IN THE HIGH COURT OF TANZANIA
(MWANZA REGISTRY)
AT MWANZA

HC CIVIL APPEAL NO.88 OF 2016

*(Arising from the decision of the Resident Magistrate Court of Musoma in Civil Case No. 49 of 2016 (Hon. J.S. Musaroche, RM) dated **28th September, 2016**)*

AMANDUS ZIKY MASINDE .....APPELLANT

VERSUS

NYAMSERA MARUMBA .....RESPONDENT

Last order date: 15/02/2018
Final Submissions date:16/03/2018
Judgment date: 24/04/2018

JUDGMENT

MAKARAMBA, J.:

The appellant, **AMANDUS ZIKY MASINDE** is aggrieved by the decision of the *Resident Magistrate Court of Musoma in **Civil Case No. 49 of 2016** (Hon. J.S. Musaroche, R.M) dated **28th September, 2016***, which concerned breach of a loan agreement and award of general damages for breach of contract.The Appellant filed the appeal in this Court on **22nd day of November, 2016** on four grounds of appeal, which I shall traverse in the course of this Judgment and hence I shall not set them out at outset.

The appeal by consent was disposed of by way of written submissions by **Mr. John Edward**, learned Counsel for the Appellant and **Mr. Rutahindurwa**, learned Counsel for the Respondent.

Briefly, the dispute between the parties before the trial Court was over a Loan Agreement (hereinafter the Agreement), the Appellant and

the Respondent concluded on **10th of August, 2015.** In that Agreement, the Respondent loaned the Appellant the sum of Tshs. **5,000,000/=** (hereinafter the Loan) and as security for the loan, the Appellant pledged his property in **Plot No. 40 Block "A" M.D.R.** The Agreement was admitted as **Exhibit PE1**. The Agreement contained a Clause for payment of interest of 20% on the principal sum of the loan monthly upon default as from the date of default.

In his submissions in support of the appeal, Mr. John Edward learned Counsel for the Appellant elected to begin with the third ground of appeal that, *the trial Magistrate erred in law and fact in failure to observe that, the said agreement was illegal.*

The Appellant submitted that the Agreement contained a contractual term at paragraph 5, which provides that:

> *"...Na nitalipanagharamanyinginezozausumbufuambazonitakuwanimezisababishakatikamkatabahuumimimkopajinanitalipaasilimia 20% yapesakilamwezitokeaambaponimeshindwakulipadenihilo..."*

Literarily translated Clause 5 of the Loan Agreement cited above was to the effect that the borrower undertook to pay any other costs incurred as a result of any inconvenience caused by the borrower and interest of **20%** on the principal sum of the loan monthly as from the date of default.

The Appellant submitted that Clause 5 of the Agreement was bad in law, since it contained a condition for loan repayment upon breach which attracted an interest of **20%**. The Appellant submitted further

that, Clause 5 essentially made the Agreement to be a business transaction. The Appellant further submitted that, since at the time of concluding the Agreement the Respondent was neither holding a business license nor was he a registered business entity capable of conducting financial business in which to charge interest, the Respondent therefore had no capacity to enter into such Agreement. In buttressing his submissions on this point, the Appellant cited the provisions of section 3(1) of the ***Business Licensing Act, Cap.208 R.E. 2002,*** which stipulates that:

> *"No person shall carry on Tanzania, whether he as a principal or an agent, business uniess-*
> *(a) Is the holder of a valid business license issued to him in relation to such business..."*

It was the further submissions of the Appellant that since the Respondent engaged in the business of lending money to other persons at an interest, without a valid business license, not only this violated the above provisions but it was also contrary to Regulation 5(4) of the ***Banking and Financial Institutions (Licensing) Regulations, 2014 G.N. 297*** which provides thus:

> *"A person shall not engage in banking business or accept deposits from the general public unless that person hads obtained a license issued by the Bank."*

