THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CIVIL APPEAL NO. 14 OF 2019

(From the Resident Magistrates' Court of Mbeya at Mbeya in Civil Case No. 26 of 2018.)

SUZANA PIUS KARANI.....APPELLANT

VERSUS

GODLISTEN MBISE.....RESPONDENT

JUDGEMENT

Date of Last Order : 01/07/2020
Date of Judgement: 27/08/2020

MONGELLA, J.

Aggrieved by the decision of the RMs court for Mbeya in Civil Case No. 26 of 2018, the appellant has preferred this appeal. In her memorandum of appeal she raised six grounds to wit:

1. *The trial court erred both in law and facts when it ordered the appellant to pay T.shs. 29,000,000/- as claimed by the defendant (sic) while there was no evidence that the parties had invested in mineral extractions business.*

2. *That the trial court erred in law and facts for entertaining the matter while it had no jurisdiction.*

3. *That the trial court erred in law and facts for relying on the evidence that the respondent gave the appellant the amount of T.shs. 17,757,000/- and the amount of T.shs. 14,836,000/- which lead to the total sum of T.shs. 32,593,000/-*

4. *That the trial court erred in law and facts for relying on the evidence that the appellant had a business agreement with the respondent in the extraction of minerals.*

5. *The trial court erred in law and facts for not considering and evaluating the evidence of the appellant and her witnesses in respect of the respondent on the business of minerals.*

6. *The trial court erred in law and facts when it ordered in its judgment that the appellant has to pay general damages to a tune of T.shs. 10,000,000/- without considering the ability of the appellant to pay such an amount.*

Both parties were represented whereby the appellant was represented by Mr. Alfredy Chapa and the respondent was represented by Ms. Mary Mgaya, both learned advocates. The appeal was argued by written submissions which were filed by the parties as per the scheduled orders.

The brief facts of the case are as follows: in the trial court, the respondent claimed from the appellant a sum of T.shs. 29,000,000/- arising from

breach of contract for extraction of mineral remains business. This amount was reduced by the respondent from the actual claim of T.shs. 32,593,000/- so as to fit into the jurisdiction of the trial court. He claimed that the two entered into the said contract whereby he gave the appellant the said amount of money to boost the business, but the appellant breached the contract by not giving him any sum of money from the yields of that business. The trial court awarded the T.shs. 29,000,000/- as claimed and in addition ordered the appellant to pay general damages to the tune of T.shs, 10,000,000/-. Hence, this appeal by the appellant.

Mr. Chapa argued collectively on ground one and four. He challenged the award of T.shs. 29,000,000/- to the respondent by the trial court. He contended that the said sum was awarded while there was no any evidence proving that the parties had entered into any contract for investment into mineral extraction business. Referring to the record, he argued that the respondent testified to have given the appellant first T.shs. 17,757,000/- and then T.shs. 14,836,000/-, but the averment was not supported by any evidence. He challenged the trial court's reliance on exhibit PE1 termed "MAKUBALIANO" to reach its decision arguing that the said exhibit does not signify any agreement for the respondent to give any money to the appellant for mineral extraction business. He was of the view that the said exhibit does not prove or relate to the respondent's allegations. He contended that the said exhibit did not provide any agreement on payment of T.shs. 29,000,000/- claimed by the respondent but presents a different figure and the trial Magistrate did not take that

fact into consideration in awarding the sum of T.shs. 29,000,000/- to the respondent.

Mr. Chapa continued to challenge the evidence adduced in the trial court arguing that it did not prove the respondent's claims against the appellant. He further referred to the respondent's testimony to the effect that he gave the appellant other amounts of money in cash and other amounts were sent through M-pesa to persons he was ordered by the appellant to send to. He contended that the evidence adduced did not support the claim of T.shs. 29,000,000/- by the respondent because through M-pesa one cannot send more than 2,522,000/-. Further referring to the testimony of DW2, he challenged exhibit P3 on M-pesa transactions saying that DW2 had testified that the money evidenced in exhibit P3 was for another business between the respondent and DW2, which was for buying goats for the respondent for his roast meat business. He referred the court to page 11 of the typed proceedings whereby the respondent had acknowledged being into the business of bar and roast meat.

