IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 151 OF 2017

NICO INSURANCE (T) LIMITED..... APPELLANT

VERSUS

PHILIP PAUL OWOYA.....1ST RESPONDENT

TABU SINJENE.....2ND RESPONDENT

ABILLAHI MOHAMED.....3RD RESPONDENT

JUDGMENT

Date of last order 16/10/2019

Date of Judgment 21/02/2020

NGWALA, J

The Appellant, Nico Insurance (T) Limited was aggrieved by the decision of Sachore, RM dated 17th May, 2016 given in Civil Case No. 10 of 2011 at the District Court of Ilala.

The brief facts of the case grasped from the pleadings are that the plaintiff, now the first respondent, filed a suit against the defendants, who are now the appellant herein, the second and third respondents respectively. The appellant claimed jointly and severally for payment of Tshs.15,400,000/= as costs of repair and break down charges to his damaged vehicle. A sum of Tshs

10,013,600/= was also claimed as general damages, interest on the decretal sum at the rate of 12% per annum and the costs of the suit.

It is not in dispute that the first respondent's vehicle was damaged by the second respondent on 9th October, 2008. Liability was admitted but the amount claimed for costs of repair and break down charges to the damaged vehicle was disputed. It was from that basis, the first respondent took the matter to court. At the end of trial, Sachore, RM entered judgment in favour of the plaintiff.He ordered the plaintiff be paid Tshs.3,712,500/= as costs of repair and break down charges to his damaged vehicle, payment of Tshs 10,000,000/= as general damages, interest on the decretal sum at the rate of 10% per annum and the costs of the suit.

Dissatisfied by the trial court's decision, the appellant brought this appeal raising two grounds of complaints as follows;

1. *That the learned trial Magistrate erred in law and in facts by awarding the 1st repondent the sum of Tshs 3,290,000/= as repair costs of her motor vehicle without any cogent proof relying only on the receipts which emanated from the garage which was never pleaded in the plaint.*

2. *That the learned trial Magistrate erred in facts and in law as he failed to properly evaluate the evidence and hence arrived to exorbitant quantum of damages*

The appeal was argued and disposed off by way of written submissions. In his written submission to the first ground of appeal, the learned counsel for the appellant Mr. Mudhihir Magee submitted that the repair costs of the motor vehicle awarded to the 1st respondent was not proved. He argued that what is pleaded under paragraph 15 of the plaint is the repair costs paid to Wilken Motors Garage. The receipts signifying the payment of repair costs to Wilken Motors Garage which repaired the 1st respondent's motor vehicle were not tendered in court. The receipts tendered to support the amount claimed for repair costs were from Green Belt Car Clinic. The company too was not pleaded in the plaint.

Mr. Magee contended that since Green Belt Car Clinic company was not pleaded in the plaint and owing to the fact that the parties to the case are bound by their own pleadings; then, the trial court was not supposed to base its finding on a matter not pleaded in the plaint. The cases of **Froil Investment Limited v. Reliance Insurance Tanzania Limited, Commercial Case**

No. 15 of 2015 and **Fatuma Idha Salum v. Khamis Said (2004) TLR 423**, were cited to support the contention.

On the second ground of appeal, the counsel pointed out that in law, general damages are awarded at the discretion of the court. The same however must be reasonable and reflect the reality of the particular matter before the court. It was further submitted that this court has the jurisdiction to interfere with the assessment of general damages if the award is on the high side. The cases of **Gervas Yustine v. Said Mohamed Ndeteleni, Civil Appeal No. 189 of 2004, Stanibic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited, Civil Appeal No. 21 of 2001** and **The Cooper Motor Corporation Limited v. Moshi/Arusha Occupational Health Services (1990) TLR 90** were cited to support the contention.

The counsel further submitted that in the present case the sum of Tshs. 10 million awarded as general damages was extraordinary high. The same does not match with the reality of the matter. He stressed that the plaintiff suffered nothing special to deserve the exaggrerated quantum of general damages. He therefore urged the court to overturn that quantum of Tshs. 10,000,000/= to catchup a reasonable damages. To him the sum

of Tshs. 2,000,000/= was reasonable if at all the plaintiff was entitled to the award of the general damages as the aim of general damages is to put the party in the former position and not to enrich the same at the expence of the others. To support that point, the counsel referred this court to the case of **Michael Ashley v. Anthony Pius Njau Limited and Nico Insurance Tanzania Limited, Civil Appeal No. 68 of 2017.**

In response to the first ground of appeal, Mr. Kelvin Kidifu, learned counsel for the 1st respondent citing the unreported case of **Mbaraka Abdallah Alsaid and Another v. National Insurance Corporation (T) Limited and Another, Commercial Case No. 72 of 2003,** as an authority, posited that though parties are bound by their own pleadings, still pleadings in themselves cannot substitute the requisite evidence unless or otherwise there is admission. He submitted that under paragraph 7 and 11 of the Written Statement of Defence, the appellant stated clearly that the assessment done by Wilken Motor Garage was not final and conclusive. This is why at the hearing DW1, the Insurance Officer and an expert in the field came up with a new assement figure. He said, the repair costs to which the 1st respondent was entitled could not be more than Tshs. 4,000,000/=. The shift from Wilken Motor Garage to Green

Belt Car Clinic by the 1st respondent was made necessary by failure of the appellant to repair the motor vehicle in time.

Mr. Kidifu submitted further that, the 1st respondent was bound by the principle of insurance to mitigate the loss by choosing the garage with less expenses compared to the former and to further mitigate the loss for non-use of the motor vehicle. To conlude, he mantained that since the appellant failed to observe and honour the terms of Contract of Insurance, then the trial magistrate was right to reach at the finding and an award of Tshs 3,712,500/=.

