

**IN THE HIGH COURT OF TANZANIA**  
**DAR ES SALAAM DISTRICT REGISTRY**  
**AT DAR ES SALAAM**

**CIVIL APPEAL No. 172 OF 2018**

(Appeal from Judgment of the District Court of Ilala at Samora Avenue  
Before Hon. Msafiri J. C. Resident Magistrate dated of 7<sup>th</sup> day of May,  
2018 in Civil Case No. 94 of 2016)

**ACCESS BANK (T) LTD.....APPELLANT**

Versus

**DUBZ AUTO CAR ACCESSORIES CO. LTD.....RESPONDENT**

**JUDGMENT**

12<sup>th</sup> February, - 19<sup>th</sup> March, 26<sup>th</sup> March, 2020

**J. A. DE-MELLO J;**

The Appellant, the Plaintiff in the lower District Court, had sued the Respondent, then the Defendant, for among others the following;

- 1. Honorable Court be pleased to declare that the acts of defendant to confiscate and retain the goods of the plaintiff in the shop located at Lumumba/Pemba Street, Kariakoo, Ilala Municipality, Dar Es Salaam, is un-procedurally, maliciously and fraudulently which is totally a breach of loan agreement hence null and void ab-initio.**
- 2. That, this Honourable Court be pleased to order the Defendants for payment TShs. 96,981,000.00 being specific damages.**

- 3. Interest on the total amount at commercial rate from the date of filling to the date of full payment.**
- 4. Payment of general damages as per court discretion.**
- 5. Costs of this suit.**
- 6. Any other Relief (s) that this Honourable Court shall deem fit to grant.**

Following evidence adduced and, which the Trial Court, analysed, the Trial Magistrate found both the Plaintiff/Respondent to be in **breach** of the contractual obligation, but, condemned the illegal seizure of the goods in the shop of the Respondent worth more than **TShs. 96,000,000/= (Ninety Six Million)** which exceed the total loan amount of **TShs. 25,000,000/= (Twenty five Million)**, and, granted award in that belief.

Aggrieved, the Appellant, represented by **Stanley Nyamle, Learned Counsel**, have lodged the grounds of Appeal which basically challenge:

- 1. That, the Trial Court erred in law and facts by awarding plaintiff specific damages which were not strictly pleaded and proved.**
- 2. That, the Trial Magistrate erred in law and fact by totally disregarding the evidences produced in defense regarding the loan contracts and banking business, hence awarding unreasonable damages to the plaintiff.**
- 3. That, the Trial Magistrate erred in law and, in facts by holding that defendant confiscated the business whose value was beyond the value of pledged collaterals, without taking into consideration the assessment of the said (Collateral) at the time of execution of contract.**

- 4. That the Trial Magistrate erred in law by admitting the plaintiff evidences which are not admissible under the eye of law.**
- 5. That, the Trial Magistrate erred in both law and, in facts by ignoring the accrued interest and overdue payments as the part of loan vide computation of specific damages purported to be suffered by plaintiff.**
- 6. The Trial Magistrate erred in law and facts by recording testimony of PW2, while knowing, himself that he was present in court session when PW1 testified.**

Written submissions was prayed and, duly granted by the Court on **3<sup>rd</sup> December, 2019**. The Appellant, represented by **Stanley Nyamle**, while the **Respondent** was represented by **Counsel Joseph M. Msengezi**. Submitting on the first ground of Appeal, **Counsel, Stanley Nyamle**, the award of **Specific Damages** to the tune of **TShs. 79,782,000/=**, Counsel contends not to have been **strictly pleaded** and, **proved** as required by law. The Court failed even to know that, the confiscated items were pledged as a collateral together with a landed property located at **Mwongozo, Temeke District, Dar Es Salaam** to secure loan amount of **TShs. 25,000,000/=** million, over and, above. Addressing the second ground of Appeal, the Trial Magistrate erred by awarding unreasonable damages to the Plaintiff, notwithstanding evidences adduced. The loan contract entered between the Parties was crucial component for Trial Court which ought to take cognizant of, if at all, a just decision was to be reached. With regard the third ground of the Appeal, the Trial Magistrate and, without taking into consideration the assessment of the said collateral at the time of execution of contract which

was far beyond the said loan, one which used secure the said loan of **TShs. 25,000,000/=** million whose assessment at the time of confiscation was eminent. On the fifth ground of Appeal, the Trial Magistrate while knowing, and, even after admission by **PW2** himself that, he was present in court session when **PW1** testified, went on to record his testimony him being disqualified. The Appeal be allowed with costs, the Appellant prays.

In response thereto, Counsel for the Respondent sternly opposed the first ground on **Specific Damages** that, the Trial Court awarded to the Respondent amounting to TShs. **79,782,000/=** having been specifically pleaded and, strictly proved by evidence adduce by **PW1** and **PW2** supported by **exhibits P-C** and **P-D** the case of **Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137 at page 139, whereby the Court of Appeal of Tanzania held that,**

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

The Trial Court considered all the evidence tendered by the Appellant’s witness which are Loan Agreement and, **Collateral Agreement**, both admitted as **exhibits E1** and **E2** respectively, as provided under **page 5** of the typed Judgment and **exhibit 3** loan status as provided under page 6 of the said typed Judgment, rendering the Appellant’s submissions in respect, baseless and, lacks merit. In actual fact, he Trial Court took into account the value of goods from the Respondent’s stock inside the shop, worth **TShs. 96,000,000/=** as opposed the actual debt that, stood less than the full loan of **TShs. 25,000,000/= million**, leaving balance of **TShs. TShs. 17,205,000/=** deposits already made of **TShs.**

**7,795,000/=** as shown in the last paragraph of **page 10** of the typed judgment. With respect to recording of **PW2 testimony**, while disregarding the fact and, upon his own admission, to be present and hence privy to **PW1's** testimony, Counsel refutes this as nowhere in the proceedings this was recorded. The Appeal is baseless, it ought to be dismissed with costs, Counsel for the Respondent prayed, with costs.