Referring to section 110 (1) of the Tanzania Evidence Act, Cap 6 R.E. 2019, Mr. Chapa argued that the one who alleges must prove. He argued that since the appellant who was the defendant in the trial court denied to have received the T.shs. 29,000,000/- for mineral extraction business, it was the duty of the respondent herein, who was the plaintiff in the trial court to prove his allegations. He contended that the respondent failed to honour this duty as the documentary evidence he tendered, being exhibit P1 and P3 did not substantiate his claims. To bolster his argument he referred to the case of ***Hamisi Faraji v. National Housing Corporation***, Land Case No.

46 of 2012, (HC at DSM, unreported); that of ***Lamshore Limited and Another v. Bizanje K.U.D.K*** [1999] TLR 330; and also ***The East African Road Services Ltd. v. J. S. Davis & Co. Ltd*** [1965] EA 676.

Arguing on the second ground, Mr. Chapa first submitted that the matter of jurisdiction is on point of law and thus can be raised at any stage including in an appeal if it was not raised during trial. To this effect he cited the case of ***Shilalo Masanje v. Lobulu Ngateya*** [2001] TLR 372 and that of ***Malmo Montagekonsult AB Tanzania Branch v. Margareth Gama***, Civil Appeal No. 86 of 2001, (CAT at DSM, unreported) in which it was ruled that a point of law can be raised at any stage of the proceedings. He then proceeded to argue that the respondent sued the appellant on breach of contract entered between them concerning a business on extraction of minerals, to wit gold. The parties were engaged in buying and selling gold. He argued that since the parties were on mineral extraction business, the trial court had no jurisdiction as in accordance with section 102 (1) of the Mining Act, Cap. 123 R.E. 2019 the power to determine such disputes is vested on the Commissioner for minerals. He further cited section 104 of the same Act which provides for further remedy where a party is not satisfied with the decision of the Commissioner, which is to file an appeal to the High Court within a period of thirty days from the date of the decision.

On the third ground, Mr. Chapa argued that the respondent claimed to have given the appellant T.shs. 17,757,000/- and T.shs. 14,836,000/- making a total of 32,593,000/-, but he failed to prove how he gave the appellant such amount of money. He faulted the trial court's finding that the claim

was established and thus the plaintiff was to be paid 29 million. He argued that the court ought to have asked questions as to which amount was proved and which was not in dispute as the plaintiff/respondent claimed to have given the appellant T.shs. 32,593,000/-. He challenged exhibit P1 "MAKUBALIANO" which was considered as an agreement between the parties by the trial court saying that the said exhibit did not show if the respondent gave the appellant such amount of money for buying gold. He was of the view that the respondent failed to discharge his duty to prove the case as per section 110 (1) of the Evidence Act.

Regarding the fifth ground, Mr. Chapa contended that the trial court failed to consider and evaluate the appellant's evidence and that of her witnesses. He said that the appellant testified that she was in no business relation with the respondent, but the respondent only went there as a petty trader who bought gold using his own capital and went to sell the same in Dar es Salaam. He contended that the appellant's evidence was corroborated by that of DW2 who testified that he was the one who met the respondent and the respondent asked him to train him on how to conduct the gold business. He further referred to the testimony of DW3 who stated that the appellant and the respondent did not share any capital with respect to the gold business. He added that DW3 testified in respect of the money sent to him by the respondent via M-pesa, to the effect that the said money was for buying goats for the respondent's roast meat business which has no bearing with the appellant's business. He argued further that the testimony by DW3 was not challenged by the respondent in the trial court.

Mr. Chapa further submitted that the trial Magistrate instead of evaluating the testimonies of the appellant's witnesses, he came up with his own evidence as seen at page 13 of the typed judgment. Referring to the case of ***Selle & Another v. Associated Motor Boat Co. Ltd. and Another*** [1968] EA 123 and that of ***Pandya v. Republic*** [1957] EA 336, he urged this Court to invoke its powers under the law and re-evaluate and consider the evidence so as to come up with a just decision.

