IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC CIVIL APPEAL NO. 3 OF 2015

(Originating from Civil Case No. 7 of 2013 of

Njombe District Court)

1. NJOMBE COMMUNITY BANK
2. COMRADE AUCTION MART & COURT BROKERS LTD -------- **APPELLANTS**

VERSUS

JANE MGANWA ------------------------------ **RESPONDENT**

11/02/2016 & 28/04/2016

JUDGMENT

KIHWELO, J.

This is an appeal against the decision of the District Court of Njombe (Hon. Kapokolo, RM) dated 21st April, 2015 in Civil Case No. 7 of 2013. The respondent sued the appellants for damages amounting to Tanzania Shillings Seventy Million Four Hundred Fourty Thousand Five Hundred

(TShs. 70,440,500/-) only, interest and costs of the suit. The respondent was successful at the trial court hence this appeal.

The facts in this appeal can be simply stated. Sometimes on 10th July, 2012 the respondent and the first appellant entered upon a loan agreement for an amount of Tanzania Shillings Three Million (TShs. 3,000,000/-) only. The loan was to be repaid within the period of one year from the date of receipt of the loan. It was a term of the loan agreement that the said loan was to be repaid in instalments of TShs. 75,500/- each week. As a security for the said loan the respondent mortgaged her asserts namely two (2) TV sets worth TShs. 1,200,000/-, three (3) sofa sets worth TShs. 900,000/-, one (1) radio worth TShs. 150,000/- and a commercial business space/room worth TShs. 2,000,000/-. The respondent was further guaranteed by her husband one Stanley Kihupi as well as her group UWENDE. The husband confirmed that the listed assets belonged to the respondent and her husband and that in the event that the respondent is unable to repay the loan in the manner set by the bank the assets should be forfeited and sold by the group (UWENDE) in order to replenish the debt. Similarly the group members who appended their signatures

committed themselves that in the event that the respondent is unable to replenish the loan then their individual savings with the bank will be deducted to replenish the loan and incase the savings are insufficient to replenish the loan then their personal assets listed shall be forfeited and sold by the group to clear the debt. It is evident that the respondent did not keep up the promise of repaying the loan according to the agreed schedule of TShs. 78,000/- per week. Instead the respondent paid two installments in January, 2013, three installments in February, 2013 and merely one installment in March, 2013. It seems as though not a single time the respondent deposited the weekly TShs. 78,000/-. She either paid less or more and not specifically on weekly basis.

Consequently on 15th February, 2013 the second appellant upon the instruction of the first appellant served the respondent with a demand note requesting her to pay TShs. 3,237,134/- being the outstanding loan and interest and TShs. 323,713/- being fees for the second appellant. On 20th March, 2013 the second appellant forfeited assets and properties of the respondent and despite the respondent writing a demand note on 2nd April, 2013 the first and the second appellants did not heed to the demand. It is

on the basis of the above that the respondent instituted a suit against the first and the second appellants, in the District Court for:-

1. *That the defendant (sic) be ordered to return the plaintiff's properties of the equivalent value of the properties to the tune of TShs. 20,440,000/-.*
2. *General damages of TShs. 50,000,000/- for harassment, disturbances and mental suffering caused to the plaintiff and her family by the defendants.*
3. *Costs of the suit.*
4. *Interest on a principal sum of commercial rate from the date of judgment to the date of payment.*

The appellants denied liability and the challenged the claim made by the respondent.

The District Court found in favour of the respondent and awarded the following heads of reliefs:-

1. *TShs. 20,440,500/- being the total value of the properties taken by the defendant.*
2. *TShs. 20,000,000/- being general damages.*
3. *Interest on 1 above at the Commercial rate of 18% per annum from the date of judgment to the date of full payment.*
4. *Costs of the suit.*

The appellants were aggrieved by the decision hence the appeal to this court.

At the hearing of the appeal the appellants had the service of Mr. Frank Ngafumika, learned counsel from Zinger Attorneys while the respondent appeared in person and fended for herself.

The memorandum of appeal presented by the appellants had three grounds of appeal which reads as follows:-

1. *That the trial court had erred in law and fact in failing to properly apply the law.*
2. *That the trial court erred in law and fact in failing to evaluate the evidence on record hence arriving at erroneous conclusion.*
3. *That the trial court erred in law and fact in failing to glve sound reasons when addressing the issues.*

Since the respondent was unrepresented and in order to afford her a fair hearing the court directed the appeal to be disposed by way of written submissions which were duly filed in accordance to the schedule set by the court.

