IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CIVIL APPEAL NO. 12 OF 2018

(Originating from Civil Case No. 10 of 2017, Bukoba RM's Court)

PASCHAZIA TINDYEBWA BARONGO---------APPELLANT

VERSUS

REVOCATUS MALIMA KALEGE----------RESPONDENT

JUDGMENT

11/5/2020 & 22/5/2020

Kairo, J.

The Appellant, Paschazia Tindyebwa Barongo preferred this appeal after being dissatisfied with the decision of the RM's Court Bukoba delivered on 20/6/2018.

Briefly the facts that can be discerned from this matter is that the Respondent sued the Appellant at the RM's Court claiming a total of USD 57,540.00 and Tshs. 1,826,000/= as specific damages, payment of general damages as may be assessed by the court for mental torture, anguish, agony and miseries experienced for the whole time spent following-up his money

from the Appellant, cost and any other relief the court would deem fit to grant.

The trial court entered judgment and decree in favor of the Respondent and ordered the Appellant to pay him the total of 57,000 U$ Dollars, general damages of Tshs. 30,000,000/= and cost. The appellant wasn't amused by the said decision, hence this appeal raising the following grounds:-

(1) That, the Trial resident Magistrate grossly erred in law and fact to order the Appellant to pay the Respondent 57,000 USD Dollars the amount which was not pleaded or proved in evidence by the Respondent to the required standard of proof.

(2) That, after the trial resident Magistrate has come to the conclusion that the established project; ERA Teachers College is owned by PASS COMMUNITY SERVICES LTD, grossly erred in law and fact for not considering the evidence of the Appellant that she was wrongly sued in her own personal capacity.

(3) That, the trial learned Resident Magistrate grossly erred in law and fact to consider and determine that case basing on the exhibit P3 (Dispute Settlement Record) which only evidence the settlement reached by the parties in settling their earlier misunderstanding.

(4) That, the award of Tshs. 30,000,000/= granted by the court as the general damages was manifestly excessive, unfair and not judiciously justified.

(5) That, the honorable Resident Magistrate grossly erred in law and fact for not holding that this suit was filed prematurely and the Respondent breached the agreement/settlement record and therefore the proper remedy was to compel the Respondent to fulfill the conditions of the Agreement.

The Appellant thus prays this court to allow the appeal with cost and any other order(s) the court would deem fit and proper to grant.

The Appellant was represented by Ms Aneth Lwiza Advocate while the Respondent was receiving the legal services from Advocate Projestus Mulokozi.

When amplifying the grounds of appeal, Advocate Lwiza contended that the Appellant is disputing the award of USD 57,000 to the Respondent arguing that the same was neither pleaded nor any evidence was adduced in its favor. Besides the Respondent showed not to be certain with his claim by giving distinct figures which he failed to substantiate any of them at the end of the day, argued Advocate Lwiza. She went on giving examples that at para 3 of the plaint the Respondent claim USD 57,540; in the 4th para the Respondent claimed USD 57,000 but the Judgment and decree stated the claim to be USD 57,540 and at the summary but ended up awarding him USD 57,000. The Advocate further argued that according to the typed proceedings at page 19-32, the Respondent narrated the amount contributed but didn't state how he arrived at the said figure.

The Advocate went further to submit that Hemed Ally (PW2) told the court when testifying that, he was being instructed by the Respondent in several occasions to send money to the Appellant which he stated to be Tshs. 24,000,000/= but didn't produce any evidence to that effect. She added that PW2 also stated to have given the Appellant USD 3000 but still even if the amount is added with USD 2290 formerly stated (Pg 38 of the proceedings) the total is not USD 57,000 claimed. Further that the said Tshs. 24,000,000/= was never converted to USD as the records are silent.

The Appellant's Advocate went on to argue that her client on her testimonies admitted part of the liability to the tune of USD 27,000. (Pg 42 – 48 proceedings). She concluded that the Respondent didn't plead nor verified his claim and that the trial court would have awarded the admitted claim of USD 27,000.

