IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO 66 OF 2018

(Originating from Civil Case No. 65 of 2013 at Kinondoni District Court dated 13th day of December, 2017)

TRIPPLE INVESTMENT LTD.....APPELLANT

VERSUS

REAL BRAND SOLUTIONS LTD.....RESPONDENT

JUDGEMENT

Date of last order: 10/07/2019
Date of Judgment: 25/10/2019

MLYAMBINA, J.

The appellant mentioned above, having being aggrieved by the whole judgment of the District Court of Kinondoni in Civil Case No. 65 of 2013 delivered by Hon. Lihamwike, RM on the 13th day of December, 2017 lodged this appeal against the whole judgment and decree on the following grounds:

1. That, the learned trial Magistrate erred in law and in fact for failing to address himself to the issues framed and agreed by parties at the commencement of the trial.
2. That, the learned trial Magistrate misdirected himself in discussing the issue of production of mortgage deed to which the parties were not at issue, or at all.
3. That, the learned trial Magistrate erred in law and fact in finding that the respondent had complied with the terms of

the contract signed between the parties while there was evidence that the Respondents did not comply with such terms.

4. That, the learned trial Magistrate erred in law and in fact in finding for the respondent on the doctrine/ test of preponderance of probability while conceding that the respondent had failed to prove its case as per the required very test.
5. That, the learned trial Magistrate grossly misdirected himself in equating the counterclaim to an afterthought and consequently erred in law in failing and or omitting completely to adjudge on the merits or otherwise of the said counterclaim.
6. That, the learned trial Magistrate erred in law and in fact in awarding a compensation of Tshs 30,000,000/= (Tanzania Shillings Thirty Million only) to the plaintiff without any basis whatsoever for such an award.
7. That, the learned trial Magistrate erred in law and in fact in accepting that the respondent had filed her written statement of defence within the prescribed time while in fact she had not done so.

Reasons whereof, the appellant prayed that this Honourable Court be pleased to quash the Judgment and Decree of the District Court of Kinondoni in civil case no. 65 of 2013 delivered by hon, Lihamwike RM with costs.

In arguing the appeal, the appellant combined ground number 5 and 7 into one as they are somewhat interrelated. In addressing the first ground of appeal, the appellant stated that the learned trial Magistrate erred in law and in fact in failing to address himself to the issues framed and agreed by the parties to the suit at the commencement of the trial. It was the appellant's submission that at the commencement of trial, the following issues were framed and agreed by the parties to wit:

a. Whether the plaintiff and the parties entered in to a sale and advertising agreement dated the 11th May 2013.
b. Whether the defendant breached the terms of the agreement.
c. Whether as a result of the breach, the plaintiff suffered loss of Tshs 77, 634, 388 /=
d. Reliefs to which parties are entitled.

The appellant was of submission that the record will indicate that the proposed issues were filed on 13th December 2016. Trial of the suit was conducted within the confines of these issues. It was the

appellant's view that, if anything the trial Court, in making and arriving at its judgment ought to have considered or reasoned along the lines of framed issues.

However, as it is evident on page two of the judgment of the trial Court, the Court framed its own issues namely;

1) *Whether the plaintiff owes the defendant amount claimed in the plaint?*
2) *If question I above is answered in the affirmative, what reliefs are the parties entitled.*

The appellant while appreciating the Court's discretion to amend the issues or even to strike off some of the issues as it deems appropriate **(Order XIV Rule 5 (1) of Civil Procedure Act, [Cap 33],** nonetheless, submitted that, that discretion does not extend to the Court's liberty to completely abandon to consider and discus the salient issues framed and agreed by the parties. According to the appellant, in this case, the Court did not even make a note that it was abandoning to discuss the issues framed by the parties and for what reason.

In doing so, it was the appellant's submission that the trial Magistrate erred in law and resultantly occasioned injustice to the appellant. To that effect, the appellant cited an English case of

Jones v. National Coal Board (1957) QB. 5 the celebrated Lord denning had this to say;

> *"....in the system of trial, which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large..." (Emphasis Supplied).*

To this end, the appellant submitted that the trial Magistrate erred in fact and law in staying out to the issues raised by the parties.