As to the second ground of appeal, the learned counsel submitted that the appellate court will not ordinarily interfere with the award of damages unless the damages awarded are extraordinary high or the trial court acted under wrong principles of law. He submitted that in the instant case, the general damage awarded was not high as alleged because the trial magistrate considered the period from the date of incident to the date the matter was finally determined which is eleven (11) years. On the basis of his submission, he maintained that this appeal was without substance. He urged the Court to dismiss the same with the contempt it deserves.

I have carefully gone through the rival arguments both in support and against the appeal. In determining the appeal, I will start with the first ground of appeal. On this I am inclined to be guided with the law relating to pleadings and specific damages. Well, the object of pleadings is, to secure that both parties shall know what are the real points in issue between them. Each must give his opponent all information that is requisite to prevent surprise at the trial. Much as I cherish, the position articulated in the English case of **Spedding v. Fitzpatrick, 38 C.D. 410** that, in civil litigation, parties are bound by their own pleadings. This trite principle has often been reiterated. The Court Appeal of Tanzania in **Civil Appeal No. 3 of 1988 between Peter Koranti & 48 others and The Attorney General & others [Unreported]** aptly stated;

> "... It is trite law that the parties to a suit are bound by their pleadings.

In the case of **Makori J.B. Wassaga and Joshua Mwaikambo & another [1987] TLR 88** the Court of Appeal of Tanzania said;

> "In general, and this is I think elementary, a party is bound by his pleadings and can only succeed according to what he has averred in his

plaint and in evidence he is not permitted to set up a new case"

What is gathered from the preceding cited authorities is that a party to the suit shall prove what is pleaded in his or her pleadings. In the instant case, the plaintiff under paragraph 15 of the plaint averred that the repair costs of his damaged vehicle were paid to Wilken Motors Garage. At the hearing, receipts from Wilken Motors Garage to prove what was pleaded under paragraph 15 of the plaint were not tendered in court. The tendered receipts were from Green Belt Car Clinic, the company not pleaded in the plaint. Since Green Belt Car Clinic company was not pleaded in the plaint and based on the fact that parties to the case are bound by their own pleadings, I am in agreement with the counsel for the appellant that the trial court erred to base its finding on a matter not pleaded in the plaint. In the circumstance, the trial magistrate ought to have dismissed the claim of specific damage.

Apart from that, the law is clear that special damages cannot be granted unless specifically pleaded and proved. In **Zuberi Augustino v Anicet Mugabe, (1992) TLR 137 at page 139** it was held by the court that:

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

In the words of Lord Goddard, C.J. **in Bonham – Carter V. Hyde Park Hotel, Ltd (1948), 64 T.L.R. 177 at page, 178, (1948) W.N. 89, 29 Digest (Repl) 16,185,** *"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages. It is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages'. They have to prove it".*

In the case at hand, the plaintiff provided no strict proof of the sum of Tshs. 3,712,500 as a special damage. It was averred in the plaint that repair costs of the damaged vehicle were paid to Wilken Motors Garage. The plaintiff did not produce any documentary evidence from Wilken Motors Garage to buttress the averments in the plaint. As such therefore, there was no verifiable evidence to prove the actual amount of repair costs incurred. On that basis, the first ground of appeal is accordingly found to have merit.

As to the second ground of appeal, the appellant complained that the trial court erred in law to award the sum of Tshs.10 million as general damages. He said, the amount was extraordinary high and does not match with the reality of the matter. I have considered the argument. All the same, the law is settled that general damages are awarded by the trial magistrate or judge after consideration and deliberation on the evidence on record able to justify the award. The magistrate or judge has discretion in awarding of general damages although he or she has to assign a reason or reasons in awarding the same. (See **STANBIC BANK LTD Vs. ABERCROMBIE & KENT (T) LTD, CIVIL APPEAL NO.21 OF 2001 (CAT).** In this appeal, the trial magistrate gave reasons when awarding the same. He stated;

> *"Plaintiff asked this court to award him ten million as general damages. I found it satisfactory due to the following reasons; first, from 2008 when the accident occurred to date is almost 8 years. If defendants were willing to resort the issue, plaintiff could get his right in time [sic]. Second, from when the case was filed until to date is almost 6 years for plaintiff waiting his right. Third, the value of Tanzania currency in 2008 and to date is not the same."*

On that basis therefore, I am of the firm view that the award of Tshs. 10 million was with reason. Taking the assigned reasons, the amount was sufficient to meet the justice of the case.

That said and done, I find merit in the 1st ground of appeal to the extent shown above. The second ground of appeal has no merit. Accordingly, the Appeal is partly allowed to the extent shown above. For avoidance of doubt the 1st Respondent is entitled to be paid the sum of Tshs.; 10,000,000/= as awarded by the trial court. Taking the circumstances of the case, the 1st respondent is entitled to costs of this Appeal.

It is so ordered.

A. F. NGWALA

JUDGE

21/02/2020

21/02/2020

Coram: A. F. Mgwala, J.

For the appellant: - Present

For 1st Respondent - Mr. James Mwanda (advocate)

For the 2nd Respondent - Absent

For the 3rd Respondent - Absent

B/C: Mts Manumbu

Court: Judgment delivered in court in the presnece of Mr. James Mwenda (Advocate) who is also holding the Brief of Miss. Dorothea Ruta advoate.

Court: Right of Appeal to Court of Appeal of Tanzania explained.

A. F. Ngwala

JUDGE

21/02/2020