IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 110 OF 2015

KARIBUNI INTERIOR LIMITED.....APPELLANT

VERSUS

CASA IN LIMITED .....RESPONDENT

JUDGEMENT

Date of the last Order 24th May 2018
Date of Judgement 08th June 2018

SAMEJI, R. K. J

The appellant in this appeal is appealing against the Judgement and Decree of Kisutu Resident Magistrate Court issued by Hon. Riwa, (SRM) in respect of *Civil Case No. 02 of 2014*. In its decision the said trial court determined the matter in favour of the respondent. The appellant was aggrieved and filed this appeal with six (6) grounds of appeal that, *the trial Magistrate erred in law and facts in*:-

(a) concluding that, the appellant is liable to pay the respondent Tshs. 10,000,000/= without supporting the said finding with evidence;

(b) giving an order for the appellant to pay the respondent Tshs. 10,000,000/= without stating the said order is based on which finding;

(c) not making analysis and not giving weight to the documentary evidence tendered and accepted as Exhibit D4 which proved that the appellant had paid for all the products supplied;

(d) failing to answer issue No. 2 which was framed and accepted by the Court; and

(e) failing to analyze the whole evidence and hence reached into wrong conclusion; and

(f) dismissing the Counter Claim despite the evidence that the respondent is the one who collected goods from the appellant's shop and that there was mutual agreement to terminate the contract.

Unfortunately, since the filing of the appeal the respondent never appeared to defend her case, the thing which forced this Court on 14th December 2016 to order that, the respondent be served through substituted services. On 9th February 2017 when the appeal was called for mention, Mr. Luka

Eringaya, the learned Counsel for the appellant informed the Court that, they have duly complied with the order of the Court and served the respondent through substituted service and produced two newspapers as evidence, *to wit* the Mwananchi and Daily News both dated 31st January 2017. On 29th June 2017 when the matter was called for hearing, again the respondent was absent and the Court ordered the matter to proceed exparte against the respondent. The Court then ordered the appellant to give exparte proof on the matter.

In his submission Mr. Eringaya informed the Court that, the appellant and the respondent were in contractual relationship under the Agreement signed on 1st November 2012. He said under the said Agreement the appellant was supposed to conduct business as per the terms and conditions agreed between the parties. He said, the consideration for the Agreement was US$ 40,000- where the appellant was required to pay 15% for each sale of the product as royalty to the respondent. Mr. Eringaya submitted further that, taking into account that the business was not doing well due to the high price set by the respondent the parties engaged into consultations where unsuccessfully the appellant requested the respondent to reduce the price. Mr. Eringaya said, since parties failed to reach

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consensus, the Agreement was terminated. Subsequent to the said termination the respondent collected all the products supplied by the appellant and instituted a suit before Kisutu Residence Magistrate Court claiming to be paid Tshs. 35,000,000/= as specific damages for the breach of the contract. Mr. Eringaya argued that, throughout the trial the respondent failed to prove her claims, but the final Judgement was delivered in her favour. He said, under grounds 1 and 2 of the Appeal, the main issue is that the specific damages claimed by the respondent before the trial court, were not specifically and strictly proved. He cited the case of **Masolele General Agencies V African Inland Church of Tanzania** 1994 TLR 192 and **Rugalabamo Archerd Mwombeki v Charles Kiziga and Three Others** 1985 TLR 59. He then referred to page 6 of the trial court's Judgement where the trial Magistrate had indicated that, *the plaintiff has not proved her claim.* He said, after arriving into that conclusion, it was then wrong for the trial Magistrate to award the plaintiff specific damages, which was not proved. He further challenged the Judgement of the trial Magistrate that, it does not contain reasons and concise statement as required by Order XX Rule 4 of the Civil Procedure Code, Cap. 33 [R.E.2002].