The Appellant submitted further that, the Respondent by inserting in the Loan Agreement a clause on payment of interest on the loan at the rate of 20% on the principal sum upon breach of the contract was therefore conducting a banking business, which was contrary to Regulation 5(4) of the ***Banking and Financial Institutions (Licensing) Regulations, 2014 G.N. 297,*** under which only banks and related financial institutions are permitted to conduct banking and related financial businesses. The Loan Agreement between the Appellant and the Respondent was therefore illegal since the Respondent was not seized of a valid business or banking business license and therefore the Respondent had no capacity to enter into the Agreement. The Agreement having been concluded between the Appellant and the Respondent who was not competent to enter into such Agreement by reason of not holding a valid business and banking business license, it was clearly contrary to section 10 of the ***Law of Contract Act, Cap. 345 R.E. 2002***under an agreement becomes a contract if made by free consent of parties competent to contract, and thus the Agreement in question is null and void ab initio. The Appellant invited this Court to revisit the decision in ***David Charles vsSeniMamumbu, Civil Appeal No. 31 of 2005*** where it was held that:

> *"...As it has come to pass that, and since the loan was advanced and was received in contravention of the law, it cannot be enforceable. By reason of the illegality, and since the loan Agreement is unenforceable in law..."*

The Appellant submitted further that, as per Clause 4 of the Loan Agreement, the Appellant gave as security to secure the loan, a **Plot No. 40 Block "A" M.D.R.**This was also against the law since only a licensed person can issue loan with a condition of putting a property as collateral. In buttressing this point, the Appellant cited the decision in the case of ***Ulf Nilson vs. Dr. Tito Mziray Andrew Land Case No. 66 of 2007*** (unreported) where it was held that "....*The law does not allow the taking of security by unlicensed money lenders...*"

In reply to the submissions of the Appellant on the first ground of appeal, the Respondent approached it on two limbs, the first one being *whether the said contract is legal and enforceable* and the second one being *whether the contract between the parties is valid or invalid.*

The Respondent zeroed his submissions on the validity of the contract at the time it was concluded regarding its subject matter, which was a loan to the tune of **Tshs. 5,000,000/=** which as per the testimony of the Appellant/Defendant before the trial court, he agreed that he borrowed that sum of money from the Respondent/Plaintiff. The Respondent further submitted that, the minds of the parties met as to the nature of the contract, which was an essential ingredient of the contract as it was stated in the case of ***Tanzania Fish Processors Limited vs Christopher Luhanyula Civil Appeal No. 21 of 2010*** (CAT)(Mwanza)(unreported.).

The Respondent further submitted that, according to the terms of the contract, the principal sum of **Tshs. 5,000.000/=** was to be repaid within a specified time of the contract in whole and without accompanying interest. Since the principal amount had no interest it does not qualify to be a "*banking business.*" Therefore if the loan had

been repaid within the prescribed time as agreed by the parties, then the question of "***interest***" in respect of the amount of money borrowed could not arise.

It was the further submissions by the Respondent that Regulation 5(4) of the ***Banking and Financial Institutions (Licensing) Regulations, 2014 G.N. 297*** cited by the Appellant in his submissions is inapplicable to this case since the contract between the parties does not qualify as a "*banking business*" as defined under Regulation 3 thereof as being:

> "*... the business of receiving funds from the general public through the acceptance of deposits payable upon demand or after a fixed period or after notice, or any similar operation through the frequent sale or placement of bonds, certificates, notes or other securities, and to use such finds, in whole or in art, for loans or investments for the account of and at the risk of the person doing such business.*"

The Respondent concluded that, what is in the loan contract between the parties was just a normal borrowing of money on the promise that the same would be repaid back within a specified period and without interest. The Respondent also took issue with 3(1) of the ***Business Licensing Act, Cap.208 R.E. 2002,*** which the Appellant cited in his submissions and argued that, it is inapplicable for it was wrong on the part of the Appellant to assume that the Respondent was doing business and therefore was required to have a business license and thus the Respondent was not competent to enter into the contract, contrary to section 10 of the **Law of Contract Act, Cap.345 R.E. 2002**. The