While in agreement that, there was breach on part of both parties, for failing to reimburse instalments by the Respondent in accordance with the schedule for payment, in accordance to **clause 4.4** of the **Loan Agreement**, and, liable under **clause 4.8** for confiscation and, selling of goods, it is obvious that the Appellant similarly and, in line with that term, illegally confiscated more than what was owing and, outstanding from the Respondent. The outstanding amount was **TShs. 17,202,000/=** as opposed to **TShs. 96,000,000/=** worth of goods in stock, for confiscation as done. Being their client, the Appellant was obliged by law and, in practise, to establish what the goods were worth, prior to the said confiscation. With this and, as rightly put forward by the Trial Magistrate, the two were both in **Breach**. It is this part, the Trial Magistrate awarded the Respondent **TShs. 96,987,000/=** as specific damages, following verifying value of the stock confiscated. It is the Stock list with its itemized prices, one which the Respondent tendered and objected but which the Trial Court in its Ruling admitted and marked as **exhibit C** which formed basis for the award. Let me pause here for a while and brainstorm what **Stock** means to be able to understanding its relevance in proving that special damages. Stock in business and trade terms means and as drawn from both Wikipedia and Oxford English Dictionary is;

**"Quantity of goods lying unsold as of a particular date".**

None of the defendants had in their testimonies opposed as to the existence of stock lying in the Respondent's shop. In fact, as alleged by the Respondent and alluded by the Appellants during Trial, all stock within the Respondent's shop was confiscated. The Court, in its wisdom guided and, acted on that and relied on the case of **Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137**, borrowing what the old English case of **Bolag vs. Hutchson (1950) A.C 515**, where it was held that:

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

It is even trite law that, all Civil suit are founded on **Balance of Probability**, principle. Further that, and under **sections 110 (1) (2)** the reading provides;

- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exists.**
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.**

Furthermore, that, **section 111** of the **Evidence Act Cap. 6** stipulates further that;

**"One who alleges must prove".**

Several others cases subscribes to these principles and to mention a few are; **Jeremy Woods & Another vs. Robert Chaundry & Others, [2008] 1 EA 143, Abdulkarim Haji vs. Raymond Nchimbi Alois &**

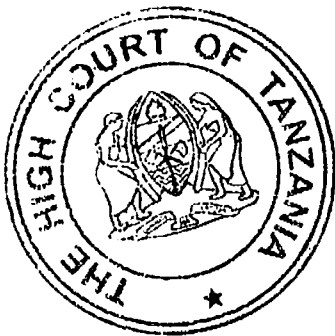
**Another [2006] TLR 419, Kwiga Masa vs. Samwel Mtubatwa [1998] TLR 103.**

Since this Court is dealing with this Appeal as the first Appellate Court and, as held by the Court of Appeal of Tanzania in the case of **Sugar Board of Tanzania vs. Ayubu Nyimbi & 2 Others, Civil Appeal No. 53 of 2013, CAT at Dar Es Salaam** (Unreported), it has the duty to review the record of evidence of the Trial Court, in order to determine whether the conclusion reached is adequate and if not, subject to re-evaluation in relation to the referred framed issues. Upon perusal of the file record, **PW1** relied on that, exhibit to prove items confiscated from his shop, but even the "**fomu ya ukamataji dhamana dated the 24<sup>th</sup> March, 2016**" though a copy and, notice to produce filed and, not responded to by the Appellant the Court admitted and, marked **exhibit D**. It is from these two that, the Trial Magistrate safely arrived to award the Respondent the **TShs. 96,981,000**. In **page 32** of that, same Trial proceedings, **DW1 Godwin Ernest Mabibo** on cross examination by Court admitted to inventory and stock to include all items in the Respondent's shop. It is however, his position as seen on **page 35** that, all stocks irrespective of its worth formed part of the collateral towards loan. The **Broker, one Nuhu Kichenje** even corroborated the confiscation of all business stock regardless of its worth, as instructed by the Appellant, as read from **page 38**. It is even clear that, this is not the first loan that the Respondent had secured from this same bank and, as testified by **PW1** on **page 23** on cross examination by Court. It is stated to be the first one amounting to **TShs. 17,000,000/=** and, re-paid even prior to expiry of the tenure. One would logically wonder why the roughness by the Bank and, his common client? **PW1** and, not objected

by the Appellant, to have been in constant contact with his banker informing **DWI Godwin** that, reasons for delays to be attachment of the stock by the Tanzania Revenue Authority. It is even vivid that for that same loan of **TShs. 25,000,000/=** other than the stock, were a **Plot at Kigamboni** worth **TShs. 18,000,000/=**, cash money, household equipments namely; **TV screen, microwave, sofa set and fridge.**

From the foregoing and on the balance of probability, the weight lies heavily on the Respondent's scale, having adequately proved his case at Trial than that, of the Appellant. As such, I find no reasons to disturb the findings of the lower Court, in **Civil Case No. 94 of 2016** as I uphold it. The Appeal is accordingly dismissed with costs.

It is so ordered.



  
**J. A. DE-MELLO**

**JUDGE**

**26<sup>th</sup> March, 2020.**