

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

**CIVIL APPEAL No. 197 OF 2016**

(Appeal from Judgment of the District Court of Temeke Before Hon. Kihawa  
Resident Magistrate dated of 3<sup>rd</sup> day of June, 2016 in Civil Case No. 54 of 2014)

**D.B SHAPRIYA AND CO. LTD.....APPELLANT**

Versus

**MEK ONE GENERAL TRADER.....1<sup>st</sup> RESPONDENT**

**ALCON AUCTION MARK LIMITED.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

5<sup>th</sup> December, - 17<sup>th</sup> December, 2019.

**J. A. DE-MELLO J;**

The Appellant, the Plaintiff in the lower District Court, had sued the Respondents then the Defendants for among others;

- 1. Honorable Court be pleased to declare that seizure of the Plaintiff's motor vehicle without an order of the Court was illegal in rem.**
- 2. That, this Honorable Court be pleased to order the Defendants severally and jointly to pay TShs. 92,807,000.00 being specific damages.**
- 3. Interest on the total amount at the amount rate from the date of judgment to the date of full settlement hereof.**

- 4. Payment of General Damages and punitive damages as per paragraph 13 hereinabove.**
- 5. Any other Relief (s) that this Honorable Court shall deem fit to grant.**

A **Counter Claim** by the Defendants now the Respondents was lodged to the effect as follows;

- 1. The Plaintiff be ordered to pay TShs. 50,447,345/= being outstanding debt and interest thereof.**
- 2. Interest on (a) above at prevailing commercial rates**
- 3. General Damages for Breach of Contract and all inconveniences caused as per the Honorable Court assessment.**
- 4. Interest on Decretal amount from the date of judgment until payment is made in full.**
- 5. Costs of this suit.**

Following the hearing of evidence, the Trial Court analysed and, evaluated evidence, in which the Trial Magistrate found it cogent, to both the Plaintiff/Appellant, and, in that, the Defendants Counter Claim was proved on the Balance of Probabilities for the claim outstanding to the tune of **TShs. 28,717,128/=** in fulfilment of the contractual obligation the two had maintained as a special damage, but illegal seizure of the motor vehicle, payment of **TShs. 17,000,000/=** for unlawful retaining of the vehicle and, **TShs. 30,000,000/=** as **General Damages to the 1<sup>st</sup> Defendant. Interest at Court rate from the date of judgment to**

**the date of full payment,** and, lastly cost be borne by the **2<sup>nd</sup> Defendant.**

Aggrieved, the Appellants and, represented by **Counsel Godwin Muganyizi,** have lodged three grounds of Appeal which basically challenge:

- 1. That, the Trial Court erred in law and fact when she condemned the Appellant to pay TShs. 30,000,000 as General Damages which amount is excessive to the principal amount pleaded by the 1<sup>st</sup> Respondent.**
- 2. That, the Trial Magistrate erred in law and fact when she awarded the 1<sup>st</sup> Respondent Specific damages which damages were not particularized and strictly proved.**
- 3. That, the Trial Magistrate erred in law and, in facts when issued a decree varying with Judgment.**

Written submissions was prayed and, duly granted by the Court on **3<sup>rd</sup> October, 2019** with the **1<sup>st</sup> Respondent** represented by **Counsel Dismas E. Mmbando,** and absence of the second Respondent and or his Counsel. Submitting on the first ground of Appeal, **Counsel Godwin Muganyizi** The award of General Damages is discretion of the court; such discretion must be exercised judiciously. That the award by Court as general damages to the tune of **TShs 30,000,000/=** to the first Respondent whereas Special Damages were at TShs. **28,717,128,000/=,** is unfounded in law as, at no time General Damages have ever been above the Special Damages. Counsel referred the case of **Ashraf Akber Khan**

vs. **Ravji Govind Varsan Civil Appeal No. 5 of 2017**, to fortify his stance as the Court of Appeal observed at page 27 as follows:-

**"...the Respondent preferred no factual basis to justify his prayer for General Damages. For, example he did not adduce any evidence on the so called psychological torture or unwarranted disturbances... therefore that the learned trial judge awarded the damages as a matter of course. The award was based on her own assumption but not on hard facts of the case. Her approach was also mistaken because she did not take into account that interest imposed on the loaned principal sum would mostly offset whatever economic loss and inflation the Respondent was exposed to.... We vacate the entire award of general damages."**

Addressing the second ground of Appeal that, the specific damages were not particularized and strictly proved as required by law and drawing from **page 28** of the typed proceedings in which **DW1** testified.