In addressing the court on the issue of breach of the loan agreement Mr. Ngafumika, learned counsel forcefully argued that since the loan agreement required the respondent not only to repay the loan agreement within one year but also to remit payments in equal weekly instalments hence failure by the respondent to compy to that requirement, the respondent was in breach of contract and that to hold that the appellants

were in breach of the contract is a misnomer. He referred this court to an array of authorities. This includes **Abdallah Yussuf Omar V People Bank of Zanzibar and Another** [2004] TLR 399, **General Tyre East Africa Ltd V HRSC** [2006] TLR 60 and **Mtega V University of Dar es Salaam** (1971) HCD 247 to drive home his point and firmly contended that the trial magistrate wrongly applied the principle of law as it was the respondent who breached the loan agreement and not the appellant.

On his part the respondent strenuously argued that it was the appellants who breached the contract as its terms were loud and clear in that the loan though was advanced to individuals but it was a group loan, guaranteed by the group itself and it was upon the group to enforce recovery and not any stranger to the contract hence the appellants were in breach of contract. She distinguished the cited cases in that while in those cases the contractual period had expired but in the instant case the twelve months period had not expired at the time when the appellants forfeited the properties of the respondent.

On the award of the total value of the properties confiscated, Mr. Ngafumika was of the opinion that the trial magistrate wrongly arrived to the figure of TShs. 20,440,500/- whilst admitting that Exhibit PE3 merely listed properties confiscated without showing neither the total value of all the properties nor the value of each property. He strongly argued that the respondent did not discharge the burden of proof as required by law and cited Section 110, 111 and 112 of the Tanzania Evidence Act, Cap 16 RE 2002.

On the question of the amount which was awarded as specific damages the respondent was very brief and contended that the said amount was not disputed during the trial stage as such the appellants can not be heard to fault it now at the appellate stage since the same was pleaded and proved during trial.

In further support of the appeal Mr. Ngafumijka, raised two legal points which were not prior formally raised to the court as additional grounds of appeal. The two legal issues were first of all that the loan agreement

...ibit PE1 was wrongly admitted and acted upon since it had not been stamped pursuant to the mandatory requirement of Section 47 of the Stamp Duty Act, Cap 189 RE 2002 and secondly the case did not comply with the provisions of Order VIIIA of the Civil Procedure Act, Cap 33 RE 2002 in that no pre-trial conference was held hence no speed track was set.

In response the respondent put a valiant fight by arguing that it is the first appellant who prepared and produced the loan agreement as such he can not be heard to fault the document which is the basis of his deeds subject of the present appeal. As regards to the failure to conduct the pre-trial conference the respondent did not reply on that aspect. Upon careful perusal and considerations of the submissions by the parties I am of the view that the major issues for considerations are as follows:-

1. *Whether the first appellant breached the contract.*
2. *Whether the trial magistrate applied proper principles in assessing special damages.*

3. *Whether the respondent was entitled to the awarded general damages.*

I shall first deal with the first issue on whether the first appellant breached the contract. After reviewing the counsel's submissions and the evidence on record in particular Exhibit PE1 the Loan Agreement there is no dispute that the first appellant and the respondent entered into the loan agreement for TShs. 3,000,000/- and that the said loan was to be paid within the period of twelve months and that the respondent was to remit TShs. 78,500/- weekly. The loan agreement stipulated the assets and value of properties which were put as security. In addition to that the loan agreement precisely spelt out the guarantors and how to execute the guarantee in the event of default.

It is imperative to stress that the relation between the first appellant and the respondent is regulated by the law of contract in Tanzania which has been codified in the Law of Contract Act, Cap 345 RE 2002.

Section 2(1) (b) of the Act defines a contract as an agreement enforceable by law. Section 10 provides that all agreements are contract if they are made by the free consent of the parties competent to contract for a lawful consideration and with a lawful object and not hereby expressly declared to be void. The appellant's counsel has forcefully argued that the respondent breached the contract for her failure to repay the loan according to the schedule. The respondent's counsel argued that as the twelve months period had not expired it is quite clear that the respondent was not in breach of contract but rather it was the first appellant who breached the contract by attaching the respondent's properties contrary to the contract.

