

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**CONSOLIDATED CIVIL APPEALS NOS 26 & 28 OF 2020**

**FINCA TANZANIA LTD .....1<sup>ST</sup> APPELLANT**

**DOMMY AUCTIONEERS & COURT BROKER .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**BALTAZARY WAMBURA .....1<sup>ST</sup> RESPONDENT**

**DANIEL MAKUYU MAGAI .....2<sup>ND</sup> RESPONDENT**

*(Arising from Civil Case No. 10 of 2018 of the Musoma District Court)*

**JUDGMENT**

2<sup>nd</sup> Dec, 2020 & 23<sup>rd</sup> March, 2021

***Kahyoza, J.***

**Baltazary Wambura** sued **FINCA TANZANIA LTD, Daniel Makuju Magai and Dommy Co. Ltd Auctioneer and Court Brokers** (Auctioneer) alleging that his 3 freezers were attached and one of them sold without any reasonable justification. He prayed for Tzs. 1,500,000/= the value of the freezer the Auctioneer sold. Tzs. 16,642,000/= being loss of expected business profits for 317 days the period, which two freezers remained attached, Tzs. 68, 316, 750 as loss incurred out of illegal confiscation of one freezer up to the date of filing the suit and general damages to the tune of Tzs. 15,000,000/=.

The trial court heard the parties and found in favour of Baltazary, to the extent that FINCA attached two freezers, the property of Baltazary. FINCA released the two freezers after Baltazary's complaint. The court awarded Tzs. 2,000,000/= as general damages without costs. The court did not find proof for specific damages of Tzs. 16,642,500/=-, claimed as loss of business during the period FINCA attached the two freezers. Further, the trial court did not find evidence for other claims.

FINCA and Baltazary were aggrieved by the decision of the trial court. FINCA lodged Civil Appeal No. 26/2020 and Baltazary lodged Civil Appeal No. 28/2020. The two appeals were consolidated at the hearing.

On one hand, FINCA's appeal raised the following issues:-

- 1) Whether it was proper for the trial court to find that two freezers belonged to Baltazary; and
- 2) Whether the trial court erred to award general damages without any proved specific damage.

On the other hand, Baltazary's appeal raised the following issues: -

- 1) Whether the trial court erred not to award costs of the suit;
- 2) Whether the trial court erred to decide that the sold freezer belonged to the Daniel;
- 3) Whether the trial court erred to hold that Daniel was conducting business at Baltazary's premises;
- 4) Whether the trial court erred by not awarding specific damage to Baltazary;

- 5) Whether Baltazary's business was alive at the time of confiscation;
- 6) Whether the amount of Tzs. 2,000,000/= awarded as general damages was justified; and
- 7) The last issue is a general one that is whether Baltazary proved his case on the balance of probabilities.

**Did the trial court err to hold that the two freezers belonged to Baltazary?**

This is a first appeal which is the form of a re-hearing. Given the issues raised above, once those issues are addressed this matter will be re-heard. I will commence with the issue, whether the court erred to find that the two freezers belonged to Baltazary.

The evidence on record shows that FINCA through the Auctioneer attached three freezers on the 14<sup>th</sup> November, 2014 to enforce payment of a loan advanced by FINCA to Daniel. This fact is not disputed as FINCA admitted it under paragraph 3 of the written statement of defence (WSD). FINCA state that *"... the attachment of the said freezer belonged to the second defendant one Daniel Makuyu Magai who mortgaged them to secure a lone from the 1<sup>st</sup> defendant"*. Parties are bound by their pleadings unless amended. There was no need to prove the fact admitted in the pleadings. See the decision in **Gabdy v Gaspair** [1965] EACA 139 where it was held that

*"unless the pleadings are amended, the **parties must be confined to their pleadings** otherwise to decide against a party*

*on matters which do not come against the issues arising from the dispute as pleaded clearly amounts to an error on the face of record.”*

Following the attachment of the freezers, Baltazary complained to FINCA's Musoma branch Manager. The Branch Manager directed the Auctioneer to raise the attachment and return the attached freezers on an undertaking by Baltazary to assist FINCA to trace Daniel. The instructions were given in writing. The letter exhibit Exh. P.4 reads: -

