IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 14 OF 2020

(Arising from Civil Case No. 09/2018 of the Resident Magistrate Court of Kigoma before Hon. K. V. Mwakitalu)

NATIONAL MICROFINANCE BANK PLC.....APPELLANT

VERSUS

PAMELA D/O THOMAS CHILLERY.....RESPONDENT

JUDGMENT

27th April, & 01/06/2021

A. MATUMA, J

The respondent herein Pamela Thomas Chillery sued the Appellant herein National Microfinance Bank PLC in the Resident Magistrates Court of Kigoma at Kigoma for payment of **Tshs 55,000,000/=** being general damages for rental loss, disturbance and reputation injury.

The brief background to the matter is that, the respondent is a lawful owner of a house situated on **Plot No. 397 MD Lubengera** within Kigoma District. Sometime on February, 2017, it was alleged that the appellant in an attempt to recover the loan advanced to one Joseph Chacha Nyamhanga appointed L.J. International Ltd, Court Broker to

auction the house of one Nangasha D. Sued situated at Bangwe area who stood as the guarantor to the defaulted loan.

L.J. International Ltd prepared the Auction Notice and fixed it on the house of the respondent. The notice in its own words reads;

> *'TANGAZO TANGAZO L.J. INTERNATIONAL LTD KWA IDHINI TULIYOPEWA NA BENKI YA NMB TAWI LA KIGOMA, TUTAUZA KWA MNADA WA ADHARA NYUMBA YA NDUGU NANGASHA D. SUED ALIYEMDHAMINI JOSEPH CHACHA NYAMHANGA. NYUMBA IPO ENEO LA BANGWE SIKU YA JUMAMOSI TAREHE 06.05.2017 KUANZIA SAA 5.30 ASUBUHI.*
>
> *WANANCHI WOTE MNAKARIBISHWA KUKAGUA NYUMBA NA MIPAKA YAKE KWA MAWASILIANO ZAIDI PIGA SIMU; DALALI 0763452525/0784988615. MENEJA NMB-0684215627'*

The respondent became aggrieved with the notice to have been posted on her house. She alleged that as a result of such notice the tenant in the house who was paying Tshs. 250,000/= rental amount monthly vacated from the house as a result of such notice, her reputation was lowered as the general public thought she was a loan defaulter while she has taken no loan from the appellant, she could not get other tenants in the house as they feared that it was about to be sold, and

even when they got a tenant PW2, he was not ready to pay Tshs 250,000/= per moth but Tshs 100,000/= as he was not sure to last for long in the house in the event the house is auctioned, and also suffered disturbances. With all these she claimed to be paid Tshs 55,000,000/= as general damages as herein above stated. The trial court at the end of the trial was satisfied that the suit was satisfactorily proved. The respondent was thus awarded the claimed amount Tshs. 55,000,000/=.

The appellant became aggrieved with the judgment and decree hence this appeal with a total of five grounds of appeal which were condensed into only the following complaints;

i. *That the suit at the trial court was wrongly entertained under the special Power of Attorney.*

ii. *That there was no evidence to prove that it was the appellant who affixed the Auction Notice to the respondent's house.*

iii. *That the plaintiff's case did not have evidence establishing the claimed damages, taking into consideration that the respondent herself did not enter appearance to testify for the alleged suffered damages.*

At the hearing of this appeal Mr. Pastory Biengo learned advocate represented the appellant while Mr. Eliuta Kivyiro learned advocate represented the respondent.

The learned advocate for the appellant in arguing the first complaint herein submitted that the suit at the trial court was between the parties herein and was neither instituted under power of attorney. Surprisingly one Upendo David Lugano is the one who prosecuted the suit under exhibit P2 the Special Power of Attorney which was filed in court on 2/09/2020 while the suit itself was instituted way back in November, 2018. The learned advocate further argued that even though, the said Special Power of Attorney did not empower the Donee to institute or Defend a suit.

Responding to this ground, Mr. Kivyiro learned advocate submitted that under clause 3 of the document exhibit P2, Upendo David Lugano was empowered to manage the house in question by negotiating all matters pertaining to the property and thus Upendo David Lugano had powers to prosecute this matter. He however stated that the plaint was endorsed by the respondent herself.

