

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL APPEAL NO 17 OF 2019**

*(Originate from Civil Case No 47 of 2017)*

**HERITAGE FINANCING LIMITED ..... APPELLANT**

**VERSUS**

**HARIET KHATIB KAMOTE.....RESPONDENT**

**JUDGMENT**

**ROBERT, J:-**

The Respondent Hariet Khatib Kamote brought a claim at the Resident Magistrates' Court of Arusha at Arusha against the Appellant, Heritage Financing Limited claiming a principal sum of Tanzania Shillings One Hundred and Eighty Million (TZS 180,000,000/-) for attaching and holding her car without any lawful cause. The court entered judgment in favour of the Respondent and ordered the Appellant to pay the Respondent a total of Tsh. 32,000,000/= as compensation for unlawful attachment and confiscation of motor vehicle; general damages at the tune of Tsh. 30,000,000/=; Interest of 10% per annum to the decretal sum from the

date of judgment to the date of payment in full and costs of the case. Aggrieved, the Appellant appealed to this court against the decision of the trial court.

A brief factual background of this matter reveals that, on 5<sup>th</sup> March, 2015, the Appellant and Respondent entered into a loan agreement whereby the Respondent took a loan of Tshs. 20,000,000/= (Twenty million Only) from the Appellant with an agreement that the Respondent would repay the loan within a period of six months from the date of execution of the agreement with an interest of 10% per month on principal sum which makes a total amount payable to Appellant to be Tsh. 32,000,000/=.

Parties to the loan agreement agreed that repayment of the loan and interest accrued thereon would be effected by the Respondent in six installments payable on monthly basis. Payment for the first to fifth installments was supposed to be paid on the 5<sup>th</sup> day of each month at the tune of Tshs. Tsh.2,000,000/= starting from 5<sup>th</sup> April, 2015 whereas in the sixth installment the Respondent was required to pay the outstanding amount which is Tshs. 22,000,000/= payable on 5<sup>th</sup> September, 2015. Based on the loan agreement, the Respondent was required to deposit

Registration Card of his Motor vehicle Number T318 CRW as security for the loan. They also agree to appoint arbitrator in case the dispute arise between them.

The Respondent paid some of the money for the interest but on 4<sup>th</sup> August, 2015, before the due date, the Appellant ordered Mabuco & Co. Ltd to seize the plaintiff's motor vehicle. The loan agreement was silent on seizing the said Motor vehicle once payment of loan interest are not made. The Respondent was also required to sign an agreement as if she sold the said motor vehicle to the Appellant. Being dissatisfied the Respondent filed a suit against the appellant at RM's Court of Arusha. The appellant denied all the charges but at the end it was decided in favor of the respondent herein.

Dissatisfied with the decision of the RMs' court, the appellant appealed to this court armed with six grounds of appeal which, for convenience of reference, I take the liberty to reproduce as follows: **One**, the trial magistrate erred in law and facts by entertaining the suit without jurisdiction. **Two**, the trial magistrate erred both in law and facts by imposing the interest of 10% from the date of Judgment till payment in full. **Three**, the trial magistrate erred both in law and facts by awarding

the plaintiff Tanzanian Shillings Thirty Two Million (Tsh. 32,000,000/=) contrary to the evidence, prayers as to relief(s) sought for by the plaintiff. **Four**, the Honourable trial magistrate made an error of law and fact when awarding Tanzania Shillings Thirty Two Million (Tsh. 32,000,000/=) to the plaintiff in total reliance on a purported opinion from the bar (plaintiff's learned counsel) contrary to and in total disregard of evidence adduced before the court. **Five**, the Honourable trial Magistrate erred in law and facts by awarding the plaintiff excessive amount of general damages. **Six**, the Honourable trial Magistrate erred in law and fact by deciding the case in favour of the plaintiff without there being any proof of payment of the said loan and interest to the Defendant.