As for the 2nd ground, Advocate Lwiza contended that, the parties had agreed to establish an Institution by the name of ERA Teachers College (hereinafter to be referred to as ERA) and when agreed, the Appellant had a company already by the name of PASSY Community Service Ltd (hereinafter to be referred to as PASSY Company) which was established in year 2008. Besides, the process to establish ERA had started and thus the Respondent was simply joining ERA to firm it up.

Advocate Lwiza clarified further that, the owner of ERA Teachers College was PASSY Company and that the Respondent as per their agreement was also required to join it.

She went on that, the Respondent was paying the Appellant so as to establish ERA as such suing the Respondent in her personal capacity was not correct.

The Advocate argued that, since PASSY Company was a legal *persona*, then it could be sued in its own capacity.

Clarifying the 4th ground, Advocate Lwiza contended that the general damages awarded was excessive, unfair and judiciously unjustified. She went on that damages are intended to put the plaintiff in the same position as far as money is concerned if his rights wouldn't have been infringed, and that general damages is such that the law would presume to be natural consequences. She quoted the case of *Project Manager Chicco vrs Theobald Michael; Civil appeal No. 8 of 2016 HC BK* (unreported). She argued that the Respondent had left assessment of general damages to the court's wisdom. However in the trial court Judgment, nowhere has the court discussed the general damages, rather it simply decided by awarding the sum to which the Advocate argued to be unjustifiable.

In her further submission, Advocate Lwiza informed the court that she would combine grounds No. 3 and 5 in his oral submission. She contended that, according to exhibit P3 in which the court based its decision, the

parties had a discussion with a view of resolving their dispute, whereby under part A it was an introduction and listed the terms in the 2nd page of exhibit P3 which stated USD 57,000/=. He added that the options on the resolutions was given under paras (d), (e) and (f) of page 2 of exhibit P3. That the parties chose the second option which didn't involve payment to the Respondent, but she is surprised that instead of implementing what has been agreed upon, the Respondent instituted the suit at RM's court. She argued that the suit was instituted prematurely and the trial court was to order the implementation of what was agreed upon. She thus prayed the court to allow the appeal.

In reply, advocate Mulokozi dismissed the submission by Advocate Lwiza arguing to lack merit. He clarified that the claimed USD 57,000 was categorically pleaded in paras 3, 4 and the reliefs prayed in the plaint. Besides, the Appellant's testimony under oath has acknowledged the existence of the settlement agreement (exhibit P3) wherein the sum of USD 57,000 was stated, adding that if both parties admit its existence it was correct for the court to consider it. He insisted that it was not therefore true that USD 57,000 wasn't pleaded or proved as the exhibit P3 so verifies.

Advocate Mulokozi went on that according to exhibits tendered during trial, the exchange of money was between the Appellant in her personal capacity and the Respondent and the issue of a company wasn't there. He argued that legally the company and owner are two distinct persons, as such if a Director decides to do a certain thing in his/her personal capacity the action

done cannot be attributed to the company concluding that it was proper to sue her in her personal capacity, as correctly found by the trial court.

Advocate Mulokozi further stated that, advocate Lwiza's contention that, the Respondent was to be added in the company according to their agreement was not true as the agreement (exhibit P3) was signed on 20/9/2013 and the suit at the trial court was filed on 29/3/2017 about three years after the settlement deed, but the Appellant never implemented it and thus if the Respondent wouldn't have instituted this suit, he would have been time barred and the said settlement wouldn't have assisted him in any way. He added that the Respondent cannot be blamed for the non implementation of the said agreement being a stranger to the company as he couldn't have entered into the company without Appellant's initiatives and other directors which wasn't done for three years. Advocate Mulokozi added that, since the agreement as per exhibit P3 wasn't implemented, then the Respondent was to be restored to the original position, which the Appellant do not dispute its existence and having acknowledged it under oath, she is now estopped from turning around.