On my party, I am resolving the first complaint as follows;

Under order 3 rule 2(a) of the Civil Procedure Code, Cap. 33 R.E. 2002 and or even R.E. 2019, a person holding powers of attorney authorizing him to make appearance, or make applications, or do any such acts on behalf of the donor is known as a recognized agent capable of suing or defending the suit provided that such powers are expressly provided for in the document. In the instant matter PW2 had specific power of Attorney dully executed to her by the respondent on the 14th August, 2014 at Dar es Salaam. Only three categories of powers were conferred upon her;

1. *To make lease agreements concerning the property with any third party.*

2. *To settle and make payments of any debt, taxes, obligations and liabilities that might accrue in respect of the property.*

3. *To negotiate all matters pertaining to the property during the absence of the donor in Kigoma.*

This Power of Attorney as I have said it was issued on 14th August, 2014 three years prior to the accrual of the cause of action in this case. In the circumstances, it is clear that the three conferred powers did not include power to institute or defend the suit in respect of the property nor by the time the deed was executed the current cause of action was

foreseen or predicted. Even if it would have to be taken that such power existed in the document under clause 3 as Mr. Kivyiro learned advocate purported to be of which is not, it has well been settled that when the Principal of a Power of Attorney choose to act himself on the matter he had previously donated powers to someone/attorney to do, then the attorney ceases locus on the matter. This was the holding in the case of ***Parin A.A. Jaffer and Another versus Abdulrasul Ahmed Jaffer and two others***, *[1996] TLR 110* that;

> *'It is imperative under Order 3 Rule 2 (a) that all applications, acts and appearances be made or done by the attorney on behalf of and in the name of the Principal.* ***By the same token where the Principal himself makes or does an applications, appearance or act, his attorney has no locus standi'.***

In the instant matter, it is alleged that the respondent who had life in the United Kingdom donated her powers to PW2 to make management of the property in question as herein above reflected. That was on August, 2014.

But according to the Plaint as rightly observed by Mr. Pastory Biengo learned advocate, and according to the submission of Mr. Eliuta Kivyiro learned advocate for the Respondent, it was the respondent herself who

entered the office of the learned advocate, instructed him to prepare the Plaint and endorsed the same by herself in 2018 in the presence of her advocate. In simple words, it was the Respondent herself who instituted the suit under her personal capacity. That being the case, even if the Power of attorney would have successfully argued to have included powers to sue or defend the suit, then such power in respect of this suit ceased the day when the respondent decided to act by herself. Her attorney PW1 had thus no locus standi in the instant matter. Even though, the suit by the respondent at the trial court was competent provided that she personally instituted the suit and had her appearance by advocate which is in conformity to order III Rule 1 of the CPC supra which recognizes appearance of a party to the suit by himself, or through his recognized agent, or by advocate dully appointed to act in his behalf.

The evidence of Upendo David Rugano shall therefore be scrutinized as a witness of the respondent and not as attorney of the respondent.

To that end the first set of complaint is allowed to the extent that the power of attorney was wrongly used in the instant matter and PW1 had no locus as an attorney of the respondent.

The second ground of complaint by the appellant is that there was no evidence to establish that it was the appellant who affixed the Auction Notice to the respondent's house.

Responding on this ground, Mr. Kivyiro argued that the notice itself is self-explanatory that it was made under the authority of the appellant and that the appellant through DW1 confessed to have known L.J. International as their court broker. Further that, through exhibit P4 the appellant made an apology to what has befallen the respondent.

It is undisputed fact that the appellant had authorized L.J. International Ltd to conduct an auction and ultimately sell the house of one Nangasha D. sued situated at Bangwe area as herein above reflected in exhibit P2. L.J. International expressed clearly as such as per the notice itself. There is no evidence either that the appellant had directed L.J. International Ltd to advertise for sale of the house of the respondent in question, or that after she had prepared the Notice, to affix it to the house of the respondent. The respondent was thus duty bound to join the said L.J. International Ltd as a necessary party as it is him alone who could explain who directed him to affix the notices on the house of the respondent at Lubengera area instead of that of Nangasha D. Sued at Bangwe. And if it is real it was her who affixed the notice as such.