When the appeal came up for hearing on 9<sup>th</sup> April, 2020, the appellant was represented by Mr. Robinson Makundi, learned counsel while the respondent was under the services of Mr. Duncan Oola, learned counsel. Mr. Makundi submitted that he intended to argue the first, second, fifth and sixth grounds of appeal separately and consolidate the 3<sup>rd</sup> and 4<sup>th</sup> grounds.

Submitting on the first ground of appeal, the appellant's counsel started his submissions by stating that, it is a trite law that, a plaintiff has to be read

as a whole with its annextures. He cited the case of **TANZANIA CHINA FRIENDSHIP TEXTILE CO. LTD vs. OUR LADY OF THE USAMBARA SISTERS (2006) TLR 71** where it was held that;-

“It is a substantive claim and not the general damages which determine the pecuniary Jurisdiction of the Court”

He argued that paragraph 12 of the amended plaint is just a creature of the general damages as the Plaintiff pleaded for the loss of use. If the claims in para 12 are expunged what remains is a claim of Tshs. 120,000/=only. He maintained that the trial court’s findings at page 9 of the impugned Judgment is to that effect. He argued that since the substantive claim was smaller compared to the pecuniary jurisdiction of the court, the trial magistrate was supposed to return the plaint to the plaintiff so that he could file the case at the court of competent jurisdiction. To support his position, he cited the case of **BIMEL ENTERPRISES COMPANY LTD VS TANZANIA NATIONAL ROADS AGENCY & AG, Civil Appeal No 31 of 2017** (Unreported) at page 14.

In reply to this ground, Mr. Oola, stated that, Mr. Makundi’s submission regarding the pecuniary jurisdiction of the court looked at paragraph 12 of

the amended plaintiff only and left out relevant paragraphs such as paragraph 3 and 16 which are also stating pecuniary jurisdiction. He argued that in ascertaining the jurisdiction of the court, the plaintiff has to be looked at as a whole.

He argued further that Mr. Makundi's submission creates a situation where specific damages can be treated as general damages. He maintained that the trial court dealt with paragraph 3 of the amended plaintiff which was a principal sum and paragraph 12 which shows specific damages of Tshs. 180,000,000/= which was supposed to be proved by the Respondent. He distinguished the two cases cited by the appellant's counsel on the ground that they deal with the loss of profit and not the loss of use as in the case at hand. Failure by the plaintiff to prove specifically how she suffered cannot take her claim to be that of general damages.

On the point that the court should have returned the plaintiff for lack of pecuniary jurisdiction, He argued that the court cannot return the plaintiff after hearing the parties as submitted by the counsel for Appellant; the only remedy will be to either award the plaintiff or dismiss the claim. Failure of the plaintiff to prove the claim does not remove the jurisdiction of the court. Pecuniary jurisdiction of the court is established at the



beginning of the case, it doesn't wait for the proof of the claim. He prayed for this ground of appeal to be rejected.

Coming to the second ground of appeal, Mr. Makundi submitted that, Order XX Rule 21 (1) of CPC, provides for the right interest rate to be imposed. The trial court was supposed to impose 7% interest and not 10% as there was no any agreement between the parties to that effect. He prayed for the 10% interest to be expunged and the court to impose the proper interest rate which is 7%.

Responding to this ground, Mr. Oola, agreed with the appellant's counsel that, the court was supposed to impose the interest of 7% and not 10% as they were not in agreement to impose that 10%. He argued that under Order XX Rule 21 of the Civil Procedure Code, Cap. 33 R.E. 2002, 7% interest is couched in mandatory terms thus the room is not open for the court to award more than 7% interest if parties are not in agreement to that percentage.

Consolidating the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal, the appellant's counsel stated that, the plaintiff did not pray for payment of Tshs. 32,000,000/= as the value of the car. It was a new issue raised by the Magistrate at page 9

and 10 of the trial court judgment. The parties were never called to testify on that matter. The defendant's counsel was a stranger to the case and not party to that case.

In reply to this ground, Mr. Oola, stated that, the said Tshs. 32,000,000/= is derived from exhibit PB (purported sale agreement) which was tendered by the Respondent and the court agreed that the said contract was illegally entered into by the Appellant. He argued that, the court was just trying to rate the value of the car which was wrongly attached by the appellant. It was not the advocate's submission which swayed the court to grant the 32,000,000/= as Mr. Makundi wants the court to believe.