On the last ground, Mr. Chapa challenged the award of T.shs. 10,000,000/- as general damages to the respondent. He contended that the trial court ordered the said amount without considering the ability of the appellant to pay it and without assigning any reasons. He submitted that though granting of general damages is within the court's discretion, such discretion must be exercised judiciously. He was of the view that the trial court failed to exercise its discretion judiciously as the respondent did not prove any damage suffered. He as well challenged the award of interest saying that the same was not included in their agreement. He concluded that the respondent did not prove his case on balance of probabilities as required under the law and thus prayed for the appeal to be allowed with costs.

In reply, Ms. Mgaya fully supported the decision of the trial court. She contended that the totality of evidence adduced by the respondent together with exhibits tendered clearly established that there was breach of contract for extraction of mineral remains between the two parties and that the respondent was entitled to be paid the awarded amount of T.shs. 29,000,000/-. She argued that the arguments advanced by the

appellant's counsel insinuates that the respondent was supposed to prove the claim beyond reasonable doubt which is a misconception of the standard of proof required in civil cases. She contended that out of the pleaded amount of T.shs. 14,836,000/- and T.shs. 17,757,000/- making a total of T.shs. 32,593,000/-, the respondent was able to prove only T.shs. 29,000,000/-. She was of the view that this pattern of events cannot be taken to be a contradiction as purported by the appellant's counsel. In support of her argument she referred to the case of ***Paulina Samson Ndawavya v. Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017 (CAT, unreported) in which the Court underscored the standard of proof in civil cases and ruled that:

> *"It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the court will sustain evidence which is more credible than the other on a particular fact to be proved."*

She further referred to an English case by Lord Denning in ***Miller v. Minister of Pensions*** (1937) 2 All. ER 372 which was quoted in approval by the CAT in ***Paulina Samson Ndawavya*** (supra). In this case it was held:

> *"This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogence as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence such that the tribunal can say-We think it more probable than no, the burden is discharged, but, if the probabilities are equal, it is not..."*

On the strength of the above authorities, Ms. Mgaya concluded that the respondent proved the amount awarded by the trial court on balance of probability as required under the law.

On the issue of jurisdiction of the trial court, Ms. Mgaya first conceded on the position of the law to the effect that a legal issue can be raised at any stage including on an appeal. She however challenged the contention by Mr. Chapa that the trial court lacked the requisite jurisdiction to entertain the matter. She argued that according to what is pleaded under paragraph 3 of the plaint, the cause of action was premised on the breach of an oral contract entered between the parties for extraction of mine remains. She added that the plaintiff's assertion was to the effect that the appellant had failed to honour her contractual obligations by deviating from the contractual terms. She was thus of the argument that given the circumstances, the appellant was entitled to knock the doors of the court to address his rights. She cited the provisions of section 37 (1) and section 39 of the Law of Contract Act, Cap 345 R.E. 2019 which provides:

> *"37(1). The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or any other law.*
>
> *39. When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."*

Ms. Mgaya argued that the interpretation that can be gathered from the above provisions of the law is to the effect that the respondent was entitled to enforce his right following the breach and put the contract to an end by instituting a case in the court of law. She contended that, due to the nature and substance of the cause of action in this matter, section 102 (1) of the Mining Act cannot be applied to curtail the jurisdiction of the trial court. She urged the court to be guided by the principle settled in the case of ***The National Bank of Commerce Limited v. National Chicks Corporation Limited & 4 Others***, Civil Appeal No. 129 of 2015 (CAT, unreported) to the effect that the court has to scrutinize the contents of the pleadings to ascertain whether it is mandated to entertain the suit before it or not. She urged this Court to scrutinize the contents of the pleadings to ascertain whether the trial court had jurisdiction or not to entertain the matter at hand. She concluded that the fact that the parties entered an oral contract for mineral remains extraction business does not *ipso facto* entail that the dispute should exclusively fall within the mandate of the Commissioner for Minerals. She was of the view that the dispute between the parties does not concern mining ownership or licenses for extraction of minerals, but rather on a breach of contract.