None of the respondent's two witnesses testified to have physical seen any person and dully identified him or her as an officer of L.J. International Ltd affixing the notices as such. The story starts with averments that the notices were found affixed to the property in question;

> *'When I arrived, I found many people surrounding our house and there were auction notices affixed at our house'.*

L.J. International Ltd was thus a necessary party to account for the alleged notices at the house of the respondent. Failure of the respondent to have joined L.J. International Calls for an adverses inference that had her joined her, she would have a successful defence against either the notices themselves or against the act of affixation to the alleged house.

I am aware that PW1 Upendo David Rugano had testified that she was phoned by their tenant one Ndenge Amiri Mabuyu who informed her that at the house he had seen the manager of NMB Bank and the broker showing each other the house and the boundary of the plot. The said tenant was not however called as a witness and thus the evidence of PW1 remained nothing but hearsays which is contrary to the principle of the law under section 62 (2) (a) of the Evidence Act supra that oral

direct evidence must always be the evidence of a person who says; he saw it. Hearsay evidence cannot be acted upon as it was held in the case of ***Augustino Lyatonga Mrema and others v. Attorney General and Others*** *[1996] TLR 273.*

I therefore allow the second ground of complaint as well and rule out that there was no sufficient evidence nor any evidence to prove that it was the appellant who affixed the notices to the respondent's house nor that she directed the said L.J. to affix the notices to that house as such. There was no even a photo evidence of the house showing the manner in which the notices were posted on it and whether exhibit P2 was one of those notices. There was neither an explanation on how PW1 obtained exhibit P2. Was it by removing it from the wall of the house, or by photographing and printing it, or collected it somewhere else? If it was by removing it from the wall, then exhibit P2 has no any sign at its back that it was affixed anywhere. If PW1 collected it anywhere else then there was no evidence that the same was at any time affixed on the house in question.

The third and last complaint is that the awarded damages were not sufficiently established. This ground should not detain me much. This is because in the absence of L.J. international Ltd, either as a party to

the suit or as a witness who is the actual suspect for the preparation and affixation of the notices, the cause of action was wrongly determined against the appellant. That would suffice to end up the matter without necessarily dwelling into the third and last ground.

Even though, I have decided to determine it as if everything was equal and the alleged cause of action was propery brought and determined against the appellant.

Mr. Pastory Biengo learned advocate on this submitted that in the circumstances that the respondent did not personally enter appearance to testify on the damages, the same was not proved. He argued that the evidence of PW1 and PW2 did not prove the amount of rental loss, disturbance and reputation. That there was no positive evidence that indeed at the alleged time the house had a tenant and that the rental amount paid per month prior to the notices was Tshs 250,000/=, and that such alleged tenant vacated from the house due to the affixation of the notices thereat. The learned advocate cited to me the case of ***Salma Mohamed Abdallah v. Joyce Hume,*** *Civil Appeal No. 149 of 2015* to the effect that the plaintiff is awarded damages only when there is proof of the same and also justified them. He also cited the case of ***Masolele General Agencies v. African Inland Church of Tanzania***

[1994] TLR 192 to the effect that once a claim for a specific item is made, that claim must be strictly proved. The learned advocate faulted the trial magistrate who held that the appellant was negligent and careless while there was no evidence to authenticate that it was the appellant who acted negligently and carelessly. To that effect he cited the case of ***Bamprass Star Service Station Limited versus Mrs. Fatuma Mwale*** *[2000] TLR 390.*

Mr. Kivyiro learned advocate for the respondent on his party responded that the respondent claimed general damages and not specific damages and thus the cited cases are all distinguishable. About none appearance of the respondent herself to establish the alleged damages, the learned advocate maintained that so long as PW1 represented the respondent under power of Attorney, she sufficed to establish the general damages in that behalf.

