IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 33 OF 2018

(Originating from Civil Case No. 75/2015, Kinondoni District Court)

MAENDELEO BANK PLC.....APPELLANT

VERSUS

EDMUND VENANCE KAVISHE.....1ST RESPONDENT
AHADI COMPANY LTD..... 2ND RESPONDENT
FELISTER PASCHAL LUSINDE..... 3RD RESPONDENT

JUDGMENT

The appellant above mentioned is appealing against the decision of the trial court, decreed a sum of Tsh 20,000,000 in favour of the first respondent as compensation for disturbance. On the memorandum of appeal, the appellant raised four grounds of appeal, but abandoned the third and fourth ground and argued in respect of two grounds: first, the learned trial magistrate erred in law and fact to held that the appellant is liable for payment of Tsh 20,000,000/= to the first respondent as compensation for disturbance caused to him; secondly, the learned trial magistrate erred in law and fact

to held that the first respondent is entitled payment of Tsh 20,000,000/= as compensation for disturbances without a proof of the assessment for the damages suffered.

The appeal proceeded ex *parte* against the second and third respondents who defaulted to appear. The appeal was argued by way of written submission.

Mr. Kelvin Kidifu learned Advocate for the appellant faulted the trial magistrate for holding the appellant liable for payment of Tsh 20 million to the first respondent as compensation for disturbance caused to him, without a specific proof of the assessment for damage suffered. He submitted that the evidence adduced on record by the plaintiff is that, Bank officials went to his (first respondent) shop intending to auction his properties, for that reason he closed his shop to prevent the appellant from attaching his properties or selling them and alleged to had lost income. He submitted that there is no proof of assessment for the damages he suffered by the appellant's acts. That there was no proof on how the plaintiff was making a daily or monthly income to substantiate the amount claimed as compensation for loss of income. He submitted that, that amount was specifically pleaded but was not specifically

proved even to the lesser amount to enable the trial magistrate to award the same. He cited **Rubarabamu Archard Mwombeki vs Charles Kizigha & 3 others** (1985) TLR 59; **Cooper Motor Corporation Ltd vs Moshi Arusha Occupational Health Services** (1990) TLR 96.

In response, Ms. Tully Kaunde learned Advocate for the first respondent submitted that the first respondent did not claim for compensation for loss of income or specific loss in business nor specifically plead specific damages for him to be required to specifically prove the assessment of the loss. That the first respondent claimed for compensation for disturbance caused by the appellant which made the appellant to close the business until when he obtained injunction order in Misc. Civil application No. 141/2015, a fact which was corroborated by PW2. The learned Advocate went further ahead to craft a reply in respect of grounds number three and four to the memorandum of appeal, which were abandoned by the learned Counsel for appellant.

It is true that in the plaint the first respondent did not implead a claim for compensation for loss of income or specific loss in business as alluded by the learned Counsel for first

respondent. In a plaint, the first respondent claimed a relief for payment of disturbance which he quantified to a sum of Tsh 60,000,000/=. But when the first respondent (PW1) was adducing evidence at a trial court, PW1 asserted to had lost his income when he closed a shop to prevent the appellant to attach or sell his properties. And he asked to be paid a sum of Ths 60,000,000/= and ten percent of 60,000,000/= alleged disturbance and loss he incurred. However, the first respondent did not explain as to how long he closed a shop as alleged, neither stated an actual loss suffered after the purported closure. It is to be noted that in the plaint the first respondent did not plead to had closed a shop. That claim bob up when the first respondent was presenting his evidence. The first respondent plaint was presented for filing on 14/7/2015 being after elapse of thirty-six days from a day the appellant's officers visited at the first respondent's shop on 8/6/2015. As such a story by PW2 that the first respondent had closed a shop for six months, is a concoct, as PW1 was silent on this aspect. And if at all he closed a shop, he could had pleaded on his plaint. Assuming that the plaintiff had closed his shop, that alone could not justify him to an amount he claimed awarded to him or even a lesser sum.

It is common knowledge that when the court makes a final lump sum of monetary award, has to figure out basis of assessment for quantification made. Herein the trial magistrate did not rule a yard stick which made her to arrive at a figure of Tsh 20,000,000. The only ground which made the trial court to make that award is due to irregularities in the process of obtaining loan and disturbance. To my view, irregularities on a process of obtaining loan was irrelevant and too remote to the award made. On the same footing, disturbance alone cannot be a base for the award made. To my understanding, disturbance payment is a compensation which is intending to cover moving expense, when someone is compelled to move. A mere fact that the first respondent was served with a notice after her wife had defaulted to pay loan, and then rushed to close a shop at his own volition, cannot justify him to be entitled to any award.

Essentially the first respondent's claim was for perpetual injunction restraining the appellant from selling and/or disturbing his properties; and to annul the guarantee agreement created between the appellant and third respondent. Even averment on the body of his plaint reflect these two themes. Issues framed also encapsulate facts in

respect of these two reliefs. Only that when the first respondent was proving his claim, he abandoned the two reliefs above mentioned and twisted his claim into monetary form. No wonder the first respondent stressed for payment of monies while during cross examination, he stated that the impugned shop at Msuguli is going well. It is in records, specifically stated by PW2 and PW3 that the third respondent used to be seen several times or visit periodically at the impugned shop which she used as collateral to secure loan to the appellant.

That said, an award made by the trial court was legally unjustifiable. An award of Tsh 20,000,000/- is abrogated.

An appeal is allowed. Each party to shoulder it is costs for this appeal.

THE HIGH COURT OF TANZANIA

E.B. Luvanda
Judge
7.9.2020