Respondent revisited the provisions of **section 11(1)** of the same Act on the three elements of capacity to contract which are *age of majority, being of sound mind* and *not suffering from legal disability or disqualification.* None of these elements the Respondent suffered at the time of concluding the contract. The Respondent distinguished the case of ***David CharlesvsSeniManumbu, Civii Appeal No. 31 of 2005*** from the facts of this case by submitting that in the cited case, the principal sum of **Tshs.1,000,000/=** attracted a monthly interest of **Tshs.300,000/=,** which was very specific from the date of the signing of the contract, different from the case at hand where the parties agreed to repay the loan amount of **Tshs.5,000,000/=** within a specified period and without interest, which was to accrue only upon default to pay the amount borrowed within the agreed period so as to cover the damages occasioned by the Appellant's failure to honourthe agreement. The Appellant also took issue with the cited case of ***Ulf Nilson vs. Dr. Tito Mziray Andrew Land Case No. 66 of 2007*** arguing that it should not be relied upon to defeat the rights of the Respondent from recovering his money that has been advanced as a loan to the Appellant in good faith.

On the submissions of the parties in support and rival to the third ground of appeal, I am at one with the submissions by the Respondent that, the issue of *"business license"* and "***banking business***" does not arise in the particular circumstances of this case. As the Respondent rightly submitted, the loan agreement between the parties ***(Exhibit PE.1***) was ajust normal contract for borrowing money on the promise to repay back within a specified period and without interest. The borrower, the Appellant herein, and the lender, the Respondent herein,agreed that

the Lender shall advance the amount of the loan to the tune of **Tshs. 5,000.000/=** to the Appellant, and the parties agreed on repayment within a specified period. Apparently the Appellant defaulted on the payment. The parties had also agreed and the Appellant undertook to pay interest in the event of default at the rate of 20% on the monthly repayment schedule. The principal loan, as the Respondent rightly submitted did not attract any interest. The issue of interest arose only upon default in repayment. This being the case therefore, the loan agreement falls squarely within the elements of a valid contract and the capacity to enter into a contract as clearly stipulated in section 11(1) of the **Law of Contract Act, Cap 345 R.E. 2002,** namely, age of majority, being of sound mind and not legal disability or disqualification, none of which the Respondent suffered at the time of concluding the contract, and thus the Respondent had capacity to enter into the agreement and the agreement was valid.

On the allegation by the Appellant that the Respondent by entering into a loan agreement with the Appellant by disbursing loans secured by property as collateral was thus engaging in a money lending business without a business license, I am at one with the submissions by the Respondent that in the instant case, the question of "***banking business***" does not arise. In terms of Regulation 3 of the ***Banking and Financial Institutions (Licensing) Regulations, 2014 G.N. 297,*** the Respondent cannot be said to have been in the business of buying and/or selling money, namely by *receiving deposit of funds from the general public* or *sale or placement of bonds, certificates, notes or other securities*and *using such finds for loans or investments.*

The Respondent,being a natural person, using his own money to advance a simple loan of **Tshs. 5,000,000/=**to the Appellant upon request and on the promise that the loan will be re-payed at a specified period, and the Appellant having defaulted in repaying the loan as promised, this is a clear case of breach of contract and cannot therefore by any stretch of imagination be said to have qualified the Respondent to do the business of issuing loans and thus to seek a business license. Were this to be the case then, this country would witnessa mushrooming of "***banking and financial institutions***" all over the place to the mockery of the very intention of having in place the regulatory regime under the***Banking and Financial Institutions (Licensing) Regulations, 2014 G.N. 297.***

On the issue of the Respondent accepting as security for the loan advanced as a collateral in the nature of the property of the Appellant, this alone and of itself does not make the Respondent an "*unlicensed money lender*" within the meaning ascribed to the term in the cited persuasive authority in ***Ulf Nilson vs. Dr. Tito Mziray Andrew Land Case No. 66 of 2007.*** If anything then, the parties in this case by agreeing on a loan and subject to collateral as security for it, they brought themselves within the purview of the **law of bailment** in the schedule to the ***Law of Contract Act, Cap.345 R.E. 2002***.

