IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 165 OF 2017

(Appeal from the Judgment and Decree of the Resident Magistrates' Court of Dar es Salaam at Kisutu before Hon. Mchauru – SRM dated 27th May, 2016 in Civil case No. 59 of 2013)

MIC TANZANIA LIMITED.....APPELLANT

VERSUS

BERNARD PAUL MNYANG'ANGA
@ MNYANG'ANGA (BEN PAUL) .....RESPONDENT

JUDGMENT

4/6/2018 & 22/6/2018

Mugeta, J.

Being aggrieved by the judgement of the lower court, the appellant preferred this appeal. The brief facts of the case are that the respondent filed a suit at the Resident Magistrates' Court of Dar es Salaam at Kisutu for damages against the appellant. The respondent claim against the appellant is for payment of Tshs. 500,000,000/= as damages for use of the respondent's song "pete" as Ring Back Tone to its subscribed customer without the respondent's authorization. The appellant claimed to have received the song from the M/S Crystal Mobile (T) Limited.

In its considered judgment the trial court found the appellant guilty of using the respondent's song "Pete" without his authorization. Consequently, the appellant was condemned to pay general damages amounting to Tshs. 95,000,000/= plus 12% interest from the commencement of the suit to the judgment date and 29% from the date of judgment to full settlement of the awarded sum. In the course of the trial, the appellant had applied and was granted leave to file a third-party notice. Consequently M/S Crystal Mobiles (T) Limited was joined as a third party. The third party filed a written statement of defence but never presented evidence after defaulting appearance.

I have gone through the evidence on record which reveals these facts as undisputed: -

i) The respondent/plaintiff has a contract with third party to distribute his songs for various use but such songs did not include the song "Pete".

ii) The appellant and the respondent had no contract whatsoever for the use of any of the respondent's songs as back ring tone.

iii) The appellant and the third party had a contract for the third party to supply songs for Back Ring Tone use by the appellant and the third party had the obligation to clear

intellectual property rights by getting the requisite permission from the owners of the intellectual property item supplied. The contract was admitted as exhibit D1.

The appellant seeks intervention of this court to remove order of the trial court on seven grounds of appeal. The appellant is represented by Rosana Mbwambo of Law Associates while the respondent is represented by Leah Kamanga of Lekas Attorneys. By consent, it was agreed that this case be disposed of by way of filing written submission. Both parties filed the same as per the schedule.

In the submission counsel for the appellant has raised an objection on jurisdiction of the trial court. I find it necessary to determine it first. This same objection was raised and overruled by the trial court. The complaint is that the claim of Tshs. 500,000,000/= by the respondent was special damage not general damage which removed pecuniary jurisdiction from the trial court. For convenience, this objection shall be dealt together with the supplementary argument presented by counsel for the appellant when arguing grounds 6 and 7. This is that the claim being of special damage was not specifically pleaded and proved. Counsel for the appellant has referred the court to the case of Stanbic Bank Tanzania Limited Vs Abercombie & Kent Limited, Civil Appeal No. 21 of 2001, Court of Appeal (unreported) which cited with approval the principle in Zuberi Augustino Vs Anicent Mugabe [1992] TLR 137 that special damages must be proved specifically and strictly. I agree this is the law. However, it is not true that the respondent

claim was for special damages. This is not reflected either in the plaint or in the evidence of PW1. As rightly submitted by counsel for the respondent the claim was for general damages and general damages cannot be used to determine pecuniary jurisdiction of the court because the same are awarded at the discretion of the court. Like the trial court, I also overrule the objection.

Now I move to the grounds of appeal. The same are interrelated and I shall not reproduce them here. This is because in his submission, counsel for the appellant decided to argue some of them jointly. So, I shall just describe the complaints representing the combined grounds of appeal. The combined grounds are: Grounds 1 and 2, 4 and 5, 6 and 7. Ground three was argued independently. I shall deal with them in the same order.

Grounds 1 and 2 covers a complaint that the trial court failed to give direction under Order I rule 18 of the Civil Procedure Act [Cap. 33 R.E 2002] of the laws of Tanzania (CPC) on how the third-party liability ought to have been determined. Besides the failure, counsel for the appellant has submitted, the trial court erred to absolve the third party from liability. I have read the submission by the respondent and it seems they never respondent to this complaint.

Indeed, according to the trial court records, no direction was given. According to the said order, it was upon the parties to ask for such direction or the court to do it on its own motion by fixing a date for such direction. None of them took the initiative. Admittedly, this was an irregularity and the appellant has his share of the blame for

not moving the court to do the needful. At this appeal stage the appellant argues that the omission vitiates the proceedings. I am of a different view. Even if I hold a view that Order I rule 18 is couched in mandatory terms, the omission can only be said to vitiate the proceedings if the complaining party establish being prejudiced by the omission. As I have already said hereinabove the appellant, after filing the third-party notice, never moved the court to issue the direction. I have, however, considered the circumstances of this case, I find no reason to rule that the appellant was prejudiced. According to the evidence on record, the third party defaulted appearance after filing the written statement of defence. The requirement to fix a date for directions presupposes the third-party presence at the trial. In this case the possibility for the direction was frustrated by the third-party default. The law provides a remedy to the plaintiff under Order I rule 19(1)(b) of CPC in case of a defaulting third-party. It reads: -

> *"19 – (1) Where a third party makes default in presenting his written statement of defence within the time allowed under rule 17 or having presented a written statement of defence, makes default in appearing on the date fixed for the giving of directions–*
>
> *(a) (Not applicable)*
>
> *(b) if the defendant presenting the third party notice suffers judgment after trial of the suit against him, the court may at or after the trial of the suit enter such judgment for the defendant against the third party as the nature of the suit and the claim made in the third party notice may require:*

Provided that execution of any decree passed consequent upon judgment being entered in accordance with this paragraph shall not be issued without leave of the court until after satisfaction by such defendant of the decree passed against him.