The respondent in reply to the first ground of appeal argued that,

it was not disputed that the proposed and agreed issues were filed on December 13th 2016. Badly enough the issue the appellant is complaining to have been departed by the learned trial Magistrate was just framed in different style but the contents and the meaning remained the same. To back up such argument, the respondent cited **Order XIV, Rule 5 (1) and (2) of the Civil Procedure Code (CPC) Cap (33, R.E 2002**) which gives the power to Courts at any time before passing a decree to strike out any issues that appear to it to be wrongly framed or introduced. The respondent refereed this Court to the reading of Order XX Rule 4 and 5 of the Civil Procedure Code which also gives the power to Court to

determine the issue before it in one way or the other and Section 95 of the Civil Procedure Code which provides as follows:

> *"Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court"*

The respondent went on to submit that; one of the basic principles is the duty of the Court to determine one way or another an issue brought before it. This is the principle which finds expression in **Rule 4 of Order XX Procedure of Civil Code, 1966**. The rule states as follows with regard to contents of a judgment:

> *"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision"*

The respondent argued that, though the rule refers to judgment, the principle therein is applicable in any type of decision in a Court following the hearing of a matter.

I have carefully considered the arguments of both sides in respect to the first ground of appeal. I must observe that the appellant has not advanced a valid legal and factual argument. Going through the agreed framed issues and the one used in determining the

matter by the trial Court in its judgement one will find that the difference is only the wording but not semantic.

As it reflects the framed issues were whether the plaintiff and the parties entered into a sale and advertising agreement dated the 11th May 2013. The second issue was whether the defendant breached the terms of the agreement. The third issue was whether as a result of the breach, the plaintiff suffered loss of Tshs 77, 634, 388 /=. The last issue was on the relief(s). During judgement, the trial Magistrate put the issues as: Whether the plaintiff owes the defendant amount claimed in the plaint? If question 1 above is answered in the affirmative, what reliefs are the parties entitled.

In my found view, proof of the first three issues framed by the Court at the commencement of trial would entail proof of the first issue put in the judgement. In other words, the first three issues framed at the hearing can be answered by the first issue altered in the judgement. As such, the first ground of appeal is useless. The judgment was properly constituted and contained a concise statement of the case, the points for determination, the decision and the reasons for such determination.

On the second ground, the appellant argued that the learned trial Magistrate misdirected himself in discussing the issue of

"production of mortgage deed" on or to which parties were not at issue, or at all. It was the appellant's submission that at the last paragraph of page 2 of the judgment, the trial Magistrate made a reference to "...the required mortgage deed." Thus, in the suit, the parties were not in issue on any mortgage contract, or mortgage deed. The appellant thought, and submitted so, because the trial Magistrate allowed himself to stray out and venture into issues which were not before it, or not being contested by the parties. The trial Court strangely ventured into the issues of mortgage.

In reply, the respondent simply stated that the issue of the mortgage deed was never at all the in dispute.

Having gone through the copy of judgement, I noted the issue of mortgage was not deliberated by the trial Court. Page 3 of the judgement on its last paragraph speaks clearly that the court never acted upon the mortgage deed. The trial Court observed:

> *"However, this Court could not award any interest due to Plaintiffs failure to produce the required mortgage deed."*

In the light of the foregoing, even if this Court would agree that the trial Court erred in endeavoring to determine issues not agreed. Yet, the complained issue was not determined at the detriment of the appellant as the plaintiff failed to prove his case on that issue.

With respect to the third issue, the appellant submitted that, the learned trial Magistrate erred in law and in fact in finding that the respondent had complied with the terms of the contract signed between the parties while there was evidence that the respondent did not comply with such terms for discussing and discarding the contents and weight of exhibit D1, D2 and D3 without bearing in mind that the said exhibits were not even controverted to.

In view of the appellant, the trial Magistrate failed to consider the evidence of DW1 Salumu Said Seif which was to the effect that the plaintiff committed the following breaches to the agreement entered on 11th May 2013, to wit that:

i. It did not deposit the sale proceeds into the designated bank accounts with Diamond Trust Bank or NMB Bank contrary to article 6 of the agreement.
ii. It did not produce original bank slips or issue daily sales reports contrary to articles 7 and 8 respectively.

In the absence of evidence to the contrary, the trial Magistrate should not have decided for the plaintiff.

In reply to the third ground of appeal, the respondent submitted that the learned trial Magistrate directed himself on the evidence submitted by both parties during the course of hearing. Each party

had a duty to tender the exhibits for the Court's determination hence bank slips and daily sales report was properly tendered as exhibits. Hence, the Court was right to reach the conclusion.

