IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

DC. CIVIL APPEAL NO. 12 OF 2017
(Originating from Civil Case 22 of 2015)

BARNABAS PASCAL NYALUSI ---------- APPELLANT

VERSUS

TANZANIA POSTAL BANK ---------- RESPONDENT

JUDGMENT

21st July & 7th August, 2020

KENTE,J.:

This appeal emanates from the decision of the District Court of Iringa in its Civil Case number 22 of 2015. In the said case the present appellant namely Barnabas Pascal Nyalusi had unsuccessfully sued the respondent Tanzania Postal Bank for breach of contract.

While Mr. Stephano learned advocate argued the appeal for the appellant, Mr. Mwego learned advocate appeared to resist the appeal on behalf of the respondent.

Before the trial District Court it was the case for the appellant and this was not disputed that he was in a banker-customer relationship with

the respondent. His bank account was Number SQA 010 – 00322568. Sometimes in June 2015, using his credit card, the appellant vainly sought to withdraw some cash from his bank account through an automated teller machine or ATM as it is otherwise known by its acronym. It was not immediately thereafter established as to what was the cause of the failure to effect cash withdrawal but when the appellant inquired from one of the respondent's officials one Adolph Tibikunda, he was verbally told that there was no sufficient funds in his account and that the amount of Tshs. 375,000/= had been clogged by the respondent as not to be withdrawn from his bank account. Deeply aggrieved, the appellant wrote an inquiry letter to the respondent's Iringa Branch Manager one Anthony Joseph Kayanda (DW1) but, as it turned out, there was no response which was forthcoming. Still aggrieved and unflinched, the appellant then lodged a suit in the trial District Court accusing the respondent for breach of contract. He prayed for three substantive reliefs to wit, Tshs. 375,000/= being the principal amount allegedly withheld without justification, Tshs. 5,000,000/= being specific damages and Tshs. 5,000,000/= as general damages for breach of contract. He also claimed interest and costs of the suit.

The case for the respondent on the other hand was that, the appellant had, way back in January 2015 withdrawn Tshs 300,000/= from his bank account in a transaction which was however not captured in their electronic systems and therefore after the said transaction was detected, that amount of money had to be debited from the appellant's bank account. The respondent maintained that, as opposed to Tshs. 375,000/= which was claimed by the appellant, it was only Tshs. 300,000/= which was withheld from his bank account. According to the respondent, the clogging of the said amount of money became necessary and was justified because the appellant had on 8th January 2015 transferred Tshs. 300,000/= from his bank account using his telephone (No. 0713644686) to a person whose phone number was 0712644586. It is the said transaction which was allegedly not captured and recorded in the respondent's electronic bank records. Moreover, it was the respondent's further contention that when the appellant withdrew the said Tshs. 300,000/= from the bank by way of mobile banking services, their electronic system was off-line hence the failure to capture the transaction made by the appellant. The respondent thus denied liability and implored the trial court to dismiss the suit with costs.

After hearing the parties, the trial court did not find any substance in the appellant's complaints. It therefore proceeded dismissing the suit with costs.

Before this court Mr. Stephano for the appellant advanced three grounds against the decision of the learned Resident Magistrate. In his memorandum of appeal which however was drawn and filed by Ms. Massey learned advocate from a law firm styled as BLS Attorneys, the appellant contended thus:-

1. *The trial Magistrate erred in both fact and law by failure to take a caution and kin analysis when evaluation was done toward the evidence adduced by counterfeit witness of the respondent which also unquestionably contradicts the exhibits tendered before it and erroneously decided against the appellant on the baseless parameters.*

2. *The trial Magistrate erred in law by ignoring to decide in favour of the appellant despite the fact that he proved to the satisfaction of the court as to the standard required that the respondent wrongfully withholding the total sum of Tshs. 375,000/- in the appellant's bank account.*

3. *The Magistrate erred both in law and fact by holding out that the appellant was negligent for not reporting to the*

respondent on the transaction while the whole essence of the suit emanated from the report by the appellant.

Before deciding whether or not I should deal with the present appeal on merit, I have found it apposite to make one remark albeit very briefly. I have noted that in his judgment, the learned trial Magistrate appeared to have predicated his decision on the following factual premises which were however not supported by the evidence on record. One, that the appellant had withdrawn Tshs. 300,000/= from his bank account on 8th January 2015. Two, that the said withdrawal transaction was completed and a notification report to that effect was dully sent to the appellant. And finally, that upon receiving report, the appellant had failed or neglected to inform the respondent that he had not performed the said transaction upon which the respondent could have intervened and called off the disputed transaction. While the learned trial Magistrate simply reproduced and inferred from the testimony of DW1, DW2 and DW3, without evaluating the same, he went on finding that the appellant had transacted through sim-banking (sic) and sent money to a wrong number. This finding was easily made without assessing the worth of both parties' evidence on that aspect. In other words, the trial Magistrate, for no apparent explanation, had

decided to believe the respondent's evidence lock-stock-and barrel. At the same time, and in the same style, he dismissed as untrue the whole of the appellant's evidence. With due respect, that was not only irrational but it was also unfair to the appellant. Above all, it was against the rules of judicial, decision making. In judicial adjudication, one cannot make a finding and arrive at a conclusion without evaluating the evidence on record and applying the law to a factual scenario obtaining in the case under review.