The appellant suffered judgement after trial. His rights against the defaulting third-party are covered by the stated law and he can move the trial court for appropriate orders. The complaint that the trial court absolved the third-party is unjustified. There is no such order in the judgement of the trial court. In the event I find no merits in this complaint.

The third ground of complaint is that the respondent did not prove that he is the lawful owner of the song. In advancing this argument counsel for the appellant has attempted to distinguish music composition from its sound record and argues that the same can be owned and claimed right of ownership separately under the Copyright and Neighboring Rights Act [Cap 218 R.E 2002] of the laws of Tanzania (the Act). The learned counsel anchored his argument on section 5 and 32 of the Act. In reply, counsel for the respondent has submitted that the issue of ownership cannot be raised at this stage without first raising it at the trial court.

In my view this complaint has been raised due to counsel for the appellant's misinterpretation of the provisions of the Act. It is not true that music composition and sound record can be owned separately between the composer and the music producer. Music is copyrighted under section 5(1) (d) of the Act. In then section there is

no such division of ownership between music composition and sound records. The description on music ownership is under section 15 of the Act where it is stated that music is owned in the first instance by the author or authors who created the work. There is no dispute that the respondent created the song "pete". In his evidence (page 42 of the typed proceedings) he testified thus: -

> *"I have come to this court to claim compensation from the defendants i.e. TIGO for the use of my song called "pete" which she has been selling to her customers as a ring back tone"*

This evidence by the respondent asserting his rights of ownership stands uncontradicted by the evidence of DW1 who testified for the appellant. I, therefore, see no merits in the complaint.

The complaints in grounds number 4 and 5 is that exhibits P1 and P2 were wrongly admitted because being printed out SMS from cellphones and video footage respectively, their reliability of the manner in which they were generated, stored and communicated is not known. Counsel for the responded replied briefly that the objection ought to have been raised when the exhibit was tendered. I agree with counsel for the respondent. As a matter of fact, these exhibits were pleaded in the plaint and finally tendered in evidence by the respondent. The counsel for the appellant never objected to their admission as exhibits. He cannot be heard on a complaint on their admissibility at this appeal stage because matters of admissibility ought to have been determined by the trial court first. However, the appellant could have been heard if there was a

procedural error in the admission process. I hold that there was no procedural error during their introduction in evidence. The complaint has no merits.

The sixth and seventh grounds constitute a complaint that the respondent did not prove the case on the balance of probabilities because all claims were based on assumptions. These are; loss of earning from sale he could have made had the song not been used as RBTs and loss on account of payment that he should be paid from the sale of his songs. Counsel for the appellant submitted that no specific particulars of the loss where either pleaded or stated in evidence. In reply, counsel for the respondent is not clear on the point. However, his submission on the point if looked at generally boils to an argument that owing to the nature of the claim, possible earnings could not have been easily quantified and that is why they pleaded for general damages instead of specific damages. I tend to agree with this submission. General damages by nature are based on presuppositions. This complaint has no merits too.

Counsel for the appellant has also complained of awarding of interests. The trial court awarded damages and interest at 12% from institution of the suit to the date of judgment and at 29% from the date of judgment to full settlement. This complaint has merits because it is a fact that the trial court award is of general damages. Interest on general damage, where awarded, starts to accrue from the date of judgment and it cannot exceed court interest under Order XX rule 21(1). Therefore, the trial court erred to award

interest before judgment. The 12% interest awarded is quashed for being unlawful. Interest after judgment which is allowable is reduced from 29% to 7 %.

The foregoing is enough to dispose of the appeal. However, for purposes of providing guidance to lower court, I wish to address an irregularity that is glaring on the face of the record. This goes to the proceeding of mediation conducted on 6/3/2014. The mediator recorded everything that transpired in court including a reason which led to the failure of mediation. This is procedurally not correct because proceedings of mediation are confidential between the parties and the mediator.

In the up short, except for the variation on interest as hereinabove explained, I find the appeal devoid of merits. It is accordingly dismissed. Since errors on award of interest cannot be attributed with the respondent and the appeal is without merits, I am of the view that he is entitled to costs. The respondent is, therefore, awarded costs of the case.

I.C Mugeta
JUDGE
22/6/2018

22/6/2018
Coram: Hon. Mugeta, J
For the Appellant: Gift Msuya, Advocate
For the Respondent: Kamanga Leah, Advocate
Cc: Mayalla

Court: Judgment delivered in chambers.

Sgd: I.C Mugeta
JUDGE
22/6/2018