It is for the above reasons the **third ground of appeal** that *the trial Magistrate erred in law and fact in failure to observe that, the said agreement was illegal*, fails. It is hereby dismissed.

The **first ground of appeal** is that,*the learned trial Magistrate erred in law and in fact for failure to properly analyze the evidence adduced.* The Appellant submitted at length on this ground. The Appellant argued

that the Appellant had paid the Respondent the amount of **Tshs. 4,290,000/=** of which **Tshs.1,000,000/=** was paid in cash and **Tshs. 3,290,000/-**was paid through the bank account of the Respondent, but the trial Magistrate unreasonably excluded the amount of **Tshs. 1,000,000/=** on the pretext that this payment was not in written form. The Appellant submitted further that, the trial Magistrate therefore misdirected herself in finding that in order for the payment to be recognized by the court it must be written since the parties themselves were not in dispute as to that amount the Respondent received in cash. The Appellant submitted further that, since the agreement was silent on how payment was to be done, the Appellant was right in paying by cash as per the evidence of **DW1** and **DW2** who testified before the trial court that, the Appellant paid the amount of **Tshs. 1,000,000/=** in cash to the Respondent on **08th September 2015** in the presence of **DW2**, which fact the Respondent himself did not dispute, thus making the outstanding amount to be **Tshs. 710,000/=** only.

In reply to the submissions by the Appellant to the **first ground of appeal,** the Respondent stated that, they dispute the amount of the loan repaid and argued that in so far as the evidence adduced during the trial is concerned, the Appellant was able to show the receipts for payments up to the tune of **Tshs. 2,290,000/=** which amount is not in dispute. As for the purported payment in cash of the amount of **Tshs. 1,000,000/=** by the Appellant on **08th September 2016**, the Respondent submitted that, the trial court guided by the evidence rightly held that the Respondent was entitled to the sum of **Tshs.1,710,000/=.**

On the mode of payment of the loan, the Respondent submitted that according to the loan agreement and particularly Clause 1 thereof, the mode of payment by implication, since the loan was taken by cash (*fedhataslimu*) there is no agreement stating to the contrary, and therefore the Appellant was bound to make repayment of the loan by cash not later than a specified time under the contract.

In so far as the **first ground of appeal** is concerned, the main controversy is as to the outstanding amount of the loan. On the part of the Appellant, he insists that he is only owed **Tshs.710,000/=,** while the Respondent maintains very strongly that, the amount due on the loan is **Tshs.1,710,000/=.** This being the case therefore, the contention is whether as per the evidence on record the Appellant paid to the Respondent the amount of **Tshs.1,000.000/=** in cash. This controversy calls for this Court being a first instance appellate court to re-assess and re-evaluate the evidence on record so as to satisfy itself as to whether the Appellant paid the amount of **Tshs.1,000.000/=** to the Respondent in the presence of **DW2** on the **08th September 2016** and whether there was an agreed mode of repayment of the loan.

I have carefully looked at the evidence on record. With due respect to the learned trial Magistrate and to the learned Counsel for the Respondent, there is no express provision in the Loan Agreement that the repayment of the loan was to be only in cash. The argument by the learned Counsel for the Respondent that according to the loan agreement and particularly Clause 1 thereof, the mode of payment by implication, since the loan was taken by cash (*fedhataslimu*) then the repayment also had to be in cash, does not accord to the evidence on record. The evidence by the Appellant of payment of

Tshs.1,000.000/= to the Respondent in the presence of **DW2** on the **08th September 2016**has not been countered by the Appellant. The Appellant is therefore owed only **Tshs.710,000/=**as being the unpaid amount due on the loan.

