**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 93 OF 2019**

(From Civil Case No. 197 of 2014 before the Court of the Resident Magistrates for Dar es Salaam at Kisutu)

**KALIST M. JOSEPH .....APPELLANT**

**VERSUS**

**ILALA MUNICIPAL COUNCIL.....RESPONDENT**

**JUDGMENT**

Last Order: 23/3/2021
Judgment: 20/4/2021

**MASABO, J**

The Appellant sued the defendant before the Court of the Resident Magistrate of Dar es Salaam at Kisutu for compensation in respect of his house and assets allegedly damaged owing to explosions of military ammunitions which occurred on 16th February, 2011 at Gongolamoto Military barracks in Dar es Salaam. His claims were found unmerited and dismissed. Being disgruntled, he has filed this appeal armed with the following two grounds of appeal:

1. That the trial court erred in law and fact by entering judgment against the appellant

without considering the evidence rendered by of the Appellant;

2. That the trial court erred in law and fact to award the Appellant compensation while was in the list of the victims of the explosions which destruct his house;

The appeal proceeded in writing. Both parties had representation. Mr. Hamza Matongo learned counsel appeared for the appellant whereas the respondent enjoyed the service of Counsel Mtagwaba.

Submitting on the 1st ground of appeal counsel Matongo argued that the appellant discharged his duty under section 110(1) & (2) of the Evidence Act, Cap 6 RE 2019 to the required standard as he ably proved that the appellant's house was damaged by the explosion. Further, he proved that he owned a house at Pugu Kinyamwezi and that the house was in good condition until on 16th February 2011 when developed cracks as a result of the explosions. He argued that, apart from the plaintiff's oral testimony in court he proved that he wrote a letter to the District Executive Director for Ilala Municipal and produced photographs showing how his house was destructed. Therefore, there was no justification for the trial court to deny him compensation. He

argued further that, contrary to the law, the court erroneously relied upon the evidence of PW2 as justification for denying him compensation.

In regard to the 2nd ground, counsel Matongo submitted that the Appellant name was included was in the list of persons eligible for compensation and that, in support of the claim he submitted evidence of a letter he wrote to the Prime Minister's Office and another letter was from the respondent which sufficiently demonstrated that he was entitled to compensation but, the trial court magistrate erroneously relied upon a letter sent to him by the respondent explaining that the damage and cracks in the wall were not caused by the explosion. He argued that since the investigation report was not appended to the letter it was wrong to place reliance upon it.

In fortification of his argument, Mr. Matongo cited the case of **Bakari Mhando Swanga vs Mzee Mohamedi Bakari Shelukindo**, Civil Appeal No. 389 of 2019 (unreported) which underlined the principle of burden of proof as articulated under section 110 of the Evidence Act. Conclusively, he submitted that the appellant proved his case on the balance of probability that he was a victim of the bomb explosions by tendering exhibit

which were admitted by the trial court but it erroneously denied him compensation.

Ardently, counsel Mutagwaba resisted the submission in chief and proceeded to reply that the trial court considered the evidence adduced by the Appellant and correctly decided the suit based on the proposed issues which needed proof. It was argued further that, the suit attracted a dismissal because the evidence rendered by the appellant in trial was contradictory. As for the documentary evidence, it was submitted that the trial court could not accord more weight to a document whose author disputed knowledge of the content as he told the court that he was illiterate and was made to sign without reading the content of the letter.

Joining hands with the appellant's counsel on the law pertaining to burden of proof and standard of proof, Mr. Mtagwaba argued that, the trite principle as underlined under Section 110 of the Evidence Act, Cap 6 RE 2019 and in the case of **Barelia Kirangirangi vs Asteria Nyalwamba**, Civil Case No. 237 of 2017, CAT at Mwanza (unreported) is that he who alleges must prove. But, in the instant case the available evidence did not sufficiently prove the alleged facts. Thus, there is nothing to fault the trial court.

Submitting on the second ground of Appeal, Mr. Mtagwaba argued that the Appellant's evidence was poor to the extent that the court could not establish the Appellant's right to compensation.

In the rejoinder Mr. Matongo still maintained that the trial court erred in law and fact as the evidence he rendered sufficed the required standard of proof. He also maintained that the exculpating testimony by PW2 that he did not understand the content of the introduction letter and he never paid a visit to the appellant's house was an insufficient ground for dismissal as it not vitiate the fact that the Appellant's house was damaged by the explosion. It was argued further that, PW2's evidence cannot be termed as a hearsay evidence. Moreover, he submitted that the appellant was duly informed of results of the investigation conducted to ascertain the houses damaged by explosion whereby it was ably established that the cracks in his house were not occasioned by the explosion. Therefore, there is no point in insisting that he deserved a compensation.

Having considered the submissions from both parties and lower courts record which I have thoroughly read, I will now proceed to the two grounds of appeal. Before I delve further on these

two points, in preface and for better appreciation of the facts pertaining to this case, I will narrate briefly the background of the appeal as discernible from the record.