*“.....Apewe dhamana zake, kwa sharti kwamba aandike maelezo kwa Kampuni ya Dommy (ambaye pia ni Auctioneer wa FINCA kwamba atatoa ushirikiano wa karibu wa kuhakikisha dhamana za ndugu Daniel Makuyu Magai zinapatikana kwa ajili ya kufuta deni lake. Na kama kuna gharama zozote za kutunza dhamana hizo anapaswa kulipa yeye”.*

Baltazary after that note, collected two freezers. The act of returning of two freezers to Baltazary by FINCA and the Auctioneer is a proof that those freezers did not belong to Daniel and therefore they were wrongly attached. I therefore, do not buy FINCA's submission that Baltazary had duty to prove that the two freezers belonged to him.

I find therefore, that the trial court held appropriately that the two freezers belonged to the Baltazary.

## **Was Baltazary entitled damages for indefensible attachment of two freezers?**

The next question is what reliefs are Baltazary entitled to recover from FINCA for unjustifiable attachment of his two freezers. The trial court found that Baltazary did not prove specific damages in relation to the attached and later released two freezers. It awarded only general damages.

It is trite law that specific or special damages must be specifically pleaded and proved. (See **Zuberi Augustino v Anicet Mugabe** [1992] TLR 137). There is also another principle that a party is awarded damages which he pleaded and proved by evidence. See **Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre** [1991] TLR 165. Baltazary pleaded in the plaint that he was losing TZS 52500/= daily for two freezers. He did not plead specifically how he incurred the alleged loss. I also scrutinized his evidence and found that Baltazary did not specifically prove how he incurred the loss. Baltazary deponed that-

*"My freezer got attached on the 13<sup>th</sup> November, 2014 while I was in jail. I was given back those two on 25<sup>th</sup> September, 2015. That affected my business (freezing fishes) to a great extent. I suffered a loss about TZS 16,642,500/= in respect of missing freezer. I went on suffering loss to date. I was getting TZS. 56,00/= profit daily from the missing freezer."*

In addition, like the trial court, I did not find it proved that at the time the freezers were attached Baltazary's business was going on.

I am of the firm view that the evidence produced above was not sufficient to prove specific damage. Baltazary ought to have shown how he was making a profit of Tzs. 56,000/= daily. He ought to have tendered tax payment receipts or given an account of his business to prove that he was capable of making the alleged profit daily. In this case, he left it to the court to speculate. It is not clear why was Baltazary made a profit of TZS 56,000/= daily and not 60,000/=. Damages be it specific or general are awarded to redress the party who suffered damage and not to enrich that person or punish the other party.

I totally concur with the trial court that Baltazary did not adduce sufficient evidence to prove specific damage to warrant an award of specific damages. Consequently, the trial court was right not to award specific damages.

**Was Baltazary entitled to general damages of Tzs. 2,000,000/=?**

I will consider the issue whether the trial court was justified to award general damages of Tzs. 2,000,000/=. The trial court did not give reasons for awarding general damages and why it awarded that amount and not more or less than that. I have depicted above that FINCA attached Baltazary's two freezers and later released them. There was no justification for the attachment of two freezers, Baltazary was entitled damages for



FINCA's act of trespass to his property. FINCA argued that Baltazary did not establish that the two freezers belonged to him. I have said above that he had no duty to do so. FINCA stated in his WSD that she attached two freezers to enforce payment of the loan advanced to Daniel. Had Daniel mortgaged the two freezers FINCA would not have released them without Daniel's debt being paid.

There was another argument that FINCA recovered the unpaid loan by selling one freezer, hence, there was no need to sell the two released freezers. That argument is defeated by the note issued by FINCA's branch manager directing the Auctioneer to release the freezers. The note read *"Apewe dhamana zake, kwa sharti kwamba aandike maelezo kwa Kampuni ya Dommy (ambaye pia ni Auctioneer wa FINCA kwamba atatoa ushirikiano wa karibu wa kuhakikisha dhamana za ndugu Daniel Makuyu Magai zinapatikana"*. The note meant that FINCA released the two freezers before Daniel's debt was settled and that the two freezers belonged to Baltazary.