It is for the above reasons the first ground of appeal that, *the learned trial Magistrate erred in law and in fact for failure to properly analyze the evidence adduced* is held in the affirmative.

The **second ground of appeal** is that,*the trial Magistrate erred in law and fact for awarding general damages without considering proportionality of loss and the general damages to be awarded.*

The Appellant submitted that the amount of **Tshs.5,000.000/=** the trial Magistrate awarded the Respondent, was without considering as to what loss or what the Respondent had suffered by the act of the Appellant delaying to pay the amount of **Tshs. 710,000/=,** to which the Respondent did not say anything about it. The Appellant maintains that in the absence of any word from the Respondent as to the amount of general damages he was seeking from Court and the reasons for being entitled to such award, it was erroneous on the part of the trial Magistrate and she acted on a wrong principle of law in awarding the general damages. In support of his submissions, the Appellant cited the decision of the Court of Appeal in the case of ***RaziaJaffervs Ahmed MohamedaliSej and Others Civil Appeal No.63 of 2005*** (unreported) at page 15 that;

> *"On the issue of award of General Damages for the harassment endured, it is entirely to be presumed to be the* ***"direct, natural or probable consequence."***(emphasissupplied by Appellant).

The Appellant submitted further that, in the proceedings of the trial Court, there is nothing indicating the *direct, natural or probable consequence*damages the Respondent suffered as a result of the act of the defaulting act of the Appellant. The Appellant insisted that much as the award of general damages is in the discretion of the Court, however, where such discretion is wrongly exercised, a higher court may intervene, as it should be in this case.

In reply to the submissions of the Appellant on the second ground of appeal, the Respondent submitted that, this ground is misplaced since general damages are awardable at the discretion of the court and further that, it is an established principle that an appellate court cannot simply interfere with the award of general damages where the trial court had rightly endeavoured to apply proper principles in the course of awarding the same. In support of this contention the learned Counsel for the Respondent cited the authoritative statement of principle by the Court of Appeal in its decision in the case of ***The Cooper Motor Corporation Ltd. vs. Moshi/Arusha Group Occupational Health Services [1990] TLR 96*** (CA). The Respondent submitted further that, if anything the authority in the decision of the Court of Appeal in the case of ***RaziaJaffervs Ahmed MohamedaliSej and Others Civil Appeal No.63 of 2005*** (unreported), much as it was specifically on the issue of harassment which is not the case presently, but still it is of great advantage to the Respondent since the terms and conditions of the loan contract are enough circumstances which are direct, natural or probable consequences which lead leading to the award of general damages to the tune of Tshs.5,000.000/=.

It would seem that although the Appellant had also brought as the **fourth ground of appeal** the issue that, the trial Magistrate erred in law and in fact for awarding costs of the suit to the Respondent, the Appellant did not make any submissions in support of this ground. This particular ground is therefore taken as having been abandoned by the Appellant and it is so marked.

In so far as the **third ground of appeal** is concerned, the issue is whether the trial Magistrate properly exercised her discretion in awarding the Respondent general damages to the tune of Tshs. 5,000,000/=, which amount the Appellant contends that it was unreasonable and disproportionate to the claim of the Respondent.

The Appellant has enjoined this Court sitting on appeal, to interfere with the assessment of damages by the trial Court which awarded the Respondent general damages to the tune of Tshs. 5,000,00/=. I wish to reiterate here that, as a matter of general principle as it was succinctly stated by the Court of Appeal in its decision in the case of ***The Cooper Motor Corporation Ltd. vs. Moshi/Arusha Group Occupational Health Services [1990] TLR 96*** (CA), which the Respondent cited in his submissions, before an appellate court can properly intervene with the assessment of damages by a judge, and here the trial Magistrate, it must be satisfied of the following things, namely that;

i) Either that the judge or the trial magistrate, in assessing the damages, applied wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one;

ii) 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.