He submitted further that, at page 28 of the trial court proceedings, Dw1 during cross examination mentioned the value of the car to range from 34 to 35 Million Shillings. The plaintiff also at page 16 of the proceedings stated the value of the car. The court was faced with a difficult time to ascertain the value as stated by the plaintiff or defendant's witness. The learned counsel was of the opinion that, the trial court believed the parties entered into a contract which stipulates the right value of the motor vehicle to be 32,000,000/=. To the contrary, the trial court was supposed to order



for restoration of the said Motor vehicle. Based on the reasons given, he prayed for this ground to be rejected.

Submitting on the 5<sup>th</sup> ground, Mr. Makundi stated that, the general damages awarded by the trial court was too excessive, general damages are to be assessed as being the direct, natural or probable consequences of the wrongful act. The general damages awarded were too excessive compared to the value of the car. He cited the case of **MBARAKA WILLIAM vs. ADAM KIBUTE & OTHERS (1993) TLR 358**, it was held that:

*“The amount awarded was excessive and acted on wrong principle and should be expunged and substituted by a proper award”.*

In response, Mr. Oola stated that, at page 16 of the lower court proceedings the plaintiff stated how she suffered psychologically, her reputation lowered, lost confidence and her marriage affected and prayed for general damages at the amount the court thought was fair and just. Under the circumstances, he argued, the amount of 32,000,000/= awarded to the plaintiff was fair. He pointed out that the Appellant’s counsel did not

come up with the amount he thinks is fair to be granted as general damages.

On the last ground, Mr. Makundi submitted that, the plaintiff never denied that she took loan from the defendant and no proof that the said loan was repaid. He argued that the alleged payments in paragraph 9 of the amended plaint were never proved in court yet the trial court magistrate decided in favour of the Respondent. He prayed for the RM's court decision to be quashed and set aside with costs.

Responding to this ground, Mr. Oola stated that, the Respondent did pay some money in adherence to the loan agreement. The problem came on 4.8.2015 when the appellant attached the motor vehicle which was not the security and the same was attached before due date which was 5.09.2015. By doing so, the Respondent breached the contract. He referred the court to page 28 para 1 of the proceedings where the appellant's witness testified that, the security was motor vehicle's card and not motor vehicle itself. He also stated that, when the Appellant's witness was cross-examined as to whether the Respondent was still indebted to the Appellant at the time of trial, she said that the car had already been sold but she

didn't remember the date of sale and the amount realized but she stated that as "for now the plaintiff owe us nothing".

Mr. Oola argued further that the submission by the Appellant's counsel that there was no proof of payment was just an afterthought. He prayed for the lower court decision to be upheld with minor modifications regarding the percentage of interest as argued in ground no 2. The rest of the appeal to be dismissed with costs.

Having heard the arguments and submissions by counsel for both parties I will now deliberate on the grounds of appeal in seriatim.

Starting from the first ground, the Appellant is faulting the trial magistrate for entertaining a suit without jurisdiction. The Appellant's counsel submitted that, paragraph 12 of the amended plaint is just a creature of general damages as the Respondent pleaded for the loss of use. And if the court expunges claims in that paragraph the remaining claim will be Tshs. 120,000/= which is less than the pecuniary jurisdiction of the trial court. He cited the case of TANZANIA CHINA FRIENDSHIP TEXTILE CO. LTD vs. OUR LADY OF USAMBARA SISTERS (2006) TLR NO

70 to establish that it is a substantive claim and not general damages which determines pecuniary jurisdiction of the court.

The Respondent's counsel, on the other hand, opposed this ground by stating that, in ascertaining the jurisdiction of the court the plaint has to be looked at as a whole. He argued that paragraph 3 and 16 of the amended plaint should also be considered in determining the pecuniary jurisdiction of the court.

