IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
CIVIL APPEAL NO 18 OF 2019

CRDB BANK PLC _____ **APPELLANT**

VERSUS

AMRULLOH ASIFANA _____ **RESPONDENT**

(Arising from the Decision and Orders of the Resident Magistrate's Court of Musoma at Musoma, Hon. R. S. Mushi RM, in Civil Case No 83 of 2016 dated 30.09.2019)

JUDGEMENT

Date of last order; 13.03.2020
Date of Judgment; 27.03.2020

GALEBA, J.

This appeal and cross appeal arise from the decision and orders of the Resident Magistrate's Court sitting at Musoma which awarded the respondent Tshs 100,000,000/= specific damages and costs of the suit but did not grant interest or general damages to him. Whereas in this appeal the appellant is challenging the grant of the said specific damages and costs, the respondent in the cross appeal is challenging the denial of the interest and general damages, which were not granted by the trial court.

The background to this appeal is that the appellant is a public limited liability company carrying out the business of banking through its branch network covering the whole of the United Republic with one of such Branches at Tarime Township in Northern Tanzania. The respondent who is an Indonesian national up to around the first quarter of the year 2013 was an employee of North Mara Gold Mine Limited (NMGM) which was sending his statutory social security contributions to the National Social Security Fund (NSSF) during his tenure of employment. Upon separation with his employer, the respondent instructed the NSSF to pay his social

security benefits to his bank account number 0152388406800 operated at the appellant's Tarime Branch. After processing the payments, the NSSF deposited the said social security benefits amounting to around Tshs. 100,000,000/= to the respondent's account. At the time that the NSSF was depositing the respondent's dues with the appellant, the former had left the United Republic and was at the time in Indonesia. According to all documents on record, the foregoing part of the background facts are not disputed by either party to this appeal and that all was well up to that point, the point at which the NSSF deposited the appellants dues in his CRDB account.

The dispute between the parties is born of the following part of the background to it. On 01.03.2016 the respondent was asked to send details to the appellant so that the appellant could transfer the respondent's Tshs. 100,000,000/= to the latter's bank account no 624201000017506 operated by the respondent at Bank Rakyat Indonesia. The respondent sent details to the appellant including the above bank account. On 11.03.2016 the respondent complained that he had not received his money and he insisted by e mail to Mathias Kingali Tarime Branch Manager that the money must be sent to his account number in Indonesia. On the same day, Mr. Kingali asked the respondent on the details of another company called **PM MAXWELL RATES INC,** to which inquiry the respondent did not make any response. Although, there is no evidence on file showing transfer of funds, but sometime in May 2016 after a lot of efforts by the respondent of following up his money, the appellant advised the respondent that the money had been transferred to the United States bank called **BB & T BANK** at account no 0005245269120 operated by a limited liability company called **AUSTIN SHIPPING & AUTO LLC**. This information was news to the respondent. Whereas the appellant's allegations was that it had instructions of the respondent

to transfer the funds to the United States, the respondent's position was his instructions were to send his money to his bank in Indonesia and he never issued instructions to send money to America. When nothing tangible seemed to be forthcoming from the appellant, the respondent issued a demand notice but as the same was not heeded, a civil action was filed in the resident magistrate's court claiming the Tshs 100,000,000/= specific damages, Tshs 100,000,000/= general damages, interest and costs of the suit. The case was heard and the trial court granted the respondent specific damages as prayed and costs but it did not grant him general damages or interests. Both parties were aggrieved by the decision of the trial court as stated at the opening of this judgment. The appellant was aggrieved by the decree awarding Tshs. 100,000,000/= specific damages and costs on one hand, and the respondent was dissatisfied with the denial of general damages and interests on the other.

The appellant's appeal was predicated on 4, but after abandoning the additional ground, the remaining grounds of appeal were as follows;

> ***"1. The trial Magistrate erred in law and fact by not considering the appellant's exhibits which were admitted as Exhibit D1 (collectively). The said exhibits included an invoice from Austin Shipping Auto LLC which was sent by the plaintiff using his e mail address instructing the defendant to directly pay the amount in dispute to Austin Shipping Auto LLC.***
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> ***2. The trial Magistrate erred in law and fact by not considering the evidence of DW2 (who tendered exhibit D2) with the effect that the plaintiff's act of sending a secure message to the defendant was the only conclusive evidence and or proof that it was the plaintiff himself who requested the transaction after login in into his account using his own password and not by calling the plaintiff.***
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> ***3. That the trial Magistrate erred in law by entertaining the suit without giving an order for security for costs considering that the plaintiff is a citizen of Indonesia and do not possess any immovable property in Tanzania."***

As for the cross appeal the grounds were that;

"1. The honorable trial Magistrate erred in law and fact for without reasons failed to award interest at commercial rate from the date of misallocation of the decretal sum to the date of judgment as well as interest at court rate.

