dismiss the appeal and sustain the judgment and decree of the trial court.

Having considered the judgment by the trial Judge, the arguments marshalled by the two learned counsel and the authorities cited therein, in determining this appeal, we shall be guided by the principle that, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, he must prove that those facts exist. (Vide section 110 (1)) of the Evidence Act, Chapter 6 of the Revised Laws. Together with the above paraphrased provision of the law, we shall have in mind section 110 (2) of the same Act which provides that:

> "When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

Our considered view of this appeal is that, it raises one compound question that is, whether there was evidence to support the trial Judge's finding of fact that a total of USD 24,000 was withdrawn by the appellant's officials from the respondent's account and later on credited back by the

appellant and, whether the alleged withdrawals, if any, occasioned damage to the respondent.

In arriving at the conclusion and making a finding that the respondent had his USD 24,000 withdrawn from his account by the appellant's officials and subsequently credited back, the learned trial Judge appears to have based his finding on the respondent's verbal assertions rather than the bank statement. We are saying so on purpose because, the bank statement that was tendered by the respondent to prove the alleged withdrawals, did not indicate that on different occasions a total amount of USD 24,000 was withdrawn from the respondent's account. Another serious shortcoming in the respondent's evidence as correctly submitted by Ms. Bachuba, is his failure to produce the bank statement for September, 2018 showing that, indeed following his complaints, the said amount of money was subsequently credited back into his account by the appellant.

In these circumstances, it is clear that the only bank statement which was tendered by the respondent and admitted in evidence as exhibit P4 did not support the respondent's claim that the specific amount of USD 24,000 which, as it turned out, was not even pleaded in the plaint, was fraudulently withdrawn from his bank account by the appellant's officials and later on credited back by the appellant. It follows in our judgment that, going by the evidence on the record, it was not proved to the required standard that, the

appellant had breached the contract between her and the respondent or that she had failed to fulfil the professional duties or obligations if any, that she was contracted and expected by the respondent to fulfil.

Since we have made a finding that there was no proof of breach of contract by the appellant, the first and second grounds of appeal must succeed and we accordingly sustain them.

We also wish to add, for the benefit of the legal fraternity that, regardless of whether or not the matter proceeded ex parte, a plaintiff in a civil case is not relieved or absolved of the duty to prove the case against the defendant on the required standard. (See **Kalyango Construction and Building Contractors . Limited Vs. China Chongqing International Construction Corporation** (CICO), Civil Appeal No. 29 of 2012 and **Mustafa Ibrahim Kassam T/A Rustam and Brothers Vs. Maro Mwita Maro**, Civil Appeal No. 76 of 2019 (both unreported). In other words, where a suit proceeds ex-parte against the defendant, the trial Judge or Magistrate does not assume the role of an umpire as to act as a conduit pipe for the plaintiff's averments to flow freely throughout and formally endorse them in the judgment. We are saying so because, it appears to us that, in the present case, the learned trial Judge endorsed the respondent's claim without subjecting his evidence to a careful scrutiny as required by law. For instance,

if the learned trial Judge had subjected the respondent's evidence to a careful examination, he would have easily found, among other things, that:

i) The bank statement (Exhibit P4) on which the respondent's claim was entirely based, does not show that a total of USD 24,000 was really withdrawn from his bank account;

ii) Apart from the respondent's mere word of mouth, there is no documentary evidence showing that the said amount of money was subsequently credited back into his account by the appellant;

iii) There is no evidence to substantiate the allegation by the respondent that because of the alleged unauthorised withdrawal of money from his account, there were a lot of misunderstandings between him and the members of his family; and

iv) None of the respondent's family members appeared before the trial court to testify so as to lend credence to the respondent's assertion regarding the alleged inner turmoil in the family.

Given the above shortcomings in the respondent's case, it would have been clear to the trial Judge to find that, there was neither a breach of contract nor professional negligence on the part of the appellant bank and that essentially, no damage was caused to the respondent as to justify the award of damages. Based on the above premise, he would have come to

the conclusion that the case against the appellant was not proved to the required standard.

Going by the above finding and conclusion, it would be rather superfluous for us to consider the remaining grounds of appeal which though seemingly plausible, their relevancy to this dispute is entirely dependant upon the outcome of the first and second grounds which we have sustained.

For the foregoing reasons and observations, we find merit in this appeal which we accordingly allow with costs.

**DATED** at **MWANZA** this 24th day of February, 2023.

A. G. MWARIJA
**JUSTICE OF APPEAL**

Z. N. GALEBA
**JUSTICE OF APPEAL**

P. M. KENTE
**JUSTICE OF APPEAL**

The Judgment delivered this 28th February, 2023 in the presence of Mr. Libent Rwazo, learned Counsel for the Appellant and Mr. Alex Lwoga, learned Counsel for the Respondent, via virtual link from Mwanza is hereby certified as a true copy of the original.


J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**