Regarding the claim on award of general damages, Ms. Mgaya vehemently challenged Mr. Chapa's contention that the trial court erred to award the general damages at the tune of T.shs. 10,000,000/- without considering the appellant's economic status. She argued that the said argument is totally misplaced and unfounded as in awarding general damages the economic status of the wrong doer has never been a determinant factor. To buttress her point she cited the case of ***Gervas***

Yustine v. Said Mohamed, Civil Appeal No. 189 of 2004 (unreported). Further referring to the case of ***Copper Motor Corporations v. Moshi/Arusha Occupational Health Services*** [1990] TLR 96, she added that it is a settled jurisprudence that general damages are awarded at the discretion of the trial court of which can only be interfered by the appellate court in the circumstance where the trial court strayed into a wrong principle of the law in awarding the damages.

Ms. Mgaya argued further that the essence of general damages is to reinstate the victim into the former position he was in before the complained act. It is mainly intended to sooth the soul of the affected party. She referred to the case of ***Tanzania Saruji Corporation v. African Marble Co. Ltd.*** [2004] TLR 155 and that of ***Consolidate Holding Corporation v. Grace Ndeana*** [2003] TLR 191 whereby it was held that:

> *"...general damages are such as the law will presume to be direct, natural or probable consequences of the act complained of, the defendant's wrongdoing must therefore, have been a cause, if not the sole or a particular significant, have been a cause of damage."*

From the above authority she argued that the trial Magistrate did not in any way act on wrong principle when awarding the general damages. She submitted that the trial Magistrate assigned reasons for awarding the general damages whereby he took into account the wrongful act committed by the appellant which occasioned pains, suffering and loss of income on the part of the respondent. She concluded by praying for this Court to dismiss the appeal for lack of merit.

After considering the submissions from both parties, I am of the firm view that there are three issues calling for determination by this Court. These are: One, whether the trial court had no jurisdiction to entertain the dispute between the parties; two, whether the respondent did not provide sufficient evidence to prove his case in the trial court; and three, whether the trial court erred in awarding general damages to the respondent to the tune of T.shs. 10,000,000/-.

On the issue of jurisdiction Mr. Chapa contended that the trial court lacked jurisdiction because the Mining Act under section 102 (1) vests the jurisdiction to resolve disputes on mining activities on the Commissioner for Minerals. For ease of reference I find it pertinent to reproduce the said provision as hereunder:

> *"102 (1)* ***The Commissioner may inquire into and decide*** *all disputes between persons engaged in prospecting or mining operations, either among themselves or in relation to themselves and third parties other than the Government not so engaged,* ***in connection with-***
>
> ***(a) The boundaries of any subject to a mineral right;***
>
> ***(b) The claim by any person to be entitled to erect, cut, construct, or use any pump, line of pipes, flume, race, drain, dam or reservoir for mining purposes, or to have priority of water taken, diverted, used or delivered, as against any other person claiming the same;***
>
> ***(c) The assessment and payment of compensation pursuant to this Act; or***
>
> *(d)* ***Any other matter which may be prescribed.*** [Emphasis added]

Considering the above provision, it is my settled view that the Commissioner is not vested with absolute powers to entertain all disputes. The provision is first of all optional as it states that "the commissioner may

inquire into and decide..." Second, the provision is crystal clear to the effect that the kind of disputes to be entertained by the Commissioner are to be connected with matters enlisted under subsection (1) (a-d) which includes disputes on boundaries or erection, cutting, construction and use of facilities listed under subsection (1) (b) above. In my settled view therefore, section 102 (1) does not oust the jurisdiction of the court to entertain claims between parties over mineral extraction. Parties still have the chance to knock the doors of the court if they wish so.