In an attempt to unravel the mystery I am persuaded by a very modern-sounding approach of interpretation of the contract in the case of **Bank of Scotland V Stewart** in 1891 Lord President Inglis (1891) 18 R 957 at 960 said;

"In a question of this kind, arising upon the construction of a contract, the Court are quite entitled to avail themselves any light they

may derive from such evidence as will place them in the same state of knowledge as was possessed by the parties at the time that the contract was entered into".

Similarly Lord Dunedin in **Charrington & Co. Ltd V Wooder** [1914] AC 71 at 82 made the following statement;

"Now, in order to construe a contract the Court is always entitled to be so far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were placed, in fact, when they made it – or, as it is sometimes phrased, to be informed as to the surrounding circumstances".

A cursory perusal of the records of the trial court in particular Exhibit PE1 the Loan Agreement and Exhibit PE3 Goods Receiving Note reveals to me the following:-

1. *The loan agreement did not stipulate at all the consequences of not repaying the loan within the stipulated schedule prior to the expiry of the loan period.*

2. *The first appellant instructed the second appellant who was a stranger to the contract to attach the respondent's properties contrary to the contract which vested that obligation to the group which was the guarantor in the event of default.*
3. *The first appellant attached and vandalized the respondent's properties not being those listed in the loan agreement.*
4. *The first appellant did not follow the due process of the law in order to enforce the contract instead opted to rules of the jungle which is not acceptable in our legal system.*
5. *The first appellant did not show that the respondent did not have adequate funds in her account to replenish the outstanding loan as was contemplated by the loan agreement.*

Without mincing words the totality of the above reveals to me nothing but the fact that the first appellant breached the contract. The first issue is therefore answered in the affirmative.

This brings me to the second issue which boils down to the question of assessment of damages. Generally speaking Damages are:-

"That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation. See Lord Blackburn in **Livingstone V Rawyards Coal Company** *(1850) 5 App. Case. 25 at page 39.*

Asquith, C. J in **Victoria Laundry V Newman** [1949] 2 K.B. 528 at p.539 said damages are intended to put the plaintiff

"--- *in the same position, as far as money can do so, as if his rights had been observed".*

In considering whether the trial magistrate assessed the damages using the correct principle of law, Mcnaughten in **Bolag V Hutchson** (1950) A.C 515 at page 525 laid down what we accept as the correct statement of the law that special damages are:-

"Such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly".

In **Zuberi Augustino V Anicet Mugabe**, [1992] TLR 137 the Court of Appeal religiously held that;

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

Given an array of authorities as cited above the question remains, did the trial magistrate apply the appropriate principle in assessing the special damages of TShs. 20,440,500/-? This would determine whether or not the court should disturb the quantum of damages awarded.

In applying the principle articulated above in the present case I agreed entirely with the counsel for the appellants that the trial magistrate did not apply the principles of evidence which requires that he who alleges must prove and that the respondent did not prove the claim for TShs.

20,440,500/- as required by law. It is my considered opinion going through Exhibit PE4 which were admitted without any objection the cash sale receipts totals TShs. 4,033,000/- while the invoices totals TShs. 9,462,500/- hence the aggregate sum which was proved seems to be TShs. 13,495,500/-. In my view the amount awarded as special damages was unjustifiably high. I am therefore of the view that the respondent is entitled to TShs. 13,495,500/- as special damages.

I will now turn to the award of TShs. 20,000,000/- as general damages.

General damages are defined by ***Black's Law Dictionary 7th edition*** to mean;

> *"Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained".*

In **P. M. Jonathan V Athuman Khalfan** [1980] TLR 175 at 190 Lugakingira J (as he then was) stated thus:

"the position as it therefore emerges to me is that general damages are compensatory in character.

They are intended to take care of the plaintiff's loss of reputation, as well as to act as a solarium for mental pain and suffering".

The sum of TShs. 20,000,000/- was awarded to the respondent by the trial magistrate. It is the function of the Court to determine and quantify the damages to be awarded to the injured party. As Lord Dunedin stated in the case of **Admiralty Commissioners V SS Susqehanna** [1950] 1 ALL ER 392.