Reacting to the issue of excessive general damages awarded to the Respondent, Advocate Mulokozi prayed the court to consider that the Respondent has invested his money since 2010 but reaped nothing. That he was forced to pay an air ticked for the Respondent from Sweden to Tanzania for signing exhibit P3 which didn't materialize, and the Appellant didn't dispute that fact. Besides the Respondent had expectation of getting profit

out of it but to date he recouped nothing while the Appellant is enjoying the same. He thus prayed for the dismissal of the appeal with cost.

In her rejoinder, Advocate Lwiza argued that apart from contending that the general damages were excessive but she also argues to have no basis. She went on that, what has been stated by advocate Mulokozi is not depicted in the records adding that even if the same would have been depicted, still the amount of 30mln is exorbitant.

Advocate Lwiza denied that it is not true that the Appellant was the one to execute exhibit P3 so as to ensure the Respondent enters into the Company and she invited this court to go through Pg7 of the Judgment to know the truth. She argued that it was not correct to rule out that the Respondent contributed USD 57,000 while the same did not tally with the evidence adduced. She also refuted that the Respondent had paid one installment of the Kagera Community Bank loan insisting that the money paid was not for the Appellant, but for the Institution (ERA) into which he was striving to be included in and the same was under PASSY Company. She reiterated her prayer to have this appeal allowed with cost.

Having gone through the petition of appeal, reply thereto and the oral submission by both parties' counsels, the court observed that the issues to be addressed in determining as to whether or not this appeal is meritorious are as follows:-

(1) Whether the amount of USD 57,000 awarded/decreed to the Respondent was not pleaded nor proved.

(2) Whether it was an error for the Appellant to be sued in her own personal capacity.

(3) Whether it was not correct for the trial court to base its findings/decision on exhibit P3 (Dispute Settlement Agreement).

(4) Whether the award of Tshs. 30mln as general damages to the Respondent was excessive and unjustified.

(5) Whether the suit was filed prematurely.

I wish to point out that each issue addresses the ground of appeal raised in the petition of appeal.

Further to that it is imperative to note that this court, being the first appellate court is entitled to evaluate the evidence afresh and come to its conclusion. **[Refer the case of Martha Wejja vrs The Attorney General; and others (1982) TLR 35].**

I will start with the 1st and 3rd issues which addresses the 1st and 3rd grounds of appeal as they relate. The plaint in the 3rd para states that the Plaintiff claims USD 57,000 and Tshs. 1,816,000/= as specific damages from the defendant (Appellant herein).

It was stated in the 4th para of the Plaint that the Plaintiff contributed USD 57,000 so that he could enter into a business venture to conduct ERA

Teachers College project. When looking at the prayers, the Plaintiff under (i) prayed for the payment of USD 57,540 and Tshs. 1,816,000/= being specific damages.

It is trite law that specific damages must be specifically pleaded and proved [Refer the case of **Zuberi Augustine vrs Anicet Mugabe [1992]** TLR 137]. Looking at the Plaint, the amount pleaded and prayed was USD 57,540. However legally it is not enough to plead it but the same should also be proved strictly [Refer the case of **Bolag vrs Hutchson [1950]** AC 515.

In proving the amount pleaded, the Respondent tendered exhibits P1 (*E-mail conversation over the issue*), Exhibit P2 (*Pecuniary claim*) and Exhibit P3 (*dispute settlement documents between the parties and parties sworn affidavits*).

All of the exhibits tendered refer the contribution by the Respondent to be USD 57,000. Advocate Lwiza has attacked the sum stated in paras 3, 4 and at the prayers arguing to show uncertainty of the Plaintiff's claim. However in his testimony the Respondent (Plaintiff therein) stated that USD 57,000 was the amount the Appellant admitted to have been contributed by him as per exhibit P3 and the USD 540 was transportation cost from Sweden to Tanzania for the desks and chairs he purchased and that Tshs. 1,816,000/= is the sum he sent via M-Pesa under the instruction of the Appellant for publication/marketing of the ERA Institution (Proceeding Pg. 27 – 28). In the said circumstances, the so called uncertainty in the figures claimed doesn't

arise with much respect as the same were clarified during his testimony. However I am aware that testifying is one thing but reliance on the testimony is another thing altogether. It is the cannon principle of law that he who alleges must prove *[Section 110 of the Law of Evidence Act Cap. 6 RE: 2002]*. The wanting question therefore is whether the Respondent proved those assertions as testified. The record reveals that he had no proof for the USD 540 and Tshs. 1,816,000/= but managed to prove the claim of USD 57,000 through exhibit P3.