In addition, the dispute at hand emanates from a breach of contract between the parties, something which is not enlisted under section 102 (1) above. Though paragraph (d) of the provision provides for "any other matter," it still puts a qualification to the effect that the same has to be prescribed. This means that the Commissioner cannot deal with any kind of dispute unless the said dispute has been prescribed. Mr. Chapa in his submission did not state as to where disputes arising from breach of contract between the parties has been prescribed. I thus find the argument by the appellant and her advocate being misconceived. This ground lacks merit and is consequently dismissed.

Regarding the issue of sufficient evidence, I found myself obliged to thoroughly go through the trial court record. The respondent claims that the two entered into an oral contract whereby the both of them would have a share on the mineral extraction business. Oral contracts are recognised under the law only that there must be proof of the existence of the same. See: ***Engen Petroleum (T) Limited v. Tanganyika Investment Oil & Transport Limited***, Civil Appeal No. 103 of 2003 (CAT-Dar es Salaam).

The said proof is to be provided by witnesses who witnessed the parties entering into such a contract. In the matter at hand there is no dispute that the parties entered into an agreement/oral contract relating to mineral business. The dispute however, as I gathered from the record lies with the contents or terms of the said oral contract. While the plaintiff/respondent claims that the two entered into a contract of partnership into the business whereby the plaintiff pumped funds to the tune of T.shs. 32,593,000/-, the defendant/appellant claims that the agreement was for her to sell gold to the respondent and not that of shareholding. The respondent unfortunately did not provide any proof of the two entering into an agreement he claims. On the other hand the appellant's assertion was corroborated by the testimony of DW3 one Erick Mello who testified to have taken the respondent to the appellant to buy Gold. DW2 also testified to have given the respondent some pieces of gold under the instruction of the appellant.

The respondent claimed that he had to abandon T.shs. 3,593,000/- so as to fit into the jurisdiction of the RMs court. Therefore he claimed for T.shs. 29,000,000/-, which was eventually granted by the RMs court. As it stands, the T.shs. 29,000,000/- falls under specific damages as it comprises the expenses incurred by the respondent in financing the business he claims to have entered into with the appellant. It is trite law that specific damages have to be specifically pleaded and specifically proven. The Court of Appeal in ***Peter Joseph Kilibika & CRDB Bank Public Company Ltd v. Patric Aloyce Mlingi***, Criminal Appeal No. 37 of 2009 had this to say on specific damages:

> *"Special damages have to be specifically pleaded and proved. We would like to emphasise the need to distinguish the difference between special and general damages. The law is very clear, that special damages must be proved specially and strictly."*

The Court also quoted in approval the decision by Lord Mcnaughten in ***Bolag v. Hutchson*** (1950) A.C. 515 at page 525 which ruled that:

> *"Special damages are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and therefore, they must be claimed specially and proved strictly."*

The Court again reiterated the position is settled in ***Zuberi Augustino v. Anicet Mugabe*** [1992] TLR 137 in which it held:

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

On the strength of the above cited authorities, I am of the firm view that the trial court ought to have considered the specific proof provided by the respondent before it went ahead to award the specific damages to the tune of T.shs. 29,000,000/-. The respondent claimed that he paid the appellant money through various forms including M-Pesa transactions. He provided a print out from Vodacom company to substantiate his claims (exhibit PE3). From exhibit PE3 and the respondent testimony, it is clearly seen that the respondent paid T.shs. 3,529,500/- which is divided as follows: T.shs. 507,000/- paid on 08/02/2014 to one James Kelele; T.shs. 1,007,750/- paid on 03/10/2014 to one Suzana Pius (the appellant); T.shs. 1,007,750/- paid on 22/11/2014 to one Elisalia Fred; and T.shs. 1,007,750/- paid on 24/11/2014 to one Elisalia Fred.