2. The honorable trial Magistrate erred in law and fact for without reasons failed to award general damages for inconvenience and mental anguish the respondent suffered for the period of three years which the respondent has been denied use of his money of which he expected to put them into investment."

When this appeal came up for hearing on 11.03.2020, Mr. Gwakisa Gervas learned advocate for the appellant argued the 1st and 2nd grounds together and he informed the Court that his precise complaint in those two grounds was that the trial court did not consider exhibit D1 (various e mails to and from the respondent) and exhibit D2 one document called a secure message (a document with handwritten words and signed by someone from CRDB Head Quarters on 29/3/2016) and that had he considered these documents, the court could not have reached at a decision it reached; it could have held that the appellant had instructions of the respondent to transfer the money to **AUSTIN SHIPPING & AUTO LLC** instead of sending it to him as argued by the respondent. He submitted that the instructions in relation to sending the money to Indonesia were being done with people with e mails from the wrong domain name which is **crdbank.com** while the right and genuine domain for the appellant was **crdbbank.com.** He submitted that all e mails that went through the first mention domain did not reach the appellant.

I must state one aspect that was poorly done in the trial court; the documents tendered are poorly marked; for instance although the three exhibits tendered by the respondent are allegedly marked exhibit P1, P2 and P3, the efforts of this Court to trace the exhibits completely failed. And too, even the exhibits marked D1 and D2 are not traceable in the original record. In this dire situation I asked the advocates, who too, had no firm assistance although they jointly

confirmed to me that all documents attached to the plaint and to the written statement of defence were all admitted as exhibits and therefore I could use all of them in this appeal. It was also agreed that D1 was all e mails from both sides and D2 was as secure message allegedly received from the respondent.

Further argument of the appellant was that the fact that the respondent admitted that the e mail address used to send the information regarding **AUSTIN SHIPPING & AUTO LLC** and the e mail that sent to the bank the secure message was his, then the trial court was supposed to believe that sending the money to the American bank was as per the instructions of the respondent.

The argument of the respondent was that all e mails relating to sending the money to the American bank did not originate from him and what he knows are the e mails he sent to the bank attached with his visa and other documents identifying himself to the bank, so that the appellant could send him his money. Counsel for the respondent stated that on 01.03.2016 at 5.30 pm **Ms. Neema Luhanga** from the bank requested various documents from the respondent for the bank to be able to transfer the money to his bank in Indonesia, which the respondent sent but he received no money.

In resolving the above grounds the issues to be resolved will be in the context of the grounds, namely

1. Whether failure to send the money to the respondent in Indonesia constituted negligence on the part of the appellant.
2. Whether the trial court heard the application for security for costs and withheld the ruling, and if so what is the legal effect.
3. Whether the respondent was entitled to general damages and interests.

I will start with the first issue, in respect of which it was the holding of the trial court that, the appellant was duty bound to confirm with the customer (respondent) by telephone whether what was happening electronically via e mail was genuine or not. The court adopted that line of reasoning because the appellant's Tarime Branch Manager Mr. Mathias Kingali used to communicate via his telephone 0763 600 892 to the respondent on other matters not as big as transferring a large amount of money to a third party but during the transfer of the money and the abrupt change of instructions from sending the money to him personally to an American company, the appellant did not bother to call the respondent to confirm the transaction. This was essentially the basis of why the trial court decided the case how it decided it.

I have reviewed the whole case file and I have noted the following matters that add to the worries that a prudent banker was supposed to entertain as the trail of e mails were streaming in and out surrounding the instructions to send the respondent's money to a bank in the United States.

First, the invoice upon which the appellant relied upon to effect the transfer of funds to **AUSTIN SHIPPING & AUTO LLC** does not have on it any bank details like branch code or even the bank account into which the funds would be deposited in case the buyer was to honor the invoice. Ordinarily invoices for exporting merchandize would always provide such details. This invoice did not have any details as to where the purchase price would be deposited.

Secondly, the other matter which would have prompted the bank to seek oral confirmation from its customer was the fact that the invoice that CRDB honored indicated that the seller of the goods was a company called **PM MAXWELL RATES INC** but there was no invoice from this company. Instead, the invoice was from **AUSTIN**

SHIPPING & AUTO LLC the company that did not own the goods ordered. In any event, there is no evidence to show that CRDB tendered any material in court to show that they were advised of the relationship between two companies.

Thirdly, the invoice from **AUSTIN SHIPPING & AUTO LLC** was expiring 7 days from its issuance on 22.03.2016. There is an e mail communicating cancellation of the invoice from "the respondent" to **Mathias Kingali** and **Sarah Nzowa** dated 29.03.2019 sent at 1125 hours informing the two bank officials that the invoice had been cancelled and that the respondent was placing an order with another company. However the appellant states that it still honored the same invoice although they had been advised that the invoice had been cancelled. In appropriate circumstances, that invoice could not be honored.

