IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 16 OF 2019

(Originating from Arusha RM's Court, Civil Case No. 10 of 2017)

OTTO MARK MOSHA..... APPELLANT

VERSUS

ABEL MUSA OJUNG'A .....RESPONDENT

JUDGMENT

27/4/2021 & 09/07/2021

MZUNA, J.:

The appellant, Otto Mark Mosha was sued at the Resident Magistrates' Court of Arusha in Civil case No. 10 of 2017 for breach of settlement deed entered on 15th day of October 2015. Following that breach the respondent claimed among other things the payment of Tshs. Sixty Million Five Hundred Thousand (60,500,000/=) being the principle amount due and payable under their deed of settlement. After a full trial, the court passed judgment in favour of the respondent and granted the reliefs sought by the respondent.

Aggrieved, the Appellant filed this appeal against Judgment and Decree of the trial court on the following four grounds of appeal as follows:

1. *That the trial Resident Magistrate's Court erred in law and in fact when it failed to properly evaluate the evidence tendered before it and based its decision solely on the evidence tendered by the plaintiff and failed to consider the evidence of the defendant.*

2. *That the trial Resident Magistrate's Court erred in law and in fact when it failed to put into consideration the fact that the appellant herein bought a running Hotel which included all the furniture therein and that the settlement agreement was entered after the Respondent herein removed all the furniture from the said Hotel thus rendering the hotel to stop functioning.*
3. *That the trial Resident Magistrates' Court erred in law and in fact when awarded the Respondent herein 20,000,000/= as specific damages which were never proved and also awarded the Respondent Tshs.5,000,000/= as general damages which are not awarded for breach of contract if at all there was any breach of contract.*
4. *That the trial Magistrates' Court erred in law and in fact when it held that the threat to the Appellant to sue him in the event, he fails to sign the settlement agreement followed by the Respondent's removal of all the furniture thus rendering the hotel business to stop did not amount to duress.*

When the matter came up for hearing on 17.2.2021 the Appellant was represented by Mr. Severin Lawena, learned counsel whereas the Respondent was represented by Mr. Ombeni Kimaro, learned counsel.

From the above-mentioned grounds of appeal there are four issues which emanates therefrom. The first issue is <u>whether the trial court properly evaluated the evidence before it?</u>

With regard to the 1st issue, Mr. Lawena submitted that, the trial magistrate failed to evaluate the evidence tendered by the plaintiff and failed to consider the evidence of the defendant, thus arrived at the wrong decision.

It was his submission that, the appellant tendered evidence to prove that he bought a running hotel from CBA Bank with all the furniture within it, but the trial magistrate did not consider such evidence. He added that the trial magistrate failed to direct his mind into a crucial question of whether there was valid contract between the parties by looking into the ingredients of the contracts. He submitted further, the CBA proceed to auction the mortgage property before all the procedures were followed, as per section 127 (1) and (2), 132 (1) and 133 (1) and (2) of the Land Act, Cap 113 R.E 2019.

Further, the respondent could have taken action against the Bank (CBA) not the appellant herein. That, in the light of the above the contract entered between the appellant and the respondent was illegal. He cited few cases to cement his ground. On evaluation of evidence, one of them was the case of **Leonard Mwanashoka vs Republic**, Criminal Appeal No. 226 of 2014(Unreported) cited in the case of **Yasin S/O Mwakapala vs The Republic**, Criminal Appeal No. 13 of 2012 where the court held that:-

> *"It is one thing to summarize the evidence of both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

On the other hand, the respondent's counsel contended that, the trial Magistrate did consider the evidence adduced by both parties. With regard to

the issue of deed of settlement, both parties signed it without any threat as alleged by the applicant's counsel. PW1 told the court that, on the material date when the respondent went to take some of the equipment which were not part of the loan they met with the applicant and agreed to settle the matter (See Exhibit P1). That was evidenced by the act of the appellant to pay some of the agreed amount (See Exhibit P2 and P3). All legal requirements as required under the law of contract were met.