The record indicates that the appellant through her advocate objected to the admission of the print out from Vodacom company on the ground that the same was not pleaded. The trial Magistrate made a ruling to the effect that the same shall be considered during judgment writing and went ahead to admit it. In the judgement the trial Magistrate appears to have considered it, which in my considered opinion was incorrect. This is because the law is settled to the effect that parties are bound by their own pleadings and documents not pleaded cannot be tendered and admitted in evidence in court. See: ***Makori Wassanga v. Joshua Mwaikambo and Another*** [1987] TLR 92; ***Peter Ng'homango v. Attorney General***, Civil Appeal No. 114 of 2011 (unreported); and that of ***Astepro Investment Co. Ltd v. Jawinga Investment Limited***, Civil Appeal No. 8 of 2015 (unreported). The respondent also tendered Exhibit PE1, termed "MAKUBALIANO" which shows that the appellant agreed into being indebted a sum of T.shs. 21,736,000/-. The said exhibit was vehemently disputed by the appellant and his counsel. It is my opinion that exhibit PE1, does not strictly prove the specific damages. Under the circumstances whereby its genuinesess was vehemently disputed, some other corroborative evidence was crucial to prove its contents. In my settled view therefore, the respondent failed to prove the specific damages he claimed to the tune of T.shs. 29,000,000/- and the trial court wrongly awarded the same.

However, on the other hand, as seen at page 29 paragraph 2 of the typed proceedings, the appellant admitted that the respondent gave her T.shs. 6,000,000/- only for selling him gold and it is the amount that she is indebted. Since this amount was not disputed then in my opinion no proof

was needed thereof. I therefore award the respondent T.shs. 6,000,000/- as specific damages.

Regarding the award of general damages to the tune of T.shs. 10,000,000/-, my observation is as follows: As argued by Ms. Mgaya, an appellate court is limited in interfering with the award of damages unless where there are justifiable reasons to do so. In ***Matiku Bwana v. Matiku Kwikubya & Another*** [1983] TLR 362 it was held:

> *"An appellate court will normally not interfere with a trial court's assessment of damages unless it is shown that the trial court acted on wrong principles such as not taking relevant facts into account or taking irrelevant facts into account resulting in an unjust decision."*

For general damages to be awarded, the claimant must provide proof of injury suffered. Just like I have opined earlier on specific damages, in general damages, the injury suffered must as well be attributed to the acts of the defendant. In ***Tanzania Saruji Corporation v. African Marble Company Ltd.*** [2004] TLR 155, it was held:

> *"General damages are such as the law will presume to be direct, natural or probable consequence of the act complained of; the defendant's wrongdoing must, therefore, have been a cause, if not a sole, or a particularly significant, cause of damage."*

See also: See: ***National Bank of Commerce Limited v. Lake Oil Limited***, Commercial Appeal No. 5 of 2014 (HC Commercial Div. at DSM, unreported); ***MS FishCorp Limited v. Ilala Municipal Council***, Commercial Case No. 16 of 2012.

I have gone through the testimony by PW1, the respondent herein and found no proof of injury suffered as a result of the appellant's breach of contract. However, following the admission made by the appellant, as I pointed out earlier, to the debt of T.shs. 6,000,000/- it is obvious that there was a certain form of contract between the parties and the appellant breached the terms. If she had not breached any term then she would not be indebted the T.shs. 6,000,000/-. Considering this fact, the court can take judicial notice that the respondent must have suffered some injury following non-payment of the T.shs. 6,000,000/ admitted by the appellant and thus deserve to be awarded a certain amount of general damages. In consideration of all this and the time that has elapsed since the breach occurred, I vary the amount of general damages to the tune of T.shs. 5,000,000/-.

In the upshot, the decision of the trial court is varied to the extent stated herein. The appellant is ordered to pay the respondent a total sum of T.shs. 11,000,000/- being specific damages to the tune of T.shs. 6,000,000/- and T.shs. 5,000,000/- being general damages. Each party to bear his own costs of the suit.

Appeal partly allowed.

Dated at Mbeya this 27th day of August 2020.

THE HIGH COURT OF TANZANIA

L. M. MONGELLA
JUDGE

Court: Judgment delivered in Mbeya in Chambers on this 27th day of August 2020 in the presence of the respondent and his advocate Ms. Rehema Mgeni.

L. M. MONGELLA

JUDGE