Fourthly, the last document attached to the written statement of defence of the appellant shows that the instructions that CRDB had were to pay Tshs 100,000,000/= to account no. 799-707-117 operated by **PM MAXWELL RATES INC** at **CHASE BANK** operating from 130 Smith Street, Perth Amboy NJ 08861. After those details there in an endorsement in the following terms;

> ***"MSC-Tarime Branch,***
> ***Please process transfer.***
> ***Sarah Nzowa***
> ***Sgd"***

There is no explanation either on pleadings, evidence or even submission not only in the trial court but also before me on the change or why is it that the money was not paid to this account, at least, of the owner of the goods. It will be noted that in the e mail trail there is nowhere, where the respondent is changing instructions from **PM MAXWELL RATES INC** to any other company.

The above shows that to a genuine banker there was a need to confirm orally from the owner of the funds before paying them to a third party.

Still there is one more issue; other than the pleadings and the word of mouth, to the trial court, there is not a single document on record showing that there was any money sent to any destination from the respondent's account held at the appellant's Tarime branch. Ordinarily evidence of funds transfer is a Swift Advice generated from the system transmitting the funds form the bank initiating the transaction to the destination bank. Such advice has all necessary details relating to the transfer. During the trial instead of proving that the money was indeed sent to **AUSTIN SHIPPING & AUTO LLC**, the recipient of the funds, according to the appellant, at page 33 of the typed proceedings Mr. Mangire Kibanda, a senior manager at Internet Banking Department CRDB Head Quarters stated;

> ***"I don't know the exact amount he requested to be transferred.....it is not my duty to know whether the money was received or not."***

Such answers are a vivid manifestation of insensitivity to customer's issues and concerns by a banker. It would have been a lot more professional during his evidence to tender a swift advice showing that at least the respondent's money left their bank on a particular date and the transaction terminated at a particular bank account in a specified homeland or overseas bank. In the instant dispute, there is no electronic evidence on record that any amount of money from the account of the respondent held at appellant's bank was sent to any destination abroad.

With the above discussion, the first issue is resolved in the affirmative that failure to send the money to the respondent constituted negligence and also the complaint in grounds 1 and 2 that the trial court did not consider exhibits D1 and D2; the holding of this Court is

that the trial magistrate considered the documents (e mails) throughout the judgment but he made a finding of fact that the appellant's officers were negligent as they were supposed to confirm the instructions by calling the respondent for his oral confirmation, which the bank did not do.

Ground three which is in tandem with the 2nd issue is whether the trial court heard the application for security for costs and did not deliver the ruling, and if that is what the trial court did, what is the legal effect. The argument of the appellant was that Miscellaneous Application No. 3 of 2016 for security for costs was heard but the trial court did not deliver the ruling on the arguments of counsel and went ahead to hear the main case.

The response of Mr. Venance Kibulika learned advocate for the respondent was that the application was overtaken by events because the appellant was supposed to appeal at the time, the ruling was not delivered. In respect of this issue all parties involved had issues, the trial court demonstrated problems because whereas the hearing was conducted in the file for the main case, the ruling was delivered in the file for the application. The ruling was prepared and delivered on 28.08.2017, but there is no ***coram*** showing those who were present, nor is the ruling signed, but the ruling is there and the application for security for costs was dismissed. The issue of non-signing of the ruling, the remedy is not setting aside the judgment in the main case, but to remit the filed in respect of the miscellaneous application for the trial magistrate to sign the ruling. Both counsel did not seem to be aware that there was actually a ruling and the same was delivered although it was not signed. In the circumstances, the second issue is resolved in the negative in that the court composed the ruling and delivered it. That said the 3rd ground complaining on issues surrounding security for costs is dismissed because the ruling was composed and the same was delivered. Because all grounds of

appeal have been dismissed, the whole appeal of the appellant stands dismissed with costs.

I will now proceed to the cross appeal which had two grounds, one complaining about refusal to grant interests and another general damages.

I will start with interests. There are two kinds of interests, interest on commercial rate that is always awarded prior to filing the case to the date of judgment and statutory interest which is also called interest at court rate. The rationale for granting commercial rate of interest on the judgment prior to filing the suit up to the date of judgment is based on the assumption that, had the defendant paid the money to the plaintiff when due to the latter, the defendant would have averted the suit and at the same time the plaintiff would have been earning interest from business he would have invested the money into. In terms of economics, that interest can be referred to as investment opportunity cost of the decree holder's money unlawfully held by the judgment debtor. The law in Tanzania is that grant of interest at commercial rate is upon the discretion of the trial court as per the case of **SAID KIBWANA AND GENERAL TYRE EA LTD VERSUS ROSE JUMBE [1993] TLR 174.** Interest prior to filing the suit up to judgment needs to be pleaded in the plaint see **FRANCIS ANDREW VERSUS KAMYN INDUSTRIES T LIMITED [1986] TLR 31.**