The Appellant on her part admitted only a claim of USD 27,000 (page 48) which was also echoed by Advocate Lwiza in her oral submission, but with due respect I don't subscribe to the said assertion for two reasons:- 1st on page 49 of the proceedings, the Appellant narrated the repayment to be made to the Plaintiff and I wish to quote *"---I had to pay him the money he gave in cash like 30,000 USD, and I have to return to the Plaintiff USD Dollars 27,000, 3000 US from Ahamed..."* Needless to say that arithmetically the total amount above which she has to repay to the Respondent is more than the USD 27,000 she admitted. But secondly, the Appellant has admitted when testifying that she had read and signed exhibit P3 and on top of that she stamped her thumb (Pg 52 proceedings). I paused to ask why she acknowledged the contribution was USD 57,000 and signed if at all the contribution was only USD 27,000! Though she claimed that there were some items which were removed like payment of Tshs. 180mln to one Director; Edward so that the Plaintiff can be able to own 50%, but I consider

her allegation to be an afterthought which this court cannot rely on, having in mind that the Appellant is literate and on top of that she conceded to have read the dispute settlement document before signing. Ironically, apart from the dispute settlement document, the Appellant had also signed an affidavit and stamped her thumb. This document is comprised of one page only. It is unconceivable how the document of one page can be altered while her signature is at the bottom of the said one page document. But also looking at the said document, the Appellant was categorical on the contributed amount and I wish to quote at para (3) *"That I do not deny that Mr. Revocatus Malima Kalege have contributed a significant amount of money to the tune of USD 57,000 (say fifty seven thousand USD only) in the establishment of the project".* Strictly speaking, nothing more is needed to prove that the Respondent has contributed the awarded sum (USD 57,000) which was unequivocally admitted by the Appellant in Exhibit P3. I join hands with advocate Mulokozi that the doctrine of *estoppell* operates against the Appellant and thus cannot deny at this juncture what she had all along admitted. As such the 1st issue has been answered negatively and the 1st ground of appeal crumbles.

The above explanation also serves to determine the 3rd issue which addresses the 3rd ground of appeal. Having found that the amount awarded of USD 57,000 was proved by exhibit P3, it goes that there is nothing to fault the trial magistrate with for basing its decision on exhibit P3. It matters not whether the document was for settling the parties' earlier dispute. After all

the suit filed at the RM's Court was a continuation of the so called earlier dispute. As such the 3rd issue has been answered negatively and the 3rd ground collapses.

With regards to the 2nd issue which addresses the 2nd ground, the Appellant argued that it was an error for her to be sued in her own personal capacity instead of PASSY Company which had legal capacity to sue and being sued.

I don't dispute that legally upon incorporation a company, PASSY inclusive acquires *"a separate legal entity"* which means it has the capacity to sue or be sued as was emphatically stipulated in the case of **Salomon vrs Salomon (1897) AC. 22** wherein Lord Macnagten observed and I quote:

> *"The company is at law a different person altogether from subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before, and the same persons one mangers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are subscriber's liable in any shape or form except to the extent in a manner provided in the Act".*

However the question is; was there a resolution to make the contribution to the Company or rather was the money remitted to Company?