I will take the liberty of reproducing para 3, 12 and 16 of the amended plaint for comfort of reference. The said paragraphs provide as follows:

*"3. That the plaintiff claims from the defendant a principle (sic) sum of TZS. 180,000,000/= (one hundred and eighty million only) for attaching and holding the plaintiff's car without any lawful cause since 5/08/2015.*

*12. That the act of attaching and or seizure of the plaintiff's car by the defendant caused the plaintiff to suffer a specific damage of TZS 180,000,000/= (one hundred and eighty million only) which is equal to a loss of TZS 300,000/= per day since 4<sup>th</sup> day of August 2015.*

*16. That the cause of action arose in Arusha and the amount claimed i.e. Tsh. 180,000,000/= by the plaintiff against the defendant is within the jurisdiction of this Honorable court."*

It is obvious from the paragraphs alluded to above that the total amount claimed by the Respondent was Tsh. 180,000,000/= which means the quoted paragraphs do not each establish a separate claim distinct from the other as argued by the counsel for the Respondent. Paragraph 3 and 16 seems only to indicate the total claim in the plaintiff's case which is a claim of damages stated in paragraph 12 of the amended plaint. However, a claim in paragraph 12 is for specific damages and not general damages as it provides for actual expenses the Respondent was forced to incur as a direct result of the Appellant's actions. As observed by the trial magistrate, the Respondent having been deprived of her motor vehicle had to seek alternative means of transport to her financial detriment. This court is in agreement with the argument by the counsel for the Respondent that failure by the Respondent to prove specifically how she suffered does not turn her claim for specific damages into that of general damages.

Having established that a claim in paragraph 12 of the amended plaint was not for general damages but specific damages, this court finds that the

Respondent's claim was within the pecuniary jurisdiction of the trial court, consequently this ground of appeal is not answered in affirmative and it is hereby dismissed.

Coming to the second ground of appeal, Mr. Makundi is questioning the 10% interest imposed by the trial magistrate from the date of judgment to the date of payment in full saying it is contrary to Order XX Rule 21 of the Civil Procedure Code (Cap. 33 R.E 2002) which provides for 7% interest. The law allows the court to grant more interest when there is an agreement between the parties which is not the case in this matter. The Respondent's counsel agrees with Mr. Makundi that the trial magistrate erred when he imposed an interest of 10% in the absence of an agreement between the parties to that effect. This court is in agreement with the submission of the counsel for both parties on this ground, the trial court was duty bound to impose a 7% interest on the decreed sum in the absence of the parties agreement to impose a higher rate. Consequently, I hereby expunge the 10% interest imposed by the trial court on the decreed sum and substitute it with the 7% interest as required by the law.

On the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal, the Appellant's counsel faulted the trial magistrate for awarding the Respondent Tshs. 32,000,000/= contrary



to the evidence and reliefs sought by the plaintiff. He argued that the plaintiff's plaint did not have a particular prayer for payment of 32,000,000/= as the value of the motor vehicle. It was a new issue raised by the Magistrate in the Judgment and parties were never called to testify on this. On the contrary, Mr. Oola submitted that, the award of Tsh. 32,000,000/= is the value of the car which was wrongly attached by the appellant as shown in exhibit PB which was tendered by the Respondent.

I have looked at the reliefs sought by the Respondent (Plaintiff) through the amended plaint filed with the trial court on 21<sup>st</sup> June, 2017 and noted that item (c) reads as follows:

*"(c) that, the motor vehicle be returned by the defendant to the plaintiff while in a proper running condition."*

The trial court dealt with this issue at page 9 and 10 of the impugned Judgment. The trial court decided that the sum equal to the evaluation of the motor vehicle be paid back to the Respondent (Plaintiff). When deciding on the amount of award in respect of the value of the motor vehicle, the trial court made reference to the testimony of DW1 as follows:

*"DW1 had deponed in this court that the vehicle was evaluated between shillings 34,000,000/= and 36,000,000/=. This court is of the considered opinion that a sum of Tshs. 32,000,000/= would meet justice of this case".*

It is therefore obvious that the award of 32,000,000/= was not an issue raised by the trial Magistrate in the Judgment which parties were not called to testify on as alleged by the counsel for the Appellant. This court finds no merit on this ground and it is hereby dismissed accordingly.