As for the 3rd and 5th grounds of Appeal, Mr. Eringaya argued that, before the trial court the appellant tendered **Exhibit D1**, (*the Agreement*) together with **Exhibits D2 and D3** (*the invoices and receipts for the money paid*). All these documents proved that the appellant had paid the respondent US$ 40,000-, as the agreed consideration for the Agreement and the royalty for a period of five years. Mr. Eringaya referred to page 4 paragraph 1 of the trial court's Judgement, where the trial Magistrate acknowledged the said documents tendered by the appellant, but in his conclusion he decided to abandoned all of them and never analyzed the same.

On ground number 4, Mr. Eringaya argued that, the trial Magistrate never analyzed the evidence to determine as whether there was breach and termination of the agreement between the parties. He said, the appellant filed a counter claim for the refund of US$ 40,000- he had since paid the same for five years, but the Agreement was only terminated within one year. He argued that, the trial Magistrate in his Judgement he did not consider all those facts and only dismissed the said Counter Claim without giving reasons for such act. He thus prayed the Court to allow the Appeal.

Having scanned the record of the case and the submission by Mr. Eringaya in connection with the Appeal at hand the cardinal issue for determination at this juncture is *whether the appellant breached the contract; whether the respondent has managed to prove her case before the trial court on the balance of probability and Whether the trial magistrate applied proper principles in assessing special or specific damages.*

In the course of determining this case, I will be guided by the canon of civil justice which suggests that, **first** "*the person whose evidence is heavier than that of the other is the one who must win*" - **Hemedi Said vs. Mohamedi Mbilu** (1984) TLR 113. **Second**, "*where doubts are created in evidence, the same should be resolved in favour of the opposite party*" - **Jeremiah Shemweta Vs. Republic** (1985) TLR 228 and **third**, '*he who alleges must prove the allegation*'.

To start with the first issue, it is imperative to start by pointing out that, the relationship between the appellant and the respondent herein is regulated by the Law of Contract of Tanzania, which has been codified in the Law of Contract Act, Cap 345 [R.E 2002]. Section 2(1) (b) (h) 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. Free consent is further defined under Section 14 of the same Act. It is therefore obvious that the so called Franchise Agreement herein was entered to by the parties on 1st December 2013 and the same is a legal Agreement enforceable by law.

I have therefore perused the said Agreement and observed that it was intended to last for a period of five (5) years, (first Term) with an option for the renewal. The said Agreement is also providing for the right to the parties to terminate the Agreement upon breach, but there is no any procedures to be adopted when one decide to terminate the said Agreement.

It is on record that, the appellant after realizing that the implementation of the Agreement is becoming impossible and after consultation with the respondent, decided to terminate the Agreement. In her testimony before the trial court the respondent explained that, upon termination of the contract the appellant did not follow the termination procedures, (See testimony of PW1 at page 12 - 13 of the trial court's typed proceedings). PW1 said, the appellant terminated the Agreement without signing any

As for the 3rd issue above I wish to refer to the decision of the House of Lords and specifically the position of Lord Macnaughten in **Bolag V Hutchinson** (1905) A.C 515 at page 525 where he laid down what have been accepted by courts 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". [Emphasis added].***

In addition in the case of **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 the above position and other array of authorities on this matter, it is settled that special damages must be proved specifically and strictly, now the question which remains for this Court to determine is whether the trial

Magistrate had appropriately apply the above principle in assessing the special damages in the case at hand.

I have since perused the evidence tendered by the plaintiff before the trial court and I entirely agreed with Mr. Eringaya 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 as required by law.* I have also perused the Counter Claim and since there are no adequate material facts to support the claims therein, I find it difficult to grant the same.

In the event and for the foregoing reasons I allow the appeal and I hereby quash and set aside the decision of Kisutu Resident Magistrate Court pronounced by Hon. Riwa (SRM) on 23rd June 2015 in respect of *Civil Case No. 02 of 2014.* I also decline to grant the Counter Claim. I make no order as to costs. It is so ordered.

DATED at **DAR ES SALAAM** this 08th day of June 2018.

R. K. Sameji.
JUDGE
08/06/2018

Ruling Delivered in Court Chambers in the presence of the parties.

A right of appeal explained.

R.K.Sameji
JUDGE
08/06/2018