

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

CIVIL APPEAL NO: 25 OF 2018

*(Originating from the decision of the District Court of Kilombero, Ifakara,
Civil case No 15 /2016)*

**FINCA TANZANIA LIMITEDAPPELLANT
VERSUS
MOHAMED MICHAEL KITUNGULU.....RESPONDENT**

JUDGEMENT

MASABO, J.:-

FINCA Tanzania Limited is disgruntled by the decision of the district Court of Kilombero at Ifakara in Civil Case No 15 of 2016 before Hon. Lyon delivered on 15th December, 2017. In the impugned judgment the court awarded the respondent specific damages at a tune of Tshs 154,170,500 and Tshs 45,000,000/= as general damages.

The genesis of the appeal is loan facility dating back to 20th January 2016. In this facility the respondent was advanced a sum of Tshs 150,000,000/= payable in a span of 36 monthly installments. The respondent defaulted repayment after he had deposited only 4 months. Consequently, on the 5th August 2016 the appellant took matters in its hands to realise the outstanding loan. It invaded the respondents shop and confiscated all his business assets approximately worth Tshs. 154,170,500/=. The respondent was unhappy. He successfully sued the Appellant for a sum of Tshs



154,170,500 being the value of the confiscated goods and Tshs 45,000,000/ = as general damages. Disgruntled, the appellant filed this appeal against the judgment and decree. He has marshaled three grounds;

1. That, the trial court erred in law and fact by entertaining the matter which was beyond its pecuniary jurisdiction;
2. That the trial court erred in law and fact by awarding special and general damages by using inappropriate standard of proof;
3. That the trial court erred in law and fact by delivering the judgment and decree thereof without considering terms and conditions of the loan and collateral agreement between the Appellant and Respondent.

Hearing proceeded in writing. Both parties were represented. The Appellant represented by Mr. Beatus Malawa submitted that the matter between the parties was beyond the pecuniary jurisdiction of the trial court because it emanated from a commercial relationship. Therefore, it was argued, the district court acted *ultra vires* as it had no jurisdiction pursuant to section 40(3) of the Magistrate Court Act [Cap 11 R.E 2019]. It was further argued that besides being a commercial matter the estimated value of the confiscated assets is Tshs. 154,170,500, an amount which is above the pecuniary bar of the district court.

On the second ground it was briefly argued that the decision of the trial court to award specific damages was erroneous as it was not based on proof contrary to the requirement of the law. It was the respondent view that,

specific damages ought to have been specifically proved by adducing EFD receipts showing the actual items in the shop on the fateful date.

On the third ground it was argued that decision of the court was made in total disregard of the fact that the Respondent pledged his business assets and his landed properties as collateral. It was argued further that, by confiscating the assets the Appellant did not breach any contract as it was merely enforcing its contractual rights to recover the loan from the respondent who had defaulted repayment. To support this argument, Mr. Malawa cited the case of **Abdallah Yusuph Omar V People's Bank of Zanzibar and another** [2004] TLR 339. He proceeded to argue that, in this case, the Court of Appeal held that the appellant breached the loan repayment, hence, the bank was entitled to exercise its power over the mortgage. He further submitted that the respondent breached the terms and conditions of the loan agreement. Based on this he concluded that the decision of the trial court be quashed and set aside.

Mr. Ezekiel Joel Ngwatu, counsel for the Respondent argued that the matter between the parties was not a commercial case. it was a purely civil matter in which the respondent claim of Tshs. 154,170,500/= as an estimated value of the confiscated goods. It was argued that the dispute sought to determine the legality of the Appellant's action of confiscating the said goods hence it was not a commercial matter.



In regard of damages Mr. Ngwatu submitted that both specific and general damages were proved and the trial court correctly addressed itself to the principles applicable in granting of the same. Further, it was argued that that appellant had the right to cross examine the respondent but relinquished that right thus his complaint cannot be entertained. The case of **Hadley V Baxendale (1984) 9 Exch 341 and Insignia Limited v CMA CMG (T) Limited**, Commercial Case No 36 of 2016 (unreported), was cited in support. Responding on the 3rd ground, he submitted that the trial court correctly considered the terms and conditions of the loan and collateral agreements. Thus, there is nothing to fault him. Mr. Ngwatu argued that the case of **Abdallah Yusuph Omary V Peoples's Bank of Zanzibar and Another** (supra) is distinguishable from the instant case because the Appellant did not give notice prior to the confiscation of the respondent's goods.

I have considered the grounds of appeal, the submission of the parties and the original records which I have thoroughly read. Three issues stand for determination.

- i. Whether the suit was commercial and beyond the pecuniary jurisdiction of the trial court;
- ii. Whether the Respondent proved his case against the appellant
- iii. Whether the damages were correctly awarded

As regards the first issue, section 40 (3) of the Section 40 (3) (b) of The Magistrates' Courts Act Cap 11 of 2019 which reads;

(Notwithstanding subsection (2), the jurisdiction of the District Court shall, in relation to commercial cases, be limited-



- (a) N/A
- (b) in proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed thirty million shillings"

What constitutes a commercial case is defined under rule Section 3 (e) of the High Court (Commercial Division) Procedure Rule of 2012, as follows:

- " a civil case involving a matter considered by the court be of commercial significance including any claim or application arising out of a transaction of trade or commerce but not limited to:-
- a) The formation of a business or commercial organization
 - b) The management of a business or commercial organization
 - c) The contractual relationship of a business or commercial organization with other bodies or person outside the business or commercial organization
 - d) The liability of a business or commercial organization or official of the business or commercial person arising out of that person's business or commercial activities.
 - e) Banking and financial services**
 - f) The restructuring or patent of commercial debts by or to business or commercial organization or person
 - g) The enforcement of arbitral award [emphasis added]

the dispute between the parties having arisen from a loan agreement with a total value of Tshs 150,000/= falls squarely under the purview of commercial matters. With respect to the respondent's counsel, the dispute between the parties is not detached from the loan agreement. It revolves

around the appellant's right for recovery of the outstanding loan and the correctness or otherwise of the recovery measures employed by the appellant. The facts are crystal clear. There is, certainly no gain in insisting that the matter was not commercial whereas the subject matter is purely commercial.

In the end result, I find and hold that, the dispute between the parties fell under the purview of section 40(3)(b) of the Magistrate Courts Act, Cap 11 RE 2019 hence, was above the jurisdiction of the trial court. Therefore, the whole proceedings of the trial court, including the judgment and decree, were null and void.

Having found the proceedings to be a nullity, I will not proceed to determine the remain two grounds.

Accordingly, the appeal is allowed. The whole proceedings of the trial court, including the judgment and decree are quashed and set aside. Costs to follow event.

DATED at DAR ES SALAAM this 16th day of June 2020.



J.L. MASABO

JUDGE