The record is silent if any money was remitted to the company. All along the communication including the money transactions was between the Appellant and Respondent. I do not object that ERA institution was owned

by PASSY Company and the understanding is to contribute for the establishment of ERA Institution. Admittedly, PASSY Company was registered in year 2008, well before the negotiations to establish ERA and money transfers in that respect, which started sometimes in year 2011. I paused to ask why the Appellant gave the Respondent her personal account to deposit the contributions into instead of the Company's account if at all she wanted the transactions to be between the Respondent and PASSY Company. Besides no evidence in terms of Body Resolution was ever tendered to verify that there was such an arrangement between the Company and the Respondent. On top of that nowhere was at least stated in her testimony that the other Directors were aware of the arrangement, and agreed upon. This is also verified by the fact that some of the transactions were received in cash by the Appellant. The Appellant's conduct of receiving the money in cash herself, giving the account to deposit the contribution of her own, no evidence of knowledge on the part of other Directors regarding Respondent's entrance into the Company convinces me that the transaction was purely personal and not on behalf of the company. The said conducts suggests that she was doing all that under her personal capacity and not on behalf of the company as she want this court to believe. As such, it was proper for her to be sued personally. Again the 2nd issue has been answered negatively and the 2nd ground is with no merit.

I will deal with the fifth ground of appeal and conclude with the fourth one. In the fifth ground, the Appellant is blaming the Respondent for breaching the settlement, arguing that the proper recourse was for the court to order specific performance of the agreement reached. The issue to be determined therefore is whether the suit was filed prematurely.

In her oral clarification Advocate Lwiza submitted that according to dispute settlement (exhibit P3) the parties discussed two options as a way forward in resolving their dispute to wit reimbursing the Respondent the whole amount he contributed or revisit their earlier intention of continuing partnering in the ERA institution. They eventually both settled for the latter option. In my understanding, the options were in alternatives. It is true as Advocate Aneth has put it that the chosen option did not entail payment of money to the Respondent. However the wanting question is whether the chosen and agreed option materialized to oust or render the first one inoperative, and if not which part made it inoperative.

It is not disputed that ERA Institution was registered in a year after the agreement in question was reached, which time in my conviction was enough to finalize all logistical tasks as well as legal requirement to enable the Respondent join PASSY Company; the owner of ERA Institution, the pertinent one being to convene a Board meeting and get a resolution removing the other PASSY Company directors and join/enter the Respondent as per part 34 (c) of the Company's Articles of Association, more so since the Appellant and the Respondent were to be the sole owners

of the Project in exclusion of others according to part (g)of the Dispute Settlement Agreement (exhibit P3). For undisclosed reason, this pertinent task wasn't done.

When shifting the blame to the Respondent, the Appellant stated that they went together to BRELLA, the Respondent was given a form which he didn't return to BRELLA. But what was the use of returning the forms to BRELLA without the Board resolution which would have enabled the Registrar effect the changes envisaged? I thought the Appellant would have tendered a Board Resolution to that effect as an evidence that PASSY Company Directors discharged their duty as such the ball was on the Respondent's cout, but there was none.

It is surprising that the Appellant expects the court to believe her mere words and grant the order she prayed. In the stated circumstances, I am convinced that the party to shoulder the blame for non materialization of the option chosen was the Appellant. To say the least, there was no sincere/genuine intent on the part of the Appellant to include the Respondent in ERA project. I am so saying as the Appellant when testifying in chief told the court point blankly that she has no intention of adding another party (pg 53). I wonder why she is praying for a specific performance of their agreement while she doesn't want to include him. In such a situation the chosen option collapsed and thus the Respondent remained with the first one and therefore the question of pre-mature filing of the suit doesn't arise with much respect. The 5th issue was again

answered in negative and the 5th ground of appeal therefore crumbles as well.

I now revert to determine the 4th ground of appeal wherein the issue is whether the award of Tshs. 30,000,000/= awarded to the Respondent was excessive and unjustified contrary to the principle of *restitution in intergrum* as was enunciated in the case of *Bolag vrs Hutchson (supra)*. In further clarification, Advocate Aneth argued that nowhere the Magistrate in his Judgment had he discussed the basis or factors taken into consideration to award the said amount.