It is my firm finding that on this ground, it is Mr. Pastory Biengo learned advocate for the appellant who is absolutely right.

Once the claims included rental loss the same ought to have been strictly proved as specific damages because rental loss can not be said to be general damages. On the general damages, since the plaint was

not drawn and filed under power of attorney, the same could not have been proved by PW1 under power of attorney as well.

Even though claims in a Civil suit cannot be proved by power of attorney as the rule of evidence under sections 110, (1) (2), 111, and 115 of the Evidence Act supra requires he who alleges owe a duty to prove that the alleged facts exists, and when the alleged facts are within the knowledge of a person who alleges, then him alone can prove the said allegations.

In the instant matter, it was neither PW1 nor PW2 who alleged the damages suffered but the respondent herself under her personal endorsement of the plaint. Therefore, her alone could prove her reputation and how the same was lowered.

Even though I have asked myself how and to what extent the respondent suffered of the alleged damages because, if at all her house was affixed the stated Notice, the notice was self-explanatory that the house to be sold **was that of Nangasha D. Sued** at **Bangwe area** and not that of the respondent **at Lubengela area.** The two areas at different locations, Lubengera is along Ujiji road in the south while Bangwe is along Bangwe road in the West. Therefore, even people who read the notice on the house of the respondent were well informed that

it isn't that house at Lubengera which was to be sold but another one at Bangwe. And that it was not that of the respondent Pamela Thomas Chillery but that of Nangasha D. Sued. In the circumstances, the tenant if at all was in that house had no any reasonable ground to vacate on the purported notice. The same applies to PW2 who purported to have decided to rent the house at Tshs. 100,000/= per months instead of Tshs. 250,000/= which was previously paid by predecessor tenants. First of all he was not involved to ascertain such previous rental amount as rightly argued by Mr. Pastory Biengo learned advocate. But also, the notice did not show that such house was in danger of being sold. In any case, the notice had phone numbers for any queries. No evidence that such numbers were called to clarify the alleged notice at the house against its contents.

I thus allow the last ground of complaint as well. In that respect the appeal succeeds as a whole and the same is hereby allowed. The judgment of the trial court is hereby quashed and the decree thereof set aside. This appeal is therefore allowed with costs. Right of further appeal to the court of Appeal is explained.

Before I pen off, let me draw the attention of trial subordinate courts to be carefully in proof reading the records before the same are forwarded to the appellate court.

In the instant matter, the suit was instituted in the Resident Magistrate's Court of Kigoma at Kigoma and it was tried by a Resident Magistrate. But the Proceedings, Judgment and Decree are titled '***in the District Court of Kigoma at Kigoma'***. That could have been argued to the effect that; despite the suit having been instituted in the Resident magistrates' court it was tried in the District Court. If that would have been raised, the matter would have perhaps taken a different route. Even though none of the parties had a concern on it nor I heard them on it. I take it that it was a mere typing error due to the fact that both the Resident Magistrate's Court and the District Court of Kigoma are under the same roof, sharing the same Registry and Secretaries. That has been occasional errors for failure to proof read properly the records. I once encountered the same problem in the case of ***Ujiji Secondary School versus Norbert Nshemetse, (DC) Civil Appeal No. 37 of 2018,*** High Court at Tabora. I therefore appeal to the trial subordinate Courts and particularly those which shares typing secretaries and typing tools to be extra-care in proof reading the documents. Copy and Paste

of some contents such as Titles or headings should be avoided as much as possible. My observation on this issue of the proper registry to be properly reflected on the proceedings, Judgment and Decree has no whatever prejudice to either party in this matter as it has not been the basis of my decision. Nor should it be taken as an advantage by either party for a further appeal as none raised it for thorough scrutiny and determination.

It is so ordered.

A. Matuma

Judge

01/06/2021

Court; Judgment delivered in Chambers this 1st day of June, 2021 in the presence of Mr. Eliuta Kivyiro learned Advocate for the Respondent who also hold brief of Mr. Pastory Biyengo learned advocate for the Appellant.

Sgd. A. Matuma

Judge

01/06/2021