It was the respondent reply that it is a matter of practice that always the Courts are ignorant of the facts of the parties and it is a duty of the parties to analyze their case properly by submitting the evidence so that the Court can reach a better decision of the trial.

I had time to go through the records, I noted true exhibit D1, D2 and D3 were water tight. The same was observed by the trial Court at page 3 of its decision when it stated:

> *"Indeed, I concur with the Defendant's averments in respect of the money being sent to the account that was not stipulated in their contract. However, evidence in record shows that they did receive such money but in different account nevertheless."*

On the fourth point, the appellant submitted *inter alia* that at the top page 5 of the judgment, the trial Magistrate concluded thus:

> *"Though the breach is evident on the part of the defendant, the plaintiff failed to prove their case as per the required test"*

It was the respondent's submission that no breach was ever proved in Court on the part of the defendant, on the contrary it is the Plaintiff (Respondent) who was in serious breach as already demonstrated above.

Secondly, the above quoted portion of the judgment says it all. The plaintiff failed to prove its case, as such, no fact was ever proved as per **Section 3 (2) of the Law of Evidence Act, (Cap 6, R.E 2002].**

In response, the respondent asserted that his prayers before the Court was to be paid TZS 77,634,388/= but the Court found it prudent and on the basis of the evidence tendered on the course of the hearing just to award the respondent TZS 30,000,000/- only.

The counsel for the appellant by stating that no facts were proved during the hearing is a disrespectfully to the trial Court.

I have digested the argument of both sides on this ground. It is evident from the impugned decision that the plaintiff/ respondent herein failed to prove the relief(s) claimed. But there was a proof which lead to the award of 30 million compensation. Such award was prompted with the findings that the appellant herein breached the contract.

I must observe further that, there might be some contradiction in terms of statements but the gist was on the breach of the contract of which this Court have the same findings. As such, the Court cannot reverse the decision of the lower Court while the record speaks voluminous that the appellant herein violated the contract.

On 5th and 7th grounds of appeal, the appellant argued that it was wrong for the trial Court to have accepted that the respondent had filed its written statement of defence to the counterclaim within the prescribed time. Records indicate that the written statement of defence containing a counter claim was filed on 16th December 2013. By the 16th June 2016, when the matter came for final pre – trial conference, the appellant herein prayed to the Court for defendant judgment as the respondent had not filed its written statement of defence to the counterclaim.

The respondent woke up and frantically attempted on an application for extension of time but later withdraw the same and proceeded to fabricate that it had indeed filed the required written statement of defence in what it termed as a rejoinder by producing an exchequer receipt dated 27/08/2015. These allegations were comprised in Misc. Application No. 65 of 2016. This application was resisted, for not being true, as the written statement of defence was never served to the appellant.

And in any event, the filing fees for the written statement of defence then was Tshs. 20,000/= and not Tshs. 5,000/= as appearing on the alleged exchequer receipt for the rejoinder.

Against these odds, the trial Magistrate proceeded to rule that written statement of defence was indeed duly filed.

As if the trial Magistrates Ruling was not enough, in his judgment he completely refused to consider and adjudge the merits or otherwise of the counterclaim. He merely equated the counter claim to "an afterthought'; which, was wrong in law and in fact.

According to the chambers dictionary new edition, a counterclaim is defined as:

> *"A claim brought forward as a partial or complete set off against another claim".*

At the same time, **Order VIII Rule 9** (2) of the Civil Procedure Code [Ca 33] provides that:

> *"Where a counter claim is set up in written statement of defence, the counterclaim shall be treated as a cross suit and the provisions of **Order VII** shall apply mutatis mutandis to such written statement of defence as if it were a plaint"*

It was the appellant's submission that; it was wrong for the Court to refuse to adjudicate on the counterclaim, and since evidence was produced by DW1 in support of the counterclaim. Thus, the judgment be entered for the appellant.

In the respondent's plaint before the lower trial Court, there was a claim of loss Tshs. 77,634,388/= which should be likened to specific damages.

The appellant argued that the law on claim for specific damages is very clear in that they should be specifically proved. During the entire trial, no loss/damage was ever proved on the part of the plaintiff (respondent) as a result of which the Court decided to award a sum of Tshs. 30,000,000/= based on its "opinion".