I shall endeavor to apply the above principles to the assessment of the general damages awarded by the trial Magistrate to the Respondent so to satisfy myself whether this is a fit case in which this Court sitting on appeal should intervene with the assessment of general damages by the trial Magistrate. I am aware that in doing so, this Court would be justified in substituting its own figure for that awarded by the trial Magistrate and not simply because it would have awarded a different figure if it had tried the case.

As to the first limb of the guiding principle, in assessing the damages, *did the trial Magistrate apply wrong principle of law? What factors did the trial Magistrate take into account when assessing the general damages? Did the trial Magistrate take into consideration some irrelevant factor or did the trial magistrate leave out of account some relevant factor?*

In so far as "**assessment"** of general damages is concerned the trial Magistrate stated in her Judgment (without page numbers) thus:

"*Coming to the fourth issue as to what are the damages (sic!) the parties are (sic!) suffered, in this case plaintiff claimed that by breach of the contract he used, he failed* ***time to make a follow ups on the payment without successto run his business accordingly*** *as many time he spent making the follow up on the payment, I have no doubts that the plaintiff suffered general damages.*" (the emphasis is of this Court).

In the Judgment, the trial Magistrate does not explicitly state the principle rule for measuring damages for breach of the Loan Agreement. It is a general rule under common law that general damages are awardable in cases of breach of contract and are assessed at the date of breach, save where justice requires a departure from that date for which it will be just and necessary to consider post-breach events known at the date of assessing damages, to the extent that they are relevant to and affect the claimant's loss.

There is still some controversy however, as to whether the award of general damages is in the realm of tortious claim, as was the case in ***RaziaJaffervs Ahmed MohamedaliSej and Others Civil Appeal No.63 of 2005*** (unreported) where it was stated that "*General Damages ... are entirely to be presumed to be the* "***direct, natural or probable consequence***", and not for breach of contract as contemplated under the principle established by the leading case of ***Hadley vs. Baxendale (1854) 9 Exch.341.***In that case the following principles were enunciated with regard to measuring general damages for breach of contract:

> *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably have been in the contemplation of both*

parties at the time they made the contract as the probabe result of the breach

The above Rule finds expression in our Law of Contract Act, Cap. 345 R.E. 2002as follows;

> ***"73.**-(1) When a contract has been broken, the party who suffers by suchbreach is entitled to receive, from the party who has broken the contract,**compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach**, or **which the parties knew, when they made the contract, to be likely to result from the breach of it.***
>
> *(2) The compensation is not to be given for any **remote and indirect loss or damage** sustained by reason of the breach.*
>
> *(emphasis added).*

On the strength of section 73(1) of the Law of Contract Act, a party who suffers from breach of contract is entitled to receive compensation for any loss which *naturally arose in the usual course of things from such breach* or *which the parties knew, when they made the contract, to be likely to result from the breach of it.* And in terms of section 73(2) of the Act, *compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."*

The issue is whether the amount of **Tshs. 5,000,000/=**awarded by the trial Magistrate as compensation for breach of contract could be said to have *naturally arose in the usual course of things from such breach* or *the parties knew, when they made the contract, to be likely to resultfrom the breach of it.* The compensation to be awarded has to meet either of these two tests, that is, loss flowingdirectly and naturally

from the failure by the Appellant to keep part of his promise in the Loan Agreement to repay the loan within the prescribed period or *parties knew, when they made the contract, to be likely to result from the breach of it.*

I am of the firm view that by the nature of things, the Respondent has suffered some loss as a result of the breach of the contract, which loss could be said to flow directly and naturally from the failure by the Appellant to keep part of his promise to repay the loan within the agreed stipulated period. The issue is whether such amount was reasonable in the circumstances of this case. The damage arising from the breach was reasonably within the contemplation of the parties at the time when the Loan Agreement was made.