FINCA's advocate submitted that Baltazary was not entitled to general damages as he did not prove specific damage. General damages are distinct from specific damages. A person may fail to prove specific damage and prove general damage. The standard of proving specific damage is higher than the standard of proving general damage. I am not convinced that FINCA had any reason to attach two freezers. For that reason, FINCA's act of attaching Baltazary's two freezers was nothing but trespass to Baltazary's property. Baltazary is entitled to general damages.

It is trite law that there are no hard and fast rules in the determination of general damages and they cannot be approached with mathematical precision. See the decision in the case of **Fredrick Wanjara, M/S Akamba Public Road Service Limited A.K.A Akamba Bus Service Vs Zawadi Juma Mruma, Civil Appeal No. 80 Of 2009 Cat [Unreported]**. Generally speaking, the figure reached by the trial court is not to be disturbed on appeal unless it is based on some erroneous principle or it is so low or so excessive that it must have been based on some incorrect reasoning. This position was stated in the case of **Obongo and another v. Municipal Council of Kisutu**, (1971) EA 91.

Assessment of damages is more like an exercise of discretion and an appellate court is particularly slow to reverse the trial court on a question of amount of damages unless it is satisfied that it misapprehended the facts or has for this or other reason made a wholly erroneous assessment of the damage suffered. It is not what the appellate court would have awarded, but whether the trial court has acted on wrong principles. The trial court assessed general damages at Tzs. 2,000,000/= I have no reason to interfere with the assessment. It did not act on a wrong principle or award exorbitant damages.

I uphold the decision of the trial court that the Baltazary is entitled to general damages assessed at Tzs. 2,000,000/= and not more.



### **Was Baltazary the owner of the sold freezer?**

I will now move to the issue whether the sold freezer belonged to Daniel or to Baltazary. FINCA's advocate submitted that there was no proof that the attached three freezers belonged to Baltazary. I have already determined that the two freezers belonged to Baltazary. That is why the FINCA returned the two freezers to him. Baltazary submitted that FINCA wrongly sold the big fridge and that it belonged to him. He deposed that it did not belong to Daniel. He tendered exh. P3 a receipt of one freezer west point make.

FINCA's advocate submitted that the receipt was not genuine. He added that previously in Civ. Case No 41/2018 District Court Musoma, Baltazary told the Court that the receipts were stolen.

I went through the records of Civ. Case No. 41/2015, tendered as Exh.D4, and found at page 22 that Baltazary deposed that receipts were stolen. He deposed-

*"There was a debt of one Kalumya s/o Magai but I was not his guarantor. I signed the loss form as his witness. I do not know what were his bond, but he surrendered, refrigerator freezer and cupboard, I was all of them were resembling but not of the same size. I have their ownership documents which were stolen in 2014."*

It is true that Baltazary's documents to prove that the sold freezer belonged to him were stolen. Baltazary had previously told the court in Civ.

41/2018 Musoma that his receipt was stolen. When and where did he recover them. Thus, the fact that Baltazary had deposed that the documents of title were stolen proves that Exh. P3, the receipt was not genuine. The trial court had the following to remark regarding the sold freezer-

*"Now the question is, can this court believe through ExhP2 and P3 that the plaintiff has established the ownership of the remained one freezer against the 2<sup>nd</sup> Defendant?"*

*It is unfortunate that it is not Exh P2 or P3 that had serial number in respect of the attached freezer in question. It was not the plaintiff or the Defendants who told this court what was the serial number of the attached freezer.*

*In the circumstance, I find that the plaintiff was duty bound to establish the description of his alleged unlawfully attached freezer the duty he has failed to discharge.*

*On the other hand, there is evidence that the 2<sup>nd</sup> defendant used freezers as collaterals in respect of the loan he was advanced by the 1<sup>st</sup> defendant. It was not disputed that the 2<sup>nd</sup> defendant used to do fisheries business at the plaintiff home or business cite. In that circumstance, I find that it is highly probable that the attached freezer belonged to the 2<sup>nd</sup> defendant.*

*I therefore conclude that the sold freezer belongs to the 2<sup>nd</sup> defendant and the returned freezers belonged to the plaintiff.*

*On the third issued, and as I have made a finding that the sold freezer belonged to the 2<sup>nd</sup> defendant, then its sale was lawful."*

I support the trial court finding that Baltazary did not prove that the sold freezer belonged to him. Baltazary evidence did not tilt the balance scale to his favour.

