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

CIVIL APPEAL NO.37 OF 2020

(Arising from the Decision of Kinondoni District Court in Civil Appeal No. 15 of 2020, Original matter, Madai No. 69 before Manzese Primary Court)

BIDCO OIL AND SOAP (RUCHIRI) .....APPELLANT
VERSUS
VEROZENT CATERING SERVICE.....RESPONDENT

JUDGMENT

Date of Last Order: 25/10/2021
Date Of Judgement: 26/11/2021

MASABO, J.:-

This is a second appeal. It drives its genesis in Civil Case No 69 of 2019 at Manzese/Sinza Primary Court where the Respondent, Verozent Catering Service, obtained a judgment against the appellant for payment of a total sum of Tshs 18,726,000/= being a debt owed to the appellant plus compensation for the loss incurred by the appellant as result for breach of contract. Disgruntled, the appellant appealed in Civil Appeal No.51 of 2020 before the District Court of Kinondoni which upheld the decision of the trial court. Aggrieved further he is now before this court for a second appeal.

The facts discernible from the records are that, the respondent had contracted to offer catering services to the appellant. It was covenanted that consideration for the services rendered to the appellant will be paid within a month and ten days. The appellant did not pay the consideration within the agreed time schedule and preferred to pay after 2 months and 10 days. The respondent persistently sought for renegotiation but the appellant declined on explanation that it was open for the respondent to terminate the agreement if she so wished as either of the parties had a right to bring the agreement to its end. The respondent terminated the contract and upon further negation with the appellant, it was agreed that the amount of due to the respondent would be paid on 31/12/2018 but this was not done. The respondent successfully instituted a civil case whereby the appellant was ordered to pay her a total of Tshs of 18,726,000/=.

In her appeal to the district court, the appellant complained that the trial court erred to grant the respondent a sum of Tshs18,726,000/= without justification; the court erred by failing to consider the evidence adduced on behalf of the appellant and that the findings of the trial court were not

supported by law. The first appellate court did not find any merit in the three grounds of appeal. It dismissed the appeal in its entirety.

In the present appeal, the appellant has advanced six grounds. **One,** the first appellant court erred in law and fact to withheld the decision of trial court; **two,** the grant of 11,048, 000/= had no justification; **three,** the first appellate court erred in uphold the decision of lower court which was not supported by any law; **four,** the first appellate court erred in law and fact to uphold the decision of the primary court that the respondent properly served the appellant with a notice of intention to terminate the contract; **five,** that the appellate court erred when it uphold the decision of trial court and granted the respondent damages of 18,726,000/= with no reasonable justification; and **six,** he court never considered the appellant written submission.

Hearing of the appeal proceeded in writing. The appellant enjoyed a service of Ms. Clara Madaraka, learned counsel and the respondent appeared represented by his managing director. Supporting the appeal, Ms. Mdaraka abandoned the 1, 2, 3rd and 6th and remained with the 4th and 5th grounds.

On the 5th ground she submitted that at page 6 of the judgment, the 1st Appellant court held the figure of 18,768 000/= granted by the trial court comprised of 7,68,000/= as outstanding balance, 10,000,000/= as general damages and Tshs 1,048,000/= as costs of advocate. She proceeded that, the general damages of Tshs 10,000,000/= had no legal justification. To authenticate her submission, she cited the case **Asharaf Akber Khan v Ravji Govind**, Civil Appeal No.5 of 2017(unreported) at page 27 where it was held that a court has to grant general damages based on evidence brought by the respondent to justify the amount claimed and since on this case, there was no evidence as to the amount of Tshs 10,000,000/= there was no justification for awarding this sum. In further fortification, she cited the case of **Matiku Bwana v Matiku Kwikubya &another** (1983) TLR 362.

Moreover, Ms. Madaraka argued that, the award of Tshs 1,048,000/= was wrong since the same could have been claimed through a bill of costs. She submitted that, if this amount was a specific damage it ought to have been specifically pleaded and proved as stated in the case of **Zuberi Augustino v Ancient Mugabe,** 1992 TLR 137. Therefore, as no evidence was

rendered, there was no justification for the same. Coming to 4th ground, she argued that the first appellant court did not consider whether the appellant was notified of the intention to terminate the contract. The contract between the parties requires the party intending to terminate it to issue a two months' notice to the other party. Thus, the failure to serve the notice constituted breach of the agreement.