The learned Counsels for the parties are at a consensus that damages are awardable at the discretion of the court. In ***Black's Law Dictionary,*** by Bryan A. Garner 9th Edition (2009), West Publishing Co., Thomas Reuters, United States of America, p.445, ***"damages"*** are defined as, "*money claimed by, or ordered to be paid to, a person as compensation for loss or injury.*" The assessment of damages in contract and tort in common law jurisdictions is underpinned by the fundamental "***compensatory principle***", which provides that, the purpose of an award of damages is to compensate the injured party for loss, rather than to punish the wrongdoer. In the instant case, I am of the firm view that the award of **Tshs.5,000,000/-**as general damages aimed more at punishing the wrongdoer (the Defendant/Appellant who was in breach of the Loan Agreement) than to compensate the Plaintiff/Respondent. The amount of **Tshs. 5,000,000/=** the trial Court awarded to the Respondent as general damages, in my considered view,

is inordinately high and it was wholly based on an erroneous estimate of the damage the Plaintiff/Respondent suffered as a result of the breach of the Loan Agreement.

In measuring or assessing general damages in breach of contract, there are *relevant factors that are to be taken into account.* In the instant case, the trial Magistrate after considering the time the Respondent spent making a follow up on the loan repayment without any success,which time according to the trial Magistrate, the Respondent would otherwise have used to run his business, concluded that she had "...***no doubts that the plaintiff suffered general damages.***"

In my considered view much as lost time in making a follow up by the Respondent on the loan payment could be an important factor to consider in assessing general damages awardable to the Respondent, it was not the only relevant in the instant matter in assessing damages. It is not evident in the record the amount of time in terms of working hours the Respondent had spent while following up on the loan payment, so as to explain as to how the trial Magistrate arrived at the conclusion that the lost time by the Respondent in following up on the loan payment and not attending to his business was quantifiable as amounting to **Tshs. 5,000,000/=.** I am of the firm view that in the absence of evidence by the Plaintiff/Respondent to prove any loss naturally and directly flowing from the breach of the loan agreement and failure by the Plaintiff to prove the actual amount of his loss, this was clearly a case for award of **nominal damages.**

Before the trial Court, the Plaintiff/Respondent did not manage to prove loss flowing directly and naturally from the breach of the Loan

Agreement or the actual amount of his loss. It is a matter of principle that damages must reflect the loss, if any, the innocent party has suffered. In such circumstances, the Plaintiff/Respondent was therefore entitled only to **nominal damages [s**ee the decision in the case of ***The Mediana [1900] A.C. 113***.] Nominal damages can arise or be granted where the Defendant's breach of contract has in fact caused no loss to the Plaintiff, but it may also arise when the Plaintiff, although he has in fact suffered loss, fails to prove any loss flowing from the breach of contract or fails to prove the actual amount of his loss.

In the particular circumstances of this case, an award of Tshs. 1,000,000/= would have met the ends of justice.

Let me now albeit very briefly comment on Clause 5 of the Loan Agreement in which the borrower (Appellant) undertook to pay any other costs incurred as a result of any inconvenience caused by him and interest of 20% on the principal sum of the loan monthly as from the date of default.

Briefly, on **10th of August 2015,** the Appellant and the Respondent entered into a Loan Agreement **(Exh. PE1)** of Tshs. 5,000,000/=. The contact term was to last until **09th of September 2015.** That period was however, extended for a further period of one month until **09th October 2015.** Theevidence on record is that, the Appellant has managed to repay part of the loan albeit having defaulted for a period of almost nine (9) months. It was also a term in Cause 5 in the Loan Agreement that, in case of default, the Appellant was to pay monthly interest rate of **20%** on the principal sum of the loan, i.e.Tshs. 5,000,000/= from the date of default for each month in default until full payment is made. This meant that in case of default, the Appellant was

to pay a monthly amount of **Tshs.1,000,000/=** for each month of default.