Now that I have found that there was no evidence to prove that Baltazary owned the sold freezer there is no reasons to determine remaining issues except the issue of costs.

### **Was Baltazary entitled to costs?**

The issue is whether the trial court erred not to award costs of the suit. Baltazary contended that the trial court erred not to award him costs.

FINCA's advocate submitted that it was proper for the trial court not to award costs. He submitted that court has discretion to award costs or not. He cited case section 60 of the **Civil Procedure Code**, [Cap. 33 R.E. 2019] to support his submission.

It is true that courts have discretion to award costs. The discretion though very wide must be exercised judicially. The award of costs is a discretion, it cannot be claimed as a matter of right. Mulla in his book "**The Code of Civil Procedure**, 12<sup>th</sup> Edition at page 150 stated that-

*"the general rule in Civil Cases is that costs shall follow the event unless the court, for good reasons, otherwise orders. This party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The court may not*

*only consider the conduct of the party in the actual litigation, but the matters which led up to the litigation"*

The above position was stated in the case of **Hussein Janmohamed & Sons Vs. Twentsche Overseas Trading Co. Ltd** [1967] 1 EA 287, where Biron J, held –

*"The general rule is that lost should follow the event and the successful party should not be deprived of them for no good cause".*

In the instant case, Baltazary sued FINCA, Daniel and the auctioneer. He won the case although not to the extent of his claim. The trial court found that FINCA attached Baltazary's two freezers without any justification. It awarded him general damages of TZS. 2,000,000/=. Thus, Baltazary won the case he was entitled to be awarded costs unless the court had good cause to order otherwise. The trial court did not give reasons for not awarding costs. I find that although the trial court had wide discretion to award or not to award costs, its failure to give reasons for not awarding costs, the trial court exercised its discretion by caprice and not judiciously. Insisting on the importance of awarding costs Bowen, L. J. in **Copper Vs Smith** [1884], 26 Ch. D 700, at 5711 stated –

*"I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have very seldom, if ever been unfortunate enough to come across an instance where*

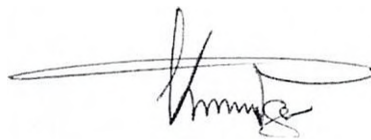
*a party ..... cannot be cured by the application of that healing medicine"*

Baltazary was entitled to costs before the trial court for reasons stated above. Consequently, I set aside the order of the trial court denying Baltazary costs and grant him costs before the trial court.

In fine, I dismiss Civ. Appeal No. 26/2020, where FINCA was the appellant with costs. I partly uphold Civ. Appeal No. 28/2020 with costs. Consequently, I give the following orders-

- 1) I uphold the award of the general damages of Tzs. 2,000,000/= ordered by the trial court;
- 2) I set aside the order denying Baltazary costs in the trial court and order that Baltazary is entitled to costs for prosecuting his case before the trial court;
- 3) Baltazary is entitle to costs in Civ. Appeal No. 28/2021.
- 4) No order as costs in Civil Appeal No. 26/2020 because the two appeals were consolidated.

It is ordered accordingly.



**J. R. Kahyoza, J.**

**23/3/2021**



**Court:** Judgment delivered in the absence of the parties. Parties shall be notified to collect a copy of the judgment or the same shall be sent to the address provided not later than seven days from the date of the judgment. B/C Catherine present.



A handwritten signature in black ink, appearing to read "J. R. Kahyoza". The signature is written in a cursive style with a long horizontal stroke extending to the left.

**J. R. Kahyoza**

**JUDGE**

**23/3/2021**