In his plaint, the appellant claimed that his house sustained serious damages as a result of explosion of military ammunitions but, for unknown reasons, he was excluded from the list of persons deserving compensation although the ten-cell leader had confirmed through a letter dated 19/3/2011 that his house was among the houses affected by the explosion. Later, having made a follow up with the concerned authorities, he was formally notified that he deserved no compensation as the investigation carried out established that the cracks in his house were not caused by the explosion.

During the hearing which proceeded ex parte the defendant, the plaintiff had two witnesses, himself as PW1 and the 10 Cell leader as PW2. He also produced documentary evidence comprising of two photographs, a letter dated from Ilala Municipal Counsel, a letter dated 18/12/2013 addressed to the Prime Minister, and hand written letter from a ten-cell leader for Kibong'wa Kinyamwezi introducing the plaintiff to the local government offices for Kinyerezi street.

As stated by both parties, it is a trite principle of law in our jurisdiction the burden of proof lies on the person who alleges insistence of a certain fact. The principle is embodied in section 110 and 111 of the Evidence Act, Cap R.E 2019 and in numerous authorities from the Court of Appeal and this court. Needless to cite any of these authorities. Suffice it to just state that, the authorities cited by both parties above are also part of the plethora of authorities on this principle.

The burden of proof, does not shift even in cases of *ex parte* proof, as in the present case (see **Mustapha Raphael vs East African Gold Mines** Ltd Civil Appeal No. 40/98 – CAT at Dar es Salaam). The rationale as emphatically articulated in **Mohamed Juma vs Halima Athumani** Civil Appeal No. 306/04 HC at Dar (Kalegeya J), is to assist the court to make a well-informed decision based on facts established by evidence and avert the risk of rendering a decision based on pleadings which are excessively exaggerated as result of ill– feelings; wrong and schemed advice, sheer ignorance or vendetta.

It was therefore upon the plaintiff to discharge his burden by proving his case to the required standard of proof which is proof on the balance/preponderance of probabilities which simply means that the court will accept evidence which is more credible

and probable (see **Wolfgango Dourado v. Toto Da Costa**, Civil Appeal No. 102 of 2002 CAT (unreported). As I embark on the two grounds of appeals, the main question to be answered is whether the plaintiff discharged his burden of proof to the required standard. In answering these questions, I will simultaneously deal with both grounds.

Regarding the first ground of appeal, I have observed that as correctly held by the trial court, the appellant did not establish on the preponderance of probabilities that his house was affected by the explosions. His oral testimony, did not show the extent of destruction and the two photos rendered did not sufficiently demonstrate the nature of the destruction if any. As correctly observed by the trial court, the photographs did not show how the house was before and after the explosions a fact which would have formed basis for the appellant's desired verdict.

Besides, as correctly held by the trial court, the letter signed by PW2 and his testimony as regards the destruction of the appellant's house was merely hearsay because while testifying under oath in court, he stated that he never visited the house and that the content of the letter is not known to him as he was merely made to sign it without reading its contests.

In his submission Mr. Matongo has invited me to ignore the evidence of the PW2 and the content of the letter authored by the ten-cell leader which was personally produced be the appellant in court as evidence in support of his claim. With respect, I outrightly reject the invitation as it sounds rather eccentric and misplaced. Whereas the fact that PW2 signed the letter without knowledge of its contents may be questionable and while I am aware that a party who calls a witness may with leave of court be permitted to cross examine the witness who has turned hostile as per section 163 of the Evidence Act, Cap 6 RE 2019, in my scrutiny of the record, I did not come across the leave or questions posed to discredit PW2. His testimony remained uncontroverted. Thus, there is no justification upon which this court can interfere with the findings of the trial court as regards the testimony of this witness.

Regarding the letter written by the ten-cell leader, a party who produces a document which discredits his case does so at his peril as he cannot undo it. Once the document has been admitted, he cannot dictate to the court the amount of weight to be accorded to such document as the assessment and weighing of evidence rests exclusively in the court. The invitation to ignore the letter is therefore misplaced as having been

admitted as evidence, it became part of the court records. In any case, even if it was established that PW2 was the author and had knowledge of the content of the letter, the letter would have added no value to the appellant's case as its contents vividly confirm that the author never visited the house but relied upon the information obtained from the appellant, hence it is merely a piece of hearsay.

The two letters to which Mr. Magongo has placed reliance, that is, the letter authored by the appellant on 18th December 2012 and addressed to the Prime Minister and the letter from the defendant, are similarly of no value to this case as none of them provides sufficient material as to the alleged destruction.

The appellant's prayer in the plaint was for compensation at a tune of Tshs 80,000,000/= but he rendered no evidence to show how he arrived at this figure. Needless to say, it is trite law that specific damages must be specifically proved (See **Zuberi Augustino vs Anicet Mugabe** [1992] TLR 137). In the absence of sufficient proof as to the destruction occasioned, the extent of the destruction and the total loss occasioned, it is illogical how the trial could have credibly awarded compensation.

In the upshot, the appellant terribly failed to prove his case to the required standard. Thus, there is nothing to fault the well-reasoned judgment pronounced by the trial court. The appeal is dismissed with costs.

Dated at Dar es Salaam this 20th day of April 2021.

**J.L. MASABO**

**JUDGE**