Moving to the fifth ground, the Appellant is disapproving the amount of general damages awarded by the trial court as excessive. Mr. Makundi submitted that the trial court did not state the basis of the award and acted on a wrong principle. He argued that, the award was excessive because general damages has to be assessed as being the direct, natural or probable consequences of the wrongful act whereas in this case the award was excessive compared to the value of the car. Objecting this ground, Mr. Oola stated that, at page 16 of the lower court proceedings the plaintiff stated how she suffered psychologically, her reputation lowered, lost confidence and her marriage affected and prayed for general damages at the amount the court thought was fair and just. The learned counsel thinks

under the circumstances the amount of 30,000,000/= awarded to the plaintiff was fair.

Awarding general damages is at the discretion of the trial court, except where the trial court applied wrong principle in awarding such damages.

In **MBOGO AND ANOTHER vs. SITAH [1968] E.A. 94**, it was held that;-

*"Principles governing award of general damages are not a new phenomenon in legal justice. They are awarded at the discretion of the court as it was held in Copper Motor's case [1990] TLR 96. The appellate court should rarely interfere with the exercise of the discretionary power of the trial court in awarding general damages. The issue which the court will determine is whether the trial magistrate erred in embarking into wrong principle by taking into account some irrelevant factors or leaving out some relevant matters in awarding general damages"*

principles or that the amount awarded was too excessive. This court thinks the Respondent (Plaintiff) preferred no factual basis to substantiate his prayer for general damages. She did not offer any material information on the so called psychological torture and lowered reputation to convince the court that her suffering was real and significant to warrant the amount awarded. The Honorable magistrate awarded the damages based on his own assumption and not on the facts of the case. In the circumstances of this case, this court considers the award of Tsh. 10,000,000/= as sufficient for general damages. The award of Tsh. 30,000,000/= awarded by the trial court is hereby expunged and substituted with that of Tshs. 10,000,000/= for general damages.

On the last ground, the Appellant's counsel faulted the trial magistrate for deciding in favour of the Respondent without proof that the loan taken and interest thereof was repaid to the Appellant. The Respondent's counsel, on the other hand, maintains that the loan money was paid in adherence to the loan agreement but the Appellant breached the contract on 4.8.2015 when they attached the motor vehicle which was not the security and the same was attached before due date which was 5.09.2015.

The claim which gave birth to this appeal was filed by the Respondent against the Appellant for attaching and holding her motor vehicle without any lawful cause. The Appellant (Defendant) did not file counterclaim against the Respondent for outstanding payments in the loan agreement. The court looked at the claim presented before it and decided in favour of the Respondent.

When looking at the alleged default to repay the loan, the court found at page 7 of the impugned judgment as follows:

*"It is a naked fact that the alleged default to repay the loan was prematurely invoked. It is also a naked fact that DW1, the principal officer of the defendant failed to tender the loan payment schedule to prove the alleged default".*

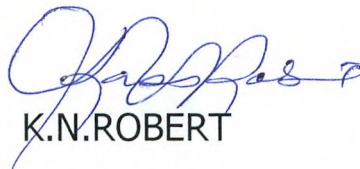
Looking at the claim presented before it and the evidence adduced, the trial court was convinced that the attachment of the motor vehicle by the Appellant was done illegally as it was done before the due date and the Appellants failed to prove the alleged default, based on that, the court decided in favor of the Respondent herein. This court finds no reason to

fault the findings and decision of the trial court on this ground. For that reason this ground of appeal is hereby rejected.

In the result, this appeal is partly allowed only to the extent of variations made to the general damages and the interest rate imposed on the decreed sum. Apart from the said variations, I otherwise find the appeal to be lacking in merit and dismiss it accordingly. In the circumstances of this case, I make no orders as to costs.

It is ordered.



  
K.N.ROBERT  
JUDGE  
3/7/2020