Generally the underpinning principle in the award of general damages is to restore the Plaintiff in the same position as far as money can do so if his rights had been observed and not to enrich the Plaintiff **[Refer the case of Victoria Laundry vrs Newman (1949) 2KB 528 at Pg 539].** However, the quantification of such damage is the court's discretion which essentially need to be exercised judiciously, the court in this matter is the RM's court. The begging question therefore is whether this court being an appellate one should or shouldn't disturb the quantum of the general damages awarded. The case of the **Cooper Mortor Corporation Ltd vrs Moshi/Arusha Occupational Health Services (1990)** TLR 96 which quoted with approval the case of **Nance vrs British Columbia Electric Raily Co. Ltd [1951] AC 601 at Pg 613** can be of much assistance and I quote:

"Whether the assessment of damages be by a Judge or a Jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case--- before the appellate court can properly intervene, it must be satisfied either that, the Judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one) or short of this that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damage".

In the matter at hand, the trial court didn't at all state any factor relied on, in assessing the awarded damages as correctly observed by Advocate Lwiza.

The omission in my view is legally unacceptable and thus entitle this court to step into the trial court's shoes so as to correct the observed oversight, thereby disturbing the awarded damages despite being an appellate court.

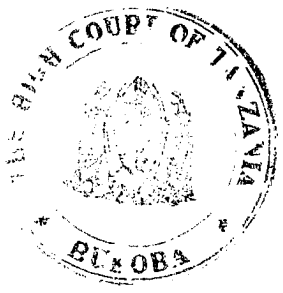
Advocate Mulokozi for the Respondent is of the view that the amount isn't excessive and listed the factors considered to be investment done by the Respondent since 2010 without reaping anything, payment of the Appellant's air ticket from Sweden to Tanzania so as to discuss and sign the agreement which didn't materialize. Suffice to state that the said factors weren't stipulated by the trial court to be the basis of the award but also the air ticket with due respect cannot fall into general damages.

Though I concede that the Respondent had an expectation to reap some profit following his investment into the said ERA Institution Project, but the recoup would have started after registration which was done in 2014 and not immediately after injecting the money which was been given in peace meals. But also in my understanding, time to break even is needed before the business starts making profit, thus assumption that he would have started getting profit in year 2010 is with due respect unrealistic. Nevertheless it is abundantly clear that the Respondent is entitled to general damages for the mental torture, anguish and miseries he experienced for the whole time when following up this matter as well as the expected profit within the above analyzed circumstances.

Considering the intention of awarding general damages is to restore him to the same position he would have been monetarily and not to enrich him, the award of Tshs. 30mln given by the trial court is inordinately high and I therefore reduce it to Tshs. 10mln which in my view will be the Justice of the case in this circumstances. Having in mind the appeal is partly allowed, I make no order with regards to cost. However since the Respondent has substantially worn the case at the trial court, it is only just to entitle him his cost therein and thus the awarded cost at the trial court is left undisturbed.

Appeal allowed to that extent.

It is so ordered.

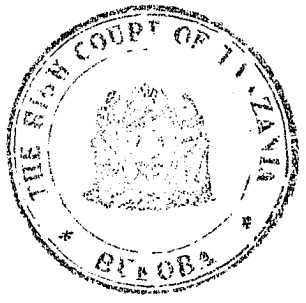


L.G. Kairo

Judge

22/05/2020

R/A explained.



L.G. Kairo

Judge

22/05/2020.

Date: 22/05/2020

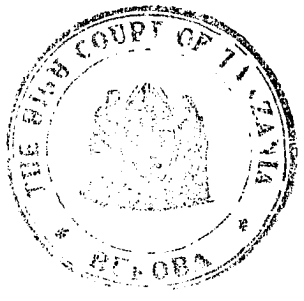
Coram: Before Kairo, J

Appellant: Advocate A.Lwiza

Respondent: Advocate P. Matete

C/C: Lilian Paul

Court: The case is scheduled for appeal. The same is ready and read over before Advocate A.Lwiza for the Appellant and Advocate P.Matete for the Respondent in open court today 22/05/2020.



L.G. Kairo

Judge

22/05/2020.