**"...We had the principal claim and interest thereto. TShs. 31,217,128/= and, interest is TShs 19,260,117 this makes from 50,477,345/= until this case is filed in Court. They paid about 25,500,000/= among the Principal sum. Claimed we later included the agent charges so it got to 30,000,000/= million."**

In this case, out of the principal claim of **TShs. 31,217,128/=** the Appellant had therefore reduced the sum by paying **TShs. 25,000.000/=** leaving a balance of **TShs. 6,217,128/=**. Cognizant of the fact that, payment for interest is accrued only on financial institutions and which are

registered by BOT, this not being one, then the outstanding balance would remain at **TShs. 6,217,128/=**. Relying on the case of **Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137, Counsel** emphatically contends that, it is trite law, that Special Damages must be specifically pleaded and, proved. Several other cases have shared the same view of the like of case of **Bolag vs. Hutchson (1950) AC 515, where** it was similarly held that:

**“Special damages are ... such as the law will not infer from the nature of the act. They do flow in the ordinary course, they are exception in their character and therefore, they must be claimed specifically and proved strictly”.**

Counsel noted the variance from the decree varies with judgment. In which the Judgment awarded **TShs 20,000,000/=** as General Damages, whereas the Decree bears general damages to the tune of **TSh. 30,000,000/=**. Coupled with all this, **Counsel Muganyizi** prayed for this Court to allow the Appeal with costs.

In reply thereto, Counsel for the **1<sup>st</sup> Respondent** opposed the ground on excessive awarding of General Damages as they purely are discretionary and never quantified the case of **Tanzania – China Friendship Textile Co. Ltd vs. Our Lady of Usambara Sisters [2006] TLR 70** in support of his contention. With Specific Damages not being specifically pleaded and, strictly proved, **Counsel Mbando** claims to have been so as depicted from typed proceedings in page 26 paragraphs five with PW1, one **Lewis Mchao** admitted that the Appellant owed the Respondent **TShs. 28 million** as an outstanding sum rout of lubricants products supplied to his

company. Moreover, the Respondent **DW1**, the Managing Director of the Respondent Company told the Court clear that he used to supply lubricant products to the Appellant since year 2013 as shown in **pages 28 and 29** of the proceedings of the Trial Court. **DW1** further testified that his Company, had only been paid **TShs 25,500,000/=** out of **31,217,128/=** from the gallons of lubricant products supplied to the Appellant. Lastly, on the third ground, on varying **Decree** with that of **Judgment, Counsel** considers it to be a minor error which can be rectified as provided by **section 96 of the Civil Procedure Code CAP. 33** which provides that:

**Clerical or arithmetic mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the court either of its own motion or the application of any of the parties.** Referring the case of **Jewels and Antingues (T) LTD vs. National Shipping Agencies Co. LTD 107** in which the Court held that;

**"Clerical and arithmetical mistakes in judgments may be corrected at any time..."**

He therefore he prays this Court to dismiss the Appeal with costs.

It is ground number 3 that, attracted my attention and, which if not well addressed, the rest of the grounds would have no legs to stand upon. I personally had struggled to comprehend and appreciate what the judgement of the Court was all about but to no avail. We might wish to recall that, other than the claim that, the Plaintiff now the Appellant raised

in the **Plaint**, the Defendant had in their **Written Statement of Defence** raised a Counter Claim as observed above. Now reading through the judgement it is difficult to appreciate what the findings of the Court were considering that, it is our law that, all Civil suit are founded on **Balance of Probability**. This is as observed by Trial Magistrate, the cardinal Principle to be relied upon which I find missing.

Further that and under **sections 110 (1) (2)** the reading goes;

- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.**
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.**

**Section 111** of the **Evidence Act Cap. 6** stipulates further that;

**“One who alleges must prove”**

All in fine it is the **Balance of Probability** which having considered the principles above, critical analysis and, evaluation of evidenced adduced by witnesses the Court has to come up with its findings. Several cases subscribes to these principles and to mention a few are; **Jeremy Woods & Another vs. Robert Chaundry & Others, [2008] 1 EA 143, AbdulKarim Haji vs. Raymond Nchimbi Alois & Another [2006] TLR 419, Kwiga Masa vs. Samwel Mtubatwa [1998] TLR 103.** The judgement should then be in line **Order XX Rule 4 & Order XX1X Rule 31 & 2 of Cap. 33.** It demands a **dispassionate evaluation of**

**evidence** for justice to prevail. It entails an objective evaluation of evidence as opposed to narration of evidence. In the case of **Mkulima Mbagala vs. Republic, Criminal Appeal No. 267 of 2006** the Court had this to say;

**“For any judgement of the Court of Justice to be held a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to found out which case among the two is more cogent. (emphasis is mine). In short, such evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at. See the cases of Shantilal M. Ruwala vs. Republic [1957] EA 570. It now behoves us to discharge this duty”.**

From the foregoing and, may the reasons for the variance as alleged, the judgement is short of the required standards. With the 34 pages proceedings, let the matter revert back to the Trial Judge to abide accordingly and, come up with a sound judgment as required that of Balance of Probability as to who among the two won the case. As well is the mismatch of decree from judgment which is vivid and quite glaring. With due respect to Counsel **Mbando** that the error is not a slip of pen as discussed and provide for by law as alleged. It is substantive in nature.



Consequently, the Appeal is hereby partly allowed as the matter is reverted to Trial Magistrate for composing a judgment in line with the standards set by law, attracting a matching decree therefrom.

It is so ordered.

  
**J. A. DE-MELLO**

**JUDGE**

**17<sup>th</sup> December, 2019.**