As it may be noted in the present case, there was no conclusive evidence from the respondent showing that the appellant had withdrawn Tshs. 300,000/= from his bank account on 8th January 2015. The only evidence adduced on that point was the evidence of DW1 the respondent's Iringa Branch Manager and DW3 a Financial Service Risk Analyst from Tigo Ltd Dar es Salaam. There was no documentary or electronic evidence to support the assertion by the respondent's witnesses that indeed the appellant had withdrawn the said amount of money and sent it to another person with phone number 0713644586 whose identity was startlingly not established. On the other hand the appellant's position that he did not withdraw the alleged cash is bolstered by his evidence which was not

materially controverted that on 8th January 2015 his credit balance was Tshs. 17,671/53 only. In that state and under normal circumstances, nothing more than the said Tshs. 17,671/53 could be drawn and consequently debited from the appellant's bank account. Quite clearly the respondent's bare assertions were not sufficient to prove the existence of the disputed cash withdrawal from the appellant's bank account in a transaction which was not even captured in the respondent's computer systems on the flimsy explanation that at the time of the said transaction, the systems were offline. What is more is that while the respondent's evidence was swiftly believed hook line and sinker, the learned trial Magistrate could not, on the other hand, assign any reason for not believing the appellant's side of the story. As stated earlier, with due respect to the trial Magistrate, that was injudicious and quite unfair to the appellant. He was, like any other litigant, entitled to an in-depth consideration and evaluation of his evidence before reaching to a decision in his disfavour.

In these circumstances and on the basis of the evidence on record, I find that it was not positively established that on 8th January 2015 the appellant had withdrawn Tshs. 375,000/= or 300,000/= from his bank

account and in the absence of any other plausible explanation, the respondent had no justification whatsoever to clog the appellant's money subsequently thereafter. Needless to say, by so doing, the respondent had gone contrary to one of the fundamental terms of a banker-customer contractual relationship, that is the obligation to pay on demand. They were guilty of breach of contract.

That said, I now move on to determine the question as to the reliefs sought by the appellant. As stated earlier on, the appellant had claimed Tshs. 375,000/= being the principal amount which was withheld by the respondent. He also claimed Tshs. 5,000,000/= in the form of specific damages and Tshs. 5,000,000/= as general damages for breach of contract.

For my part, without demur, I would say that, I have no squabble with respect to the claim for Tshs. 375,000/= as the principal amount which was wrongly withheld by the respondent from the appellant's credit balance. It is his entitlement as it is intended to restore the appellant in the condition he had been immediately before the withholding of the same amount from his account balance. I accordingly grant the appellant's first prayer.

As for the claim of Tshs. 5,000,000/= being special damages, I would say straight away that this claim was not substantiated. It is the law of this land and case-law authorities abound that special damages cannot be implied. They must be specifically pleaded and strictly proven. (see **Anthony Ngoo & Another V. Kitinda Kimaro, Civil Appeal No. 25 of 2014, Court of Appeal of Tanzania at Arusha (unreported), Stanbic Bank Tanzania Ltd V. Abercrombie & Kent T. Ltd, Civil Appeal No. 20 of 2001 (unreported) and Zuberi Augustino V. Anicet Mugabe [1992] TLR 137**). As can be gleaned from the plaint lodged in the trial District Court, save for the reliefs sought, there was no specific mention of the specific damage allegedly suffered by the respondent as a direct result of the withholding of Tshs. 375,000/= from his account balance. It follows therefore in my judgment that such damages cannot be determined and gratuitously granted by this court based on the appellant's unsubstantiated figure which clearly appears to have been a product of his own guess or conjecture.

As for the prayer for general damages, I think there can hardly be any dispute that following the wrongful withholding of some cash from his bank account, the appellant could not draw the required amount of money

for his own use. Even though it is unfortunate that in his testimony before the trial District Court the appellant did not lead substantial evidence to justify the claim for general damages. Apparently, he took it for granted that once the question of unlawful withholding of his money from his bank account is resolved in his favour, the relief claimed would not be open to question. The appellant in his scanty evidence is simply saying thus:-

> *"For the act of the defendant to withdraw my money caused me to secure loan from other source so as to pay school fee for my children. I got disturbed a lot. The defendant breached his duty as a banker who kept my money that wherever I was indeed I could use them. I pray the court to grant my prayer as asked in the plaint."*

On the position of the law, in a situation of the present nature, I cannot but quote the observations made by my brother Mchome, J in the case of **Roseleen Kombe V. The Attorney General [2003] TLR 347 at 357** when he said that:-

> *"Failing to argue adequately or at all on the issue of what reliefs are just is quite risky for learned counsel for the plaintiff. This is assuming that since there are no specific denials but only evasive or general denials in the Written Statement of Defence the Court will automatically grant every prayer claimed. The Court is not sitting just like a referee in a game*

watching the parties passively do whatever they want with justice. Even where the defendant files no Written Statement of Defence at all or does not appear. Let alone where he filed "an evasive or general damages," the plaintiff still has to prove his case even if ex parte."

Having taken into account the pains suffered by the appellant after he was blocked from assessing money which he had deposited into his bank account and therefore the inability to perform certain financial functions such payment of school fees for his children as he himself put it, I find the claimed amount of Tshs. 5,000,000/= to be not on the higher side. I accordingly grant it.

To the above stated extent, this appeal is allowed. The judgment and decree of the trial District Court is set aside and in *leau* thereof, it is decided and decreed as follows:-

a) The appellant is awarded Tshs. 5,000,000/= (five million shillings) to cater for general damages.

b) Interest on the above at the rate of 12% per annum from June 2015 to the date of this judgment.

c) Interest at 7% per annum from date of this judgment to payment in full.

d) Costs of this suit both before this court and the court below.

It is so ordered.

Dated at Iringa this 7th day of August, 2020.

P. M. KENTE
JUDGE