He added that, there was no need for the appellant's counsel to discuss the right to sale a mortgaged property by the Bank. The dispute was between the agreement entered between the applicant and the respondent in respect of the furniture of the hotel which was not part of the mortgaged property. At page 22 of the typed proceedings, the appellant (DW1 by then) stated that;

> *"The furniture were returned after signing the contract and up to the moment I have paid Tshs 64,500,000/="*

Even DW2 when he was cross examined, he admitted the furniture were not part of the mortgage and the initial valuation did not include the hotel furniture. Having established that furniture was not part of the security placed to the CBA then the contract between the Appellant and the Respondent is valid. He cited the case of **Abdalla Yussuf Omar vs. People's Bank of Zanzibar and Another** [2004] TLR 399, where the Court of Appeal of Tanzania held that;

"By failing to repay any of the instalments due until May 2002, when he was served with a demand notice the appellant was in breach of the loan repayment terms and the bank was entitled to exercise its power of sale of the mortgaged property."

Basing on the said decision, failure to pay any instalment as agreed is a breach of contract and the court was right to hold that there was a breach of contract between the parties. Even the contract was not signed under duress as the appellant was aware that furniture was not part of the mortgaged property that's why he submitted himself to the signing of the said deed and paid half of the agreed amount.

He added that, the trial court did consider the evidence adduced by both parties. Page 3 of the typed Judgment shows the way the defendant's evidence was followed, he quoted;

"However, the above was challenged by the defendant after alleging that he signed that deed of settlement under duress that he entered into that contract after having been threatened that there will be a case against him."

It is enough to say that, the judgment of the trial court was well composed and the allegation raised by the appellant with due respect is of no use since the evidence of both parties were considered. That is why the court was convinced that the evidence of the plaintiff proved the case on the balance of probabilities. Hence, there was no need for the appellate court to interfere

with that finding (See **Deemay Daati & 2 Others vs The Republic**, Criminal Appeal No. 80 of 1994, CAT (Unreported)).

I am aware of the fact that failure to consider the defence evidence in many occasions has been found to render the proceedings to be fatal. The court of appeal in **Hussein Iddi and Another Vs Republic** [1986] TLR 166, 169 observed and held that:

> *"It seems clear to us that the judge dealt with the prosecution evidence on its own and arrived at the conclusion that it was true and credible and as a result he rejected the alibi put forward as a deliberate lie. In our view this is a serious misdirection. The judge should have dealt with the prosecution and defence evidence and after analysing such evidence, the judge should then reach a conclusion. Here Accused 1 was deprived of having his defence properly considered by the judge. In the circumstances we think it unsafe to let the conviction of Accused 1 stand."*

It is trite law that every judgment must be written and must contain the points for determination, the decision thereon and the reasons for the decision having taken into consideration the evidence of both parties. It doesn't matter whether defence evidence was weak or not but such defence must be considered in the judgment (See the case of **Lonard Mwanashoka** (supra)).

My perusal from the records reveals that the trial court considered evidence of both sides. The trial court Magistrate did consider the evidence of the plaintiff as well as that of the defendant and evaluate the evidence in its

entirely. For ease of reference, I wish to quote page 3 paragraph 2 of the typed trial court Judgement. It reads as follows;

> *"However, the fact above was challenged by the defendant after alleging that he signed that deed of settlement under duress that he entered into that contract after having been threated that there will be a case against him. The situation obliges this court to resort to the decision of* ***Hassan Ali Issa vs Jeras Produce*** *(1967) HCD 52 where the same circumstances was resolved (sic) since in this reported case the defendant had alleged that the cheque had been written under duress in that the plaintiff had threatened to sue if repair and storage charges where it was held that threat did not amount to duress."*

The above-mentioned paragraph evidenced that the trial court Magistrate considered the evidence of both parties in arriving into the decision. The allegation raised by the counsel for the appellant that the contract between the parties was illegal for the reason that the respondent was threatened to sign the deed of settlement was just an afterthought and baseless. The evidence revealed that the appellant signed the deed of settlement willingly, and he paid half of the actual amount agreed on the deed (See Exhibit P2 and P3). The appellant is barred to deny what he signed by the principle of estoppel. That is clearly provided at Paragraph 284 at page 162 **Halsburys' Laws of England,** 4th Edition, Vol. 9 that:-

> *"Now the rule is that a man is estopped by his signature thereon from denying his consent to be bound by the provisions contained in that deed or other agreement...."*

This complaint fails as it does not fall to the exception like the plea of *non es factum* rule, that he never knew what he signed. In our case both the mind of the appellant and his consent were both together.