"If the damage be general, then it must be averred that such damage had been suffered, but the quantification of such damage is a jury question".

In **Davies V Powell** (1942) 1 ALL ER 657 which was approved by the **Privy Council in Nance V British Columbia Electric Rally Co. Ltd** (1951) AC 601 at page 613 it was stated as under:

> *"Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case --- before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or short of this that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage ---"*

This position way adopted by the Court of Appeal of Eastern Africa in **Henry Hidaya V Manyema Manyoka** [1961] EA 705 at page 713. Similarly this position has often been adopted by the Court of Appeal of Tanzania. See the cases of **Cooper Motor Corporation V Moshi/Arusha Occupational Health Services** [1990] TLR 96, **Musa**

Mwalugala V Ndeshe Hota [1998] TLR 4 and **Peter Joseph Kilibika & Another V Patric Aloyce Mlinga**, Civil Appeal No. 37 of 2009, Court of Appeal of Tanzania at Tabora (unreported).

From the records of the trial court it is evident that the second appellant upon the instructions of the first appellant and in total disregard of the contract vandalized the respondent's house and took away everything they could lay their hands on from beds, mattresses, cutlery, crockery and other home appliances such that they made the respondent's life and that of her family unbearable if not miserable. Literally the respondent and her family were left with nothing to sustain their living and it does not require one to be a rocket scientist to figure out the trauma, inconvenience and mental agony which they went through. For that reason I find it hard to interfere with the amount which was awarded as general damages.

I am mindful of the fact that the duty of the court is to facilitate and not to impede the smooth business environment. I am inclined to borrow the

statement by Lord Goff of Chieveley put it, extra judicially in **"Commercial Contracts and the Commercial Court"** [1984] LMCLQ 382 at 391;

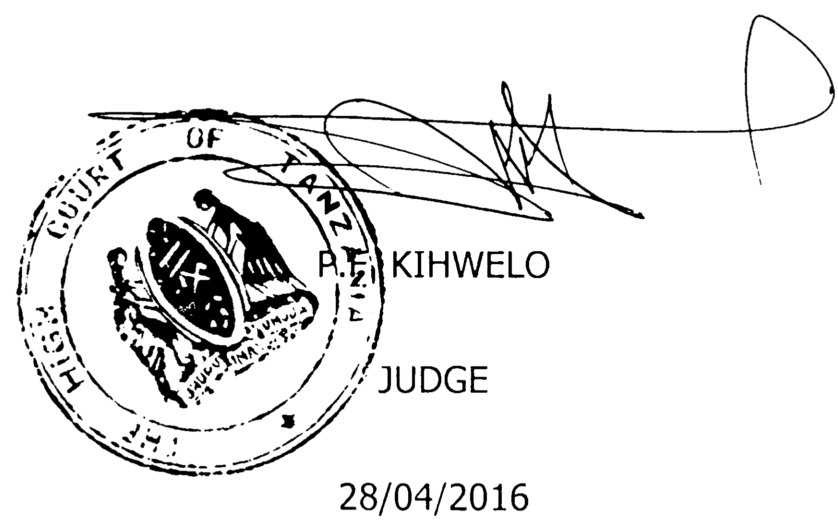
"We are there to help businessmen, not to hinder them. We are there to give effect to their transactions, not to frustrate them: we are there to oil the wheels of the commerce, not to put a spanner in the works, or even grit in the oil.

Lord Steyn, also extra – judicially, made very much the same point in **Democracy Through Law: Selected Speeches and Judgments** (2004) 225 – 226;

"A thread runs through our contract law that effect must be given to the reasonable expectations of honest men --- the function of the law of contract is to provide an effective and fair framework for contractual dealings".

Consequently, I hereby set aside the award of special damages of TShs. 20,440,500/-. Instead of TShs. 20,440,500/- awarded by the trial court, I will award TShs. 13,495,500/-. The award for TShs. 20,000,000/- as general damages remains undisturbed. The damages shall bear no interest. This is because the respondent too was partly to blame for her failure to remit funds weekly as required although as I stated that did not neither amount to breach of contract nor make her deserve the treatment she was subjected. Save for the variations made on damages and interest, the appeal is hereby dismissed with costs.

Ordered accordingly.



P.F. KIHWELO

JUDGE

28/04/2016