The appellant argued that in the absence of any proof, the Court cannot make a finding on merely being reasonable, or basing on speculation and /or conjecture as was established in the case of **NBC Holding Corporation v. Hamson Erasto Mrecha (2002) T.L.R** 71,72 and 73. The award of Tshs. 30,000,000/= therefore lacks no proof and basis.

In reply, the respondent argued that the written statement of defence which the appellant's counsel is contesting to have not been filed in time is a totally lie. The written statement of defence

was indeed filed within stipulated time, and the trial Court was always available to ensure the laws are adhered at all times in filing the documents. Should the same was not filed on time as the appellant wants this Court to believe. The Court is prudent enough to expunge the written statement of defence filed out of time from the Court's record.

In regards to the exchequer receipt of TZS 5000/=, respondent stated that; it is the duty of registrar officer to determine how much Court fees are payable on course of filing the pleadings before it and not the respondent. The appellant had no power to assess the Court fees to be paid but the duty of the Court. It is the submission of the respondent that the rejoinder and reply to the counter claim was properly assessed by the trial Court hence clear that the respondent paid the Court fees as per the assessment of the Court.

Considering the counter claim which the appellant counsel states that it was fabricated. The respondent stated that from the Court's record, it was very clear that the respondent filed the reply to the counter claim on August 27th, 2015.

For the avoidance of doubt and clarity the respondent paraphrased the ruling of the trial Court specifically at page 12 as follows:

"This Court has gone through the case file and found that indeed a document titled "rejoinder" containing a reply to counter claim at its page 2 was filed in Court as on August 27th, 2015 there were two copies of the same to let one draw an inference that the other party was not served"

The respondent stated that; the WSD to Counter claim was filed but was not served to him. The trial Court emphasized again at page 13 of the ruling that from the Court's record the reply to counter claim was made in Court on August 27th, 2015 but was not served to the appellant and the Court ordered the same to the served to the appellant. The prayer by the appellant that the judgment be entered in favour of the appellant does not hold water, unless the appellant does not believe the Courts which were established by laws.

In regard to ground of appeal no 6, the respondent submitted that; it is absurd for the appellant to doubt the reasoning of the Court on awarding compensation of TZS 30,000,000/ to the respondent. It is true that the respondent before the trial Court, prayed for claim of loss of TZS 77,634,388. It was the reasoning of the Court in its judgment not to award the respondent on what was prayed but awarded only TZS 30,000,000/=.

It was the respondent beliefs that; what was awarded to the respondent was based on the balance of probabilities as it is in civil cases. The case of **NBC Holding Corporation v. Hamson Erasto Mrecha** (2002) T.L.R is distinguishable as in the present case the respondent proved his case on the balance of probabilities.

Taking into account of the above submissions and in particular on the fact that there was a proof that the appellant herein breached the contract terms. The rule of the common law as it is in Tanzania, where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. (see **Robinson v. Harman** (1848) 1 Exch 850 at 855, (1843-60) All ER Rep 383 at 385).

However, it does not mean that every case of breach of contract the Plaintiff will be entitled to the whole amount claimed. It is the duty of the Court to assess the damages incurred and restore such person to his or her original position. Here there are no mathematics formula. It is the sole unfettered wisdom of the Court in awarding such damages. In the instant case, it is true the respondent claimed the sum of TZS 77,634,388. The trial Court when applying its wisdom, it awarded only TZS 30,000,000/=.

Therefore, one cannot challenge such wisdom of the Court unless he has very compelling reasons so to do.

On the issue of filling WSD out of time, the trial Court observed correctly that it was filed within time. The issue of filling and the issue of serving the other party should not be mixed up. If the WSD was filed within time, it cannot be said to have been filed out of time merely because it was served late to the other party.

As far as the fees of filling pleading is concerned, it has to be noted that such requirement is a statutory one. One has to comply with the schedule. Neither Registrar no any Court officer can reduce fees at his own wish. If such behavior is accepted, it is likely to paralyse the judicial system.

In the end, the appeal is dismissed with costs for lack of merits.

Y. J. Mlyambina
Judge
25/10/2019

Dated and delivered this 25th day of October, 2019 in the presence of counsel Beatus Kiwale holding brief of Mathew Kakamba for the appellant in person and Beatus Kiwale holding brief of Dennis Mwesigwa advocate for the respondent.

Y. J. Mlyambina
Judge
25/10/2019