The Law of Contract Act, Cap. 345 R.E. 2002 provides for compensationfor breach ofcontract where**penalty** is stipulated under section 74 in the following terms;

> ***"74.****-(1) When a contract has been broken,* ***if a sum is named in the contract as the amount to be paid in case of such breach****, or* ***if the contract contains any other stipulation by way of penalty,*** *the party complaining of the breach is entitled,* ***whether or not actual damage or loss is proved to have been caused thereby****, to receive from the party who has broken the contract* ***reasonable compensation not exceeding the amount so named*** *or, as the case may be,* ***the penalty stipulated****.*
>
> *(2) A stipulation for increased interest from the date of default may be astipulation by way of penalty." (emphasis added).*

In the instant case, Clause 5 in the Loan Agreement falls squarely within the ambit of section 74(1) and (2) of the Law of Contract Act as being a "***penalty clause.***" This provision do away with the common law rule that,*to the extent that a clause is a penalty, it will be unenforceable, but otherwise if the payment stipulated amounts to a genuine pre-estimate of loss arising in the event of breach, it may be enforceable.* In my considered view, a penalty clause in a contract is intended to compensate the person who suffers from a breach of contract whereactual damage or loss arising from breach of contract is not proved whereby reasonable compensation is to be awarded which does

not exceed the amount named in the contract as the amount to be paid in case of breach or the amount stated in the penalty.

In the instant case, the penalty clause in the Loan Agreement did not provide for a specific sum of money to be payable in the event of breach but stipulated for payment of a monthly interest rate of 20% on the principal sum of the loan, which is Tshs. 5,000,000/= on default until the loan amount was fully settled. In terms of section 74(1 and (2) of the Law of Contract Act such penalty clause is enforceable.

It is for the above reasons the **third ground of appeal**the trial Magistrate did not properly exercise her discretion in awarding the Respondent general damages to the tune of **Tshs. 5,000,000/=,** which amount the Appellant contends that was unreasonable and disproportionate to the claim of the Respondentis hereby held in the affirmative.

In the whole and for the above reasons, the appeal succeeds to the extent as shown herein.

The Judgment of the Resident Magistrate Court of Musoma in **Civil Case No. 49 of 2016** (Hon. J.S. Musaroche, RM) dated **28th September, 2016**) is hereby upheld to the extent as indicated herein.

The order by the trial Court for the Appellant to pay **Tshs.1,710,000/=** is hereby quashed and set aside.

The Appellant shall pay the Respondent only **Tshs.710,000/=**which is the amount remaining as the unpaid amount due on the loan.

The order by the trial Court for the Appellant to pay **Tshs. 5,000,000/=** as general damages for breach of contract is hereby quashed and set aside.

The Appellant shall pay the Respondent **nominal damages** to the tune of **Tshs. 1,000,000/=** only.

Thejudgment debt shall attract an interest at the court'sof **7%per annum** from the date of the judgment in the trial Court until full payment.

The order by the trial Court for payment of monthly interest rate at the rate of 20% on the principal sum of the loan for breach of contract as from the date of breach until full settlement of the loan amount is hereby confirmed and upheld.

I shall not make any order for costs. Each party shall bear its own costs for this appeal.

It is so ordered.

SGD: R.V. MAKARAMBA
JUDGE
24/04/2018

Date: 24/04/2018

Coram: Hon. Makaramba, J.

Appellant: Absent

Respondent: Mr. Alfred Daniel for the Respondent

B/C: S. Isangi

Mr. Alfred Daniel: My Lord, the matter is coming for Judgment. We are ready to receive it.

Court: Judgment delivered.

R.V. MAKARAMBA
JUDGE

AT MWANZA
24/04/2018