In this case the commercial interest claim was prayed at item (i) of the prayers. It's the holding of this Court, that that item having been pleaded, the same was supposed to be dealt with by the trial court and either be granted or be refused, but no consideration was accorded to the prayer. Mr. Gervas Gwakisa on this issue submitted that the silence of the court meant that the prayer was denied. That submission is not right because, had the trial court wanted to deny the prayed interest, it would not have kept quiet, it would have held

accordingly and said so. It is the holding of this Court that refusal to grant interests was erroneous.

Because the trial court made a finding of fact that the appellant was supposed to pay the Tshs 100,000,000/= to the respondent since early March 2016 and the appellant did not transfer it to him then, the court was supposed to grant interest on that amount from that time till the date it delivered the judgment on 30.09.2019. I stated already that that was not done, but this Court being the immediately appellate Court to the trial court it has mandate to step into the shoes of the trial court and make the appropriate order. In all fairness the commercial interest to be applied on the Tshs 100,000,000/= that was due for payment in March 2016, shall be sixteen percent (16%) per annum which shall apply to that amount from 01.04.2016 to 30.09.2019, the date of judgment.

The second category of interest is interest on the judgment debt after the date of judgment. The rate of this interest is specified by **section 29 of the Civil Procedure Code [Cap 33 RE 2002]** (the CPC) read together with **Order XX Rule 21** of the same statute. The rate is 7% per annum but where there is an agreement between the parties the rate can go up to 12% per annum, see holding (iii) in the case of **NJORO FURNITURE MART LTD VERSUS TANZANIA ELECTRIC SUPPLY COMPANY LIMITED [1995] TLR 205.** See also **REV. CHRISTOPHER MTIKILA VERSUS THE ATTORNEY GENERAL [2004] TLR 172** where it was held at holding (xii) at page 173 that under section 29 of the CPC the appellant is entitled to the court's interest rate of 7% per annum from the date of judgment to the date of final settlement. In this appeal the trial court did not deny or award this interest, without giving any reasons. That was not lawful because the interest is statutory. This Court therefore holds that the respondent is entitled to interest of seven percent (7%) per annum calculated on Tshs 100,000,000/= from when the judgment was delivered up the time

that the appellant shall settle the judgment debt. In the circumstances, the 1st ground of appeal in the cross appeal is upheld.

Next and finally, is general damages. Assessment and grant of general damages is ordered upon the plaintiff pleading that following the acts of the defendant he suffered damage and the plaintiff does not need to prove the damages see **CIVIL APPEAL NO 23 OF 2019 RELIANCE INSURANCE COMPANY (T) LIMITED, CONRAD ANTHONY MALYA AND ATHWAL TRANSPORT AND TIMBER VERSUS FESTO MGOMAPAYO CA, DODOMA (UNREPORTED) LEVIRA JA** at page 23. According to that decision assessment of general damages is the domain of the trial court and the appellate court, unless the trial court applies a wrong principal, it has no mandate to interfere with the assessment of general damages. According to the holding in **VICTORIA LAUNDRY VERSUS NEWMAN [1949] 2KB 528** at **539** the purpose of general damages is to put the plaintiff in the same position, as far money can do so, as if his rights had been observed. Before the trial court general damages were pleaded at paragraph 25 of the plaint being for inconvenience and mental anguish. Surely the respondent who has to organize everything from Jakarta Indonesia suffered greatly following the acts of the appellant, although the trial court did not assess or grant any amount. Because this Court is the immediate appellate court, it has mandate to step into the shoes of the trial court and grant the damages. Although the respondent put general damages at Tshs 100,000,000/=, but it is the opinion of this Court that, Tshs 20,000,000/= will make good the damage. The respondent is awarded 7% interest on this amount from the date of this judgment till final settlement. That said the 2nd ground of appeal in the cross appeal is upheld with the 3rd issue which is corresponding to it being answered in the affirmative.

As for the ruling for security for costs, it is hereby ordered that the original record in Miscellaneous Application No. 83 of 2016 be remitted to the trial court for signing by the appropriate magistrate for perfection of the said ruling.

In the final analysis, the cross appeal is partly allowed with costs.

DATED at MUSOMA this 27th March 2020

Z. N. Galeba
JUDGE
27.03.2020

Court; The Judgment has delivered this 27th March 2020 in the presence of Ms. Flora Okombo advocate holding brief of Mr. Gwakisa Gervas advocate for the appellant and Mr. Kikwaza Haruna Kikwaza holding the power of attorney of the Respondent.

Z. N. Galeba
JUDGE
27.03.2020