The second issue is whether the relief awarded are justifiable by law?

The appellant's counsel submitted that the respondent never proved the relief sought at paragraph 9 of their plaint. That the damages awarded were not justifiable under the law. He argued that there is no connection between the general damages awarded and its implication in respect to the contract alleged to have been breached. He cited the case of **Adam Rashid Chora vs Knight Support (T) Limited**, HC Dar es Salaam Commercial Case No. 88 of 2013 (unreported) where Mwambegele J,(as he then was) stated at page 13-14 that:

> *"As for the general damages, the plaintiff has pleaded the same at para 8 of the plaint at the rate to be assessed by the court. This is quite the opposite as general damages are never quantified; they are paid at the discretion of the court and, on that score, it is the court which decides which amount to award. See* ***Tanzanian-China textile Co. Ltd vs. Our lady of the Usambara Sisters*** *[2006] TLR 70 and* ***Admirality Commissioner vs Susquesh -Hanna*** *[1926] AC 655. In the admiralty supra it was stated:*
>
> *If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question [in our jurisdiction the court]". As quoted by the Court of*

Appeal of Tanzania in Kibwana and Another vs Jumbe [1990-1994] 1 E.A 223."

On the other hand, the respondent never responded to this issue in his reply submission with regard to the issue of relief awarded.

Reading from the appeal ground on the awarded damages, the complaint is both on the specific damages as well as general damages. Let me start with the issue of specific damage.

At page 4 and 5 of the trial court judgment the Hon. Magistrate awarded the following reliefs:- (i)Tshs. 60,000,000/= as per deed of settlement; (ii) Tshs. 20,000,000/= being the specific damages and (iii) Tshs. 5,000,000/= as general damages. That would mean, the first awarded relief was for specific damages while the last two are for general damages.

Let me start with the specific damages. The position of the law is as it was held in the case of **Masolele General Agencies vs African Inland Church of Tanzania** [1994] TLR 192 that;

"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one..."

In the present case, the trial Magistrate awarded specific damages of Tshs, 60,000,000/= which arose from the actual agreed amount as per the deed of settlement. This amount was specifically pleaded and proved. The same is valid in law.

This takes me to the issue of general damages. Generally speaking, on the issue of general damages, there is no need to be specifically pleaded, they may be asked for by a mere statement of prayer or claim. This position was clearly echoed in the case of **Cooper Motor Corporation Ltd vs Moshi Arusha Occupational Health Services** [1990] TLR 96 at page 98 where the Court quoted with approval, **Halsbury's law of England** 3rd Edition Vol.11 at page 400 which reads;

> *"The fundamental principle by which the courts are guided in awarding damages is "restituio in intergrum". By this it is meant that the law will endeavour, so far as money can do it, to place the injured person in the same situation as if the contract had been performed....."*

I will disallow the amount of Tshs. 20,000,000/= awarded to the respondent as the same was not pleaded nor proved on the balance of probabilities. As for the general damages of Tshs. 5,000,000/=, it was not pleaded led alone claimed in evidence. For that reason, the appeal on claim for general damages succeeds, it was not proved on the balance of probabilities.

The third issue is whether the terms entered upon by the parties at the time of purchase was latter violated or abused?

There is an argument that the purchase included furniture.

As the appellant was physically fit and with sober mind when he signed the deed of settlement, he ought to have taken an action if he was not satisfied

with the said deed. Complaining it after paying half of the agreed amount was just an afterthought and does not hold water.

Lastly, what is the outcome of this appeal?

The appeal is partly allowed so far as it relates to the general damages. The appellant is ordered to pay Tshs. 60,000,000/= as actual amount which remained due as per the deed of settlement made on 15.10.2015. Each party to bear its own costs.

Ordered Accordingly.

M. G. MZUNA,
JUDGE.
09.07.2021.