In reply, the respondent submitted the two grounds argued by the appellant are devoid of merit. They are mere repetition of the grounds fronted before the first appellant court which correctly reevaluated the evidence and made a finding that they had no merit. It was submitted further that, the notice of intention to terminate the contract was properly served and the amount of Tsh 18,726,000/=awarded to the her was reasonably and fairly awarded as Tsh 7,678,000/= was the outstanding balance duly acknowledged by the appellant in the trial court. She exemplifies further that the appeal emanates from a binding contract where the respondent was to provide catering services to the appellant's workers. On 20/12/2018 the Appellant paid the respondent paid a partial consideration leaving an outstanding balance of Tsh 7,678,000/= unpaid. She argued further that, in the trial court, the

appellant's witness acknowledged the indebtedness. Also, they acknowledged to have received Further the demand notice served to them on 20/12/2018. Thus, the finding by the lower courts on this issue was well founded.

The respondent submitted further that, the award of Tsh 18,726,000/= was justified as it could be seen in page 7th to 8th of the trial court judgment. Thus, there is no reason to fault the first appellate court. She further lamented that the award of Tsh 10,000,000/= as general damages is well founded as the appellant has taken possession of the respondent's utensils/working instrument thus denying her the right to work. As for the cost for advocate, she argued that this was well acknowledged in evidence. Regarding the notice, it was argued that, the notice to terminate the agreement dated 15/10/2018 was served properly served upon the appellant. Therefore, as concurrently held by the lower courts, the complaint by the appellant as to the service of notice was baseless.

Rejoining, the appellant argued that, this court being the 2nd appellate court can interfere and reverse the decision of the lower courts it finds that the

lower courts erred in their findings. He cited the case of **Matika v Matiku Kwikubya & Another** (1983) TLR 132 and argued that there is room for this court to reverse the amount awarded to the respondent by the lower courts if it finds that the trial court acted on wrong principle such as not taking relevant facts into account or taking irrelevant facts into account. Regarding the notice the appellant reiterated that the two months' notice before termination of the agreement was not served upon the respondent.

Having summarized the submission, I am now set to consider and determine the appeal. Upon the four grounds of appeal being abandoned, there are now only two points for consideration and determination, namely *whether the lower courts were correct in holding that the notice of termination of contract was property served upon the appellant* and the second *is weather the award of Tshs 18,726,000/= was legally tenable*.

Before I venture into these points it must be noted from the outset that as held in **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012, CAT (unreported):

> ...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice.

Therefore, since the instant appeal is a second appeal, I will be guided by this principle in dealing with the two points above.

Starting with the notice, it is undisputed that clause 6 of the agreement between the parties provided for a two months' notice prior to termination of the contract. The lower courts concurrently found that the notice was correctly served upon the appellant. This being a pure point of fact, after considering the concurrent findings of the lower courts and especially the analysis and the several pertinent questions raised by the trial court in page 6 of its judgment, I decline the invitation to vary the lower courts concurrent findings

Regarding the award of the damages, the position of the law is fairly settled special damages must be pleaded and proved. (See **Zuberi Augustino v. Anicet Mugabe** (supra), **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001; and **Strabag International (GMBH) vs Adinani Sabuni**, Civil Appeal No.241 of 2018) CAT (unreported). The trial court would not award specific damages unless they are specifically pleaded and proved. To the contrary, general damages need not be proved. As held in **The Cooper Motors Corporation Ltd v. Moshi Arusha Occupational Health Services** [1990] TLR. 96:

> "General damages need not be specifically pleaded they may be asked for by a mere statement or prayer or claim."

Also, as correctly submitted by the parties herein, it is trite that, the award of general damages is within the discretionary powers of the trial court. The appellate court will not interrupt or vary the general damages awarded by trial court unless it is satisfied that the award was based on wrong principles or law or was too low or excessive. The principle is articulated in **Matika v Matiku Kwikubya &Another**(supra) where it was held that;

> An appellate court will normally not interfere with a trial court's assessment of damages unless it is shown that the trial court acted on wrong principles such as not taking relevant facts into account or taking irrelevant fact into account resulting in unjust decision"

Cementing this principle, the Court of Appeal in **The Reliance Insurance Co. T. Ltd & Others vs Festo Mgomapayo**, Civil Appeal No.23 of 2019, CAT at Dodoma (unreported) stated thus:

> It is trite law that, interference of the award of damages is only permissible if it will be seen that the magistrate or a judge assessed the said damages by using a wrong principle of the law. If it happens so, the appellate court should disturb the quantum of damages awarded by the trial court. In **Davies v. Powell** (1942) 1 All ER 657 which was approved by the **Privy Council in Nance v. British Columbia Electric Rail Co. Ltd** (1951) AC.601 at page 613 it was stated as follows:
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> > "Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case ...before the appellate court can properly

> intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage

In the present case, the respondent claimed Tshs 7,678,000/= as outstanding balance, Tshs 1, 048,000/= as costs for advocate and Tshs as general damages. The claim of Tshs 7,678,000/= was by its nature, special damages which as per the principles above required pecific proof. Looking at the record, I find no reason to fault the concurrent finding of the lower courts as it is crystal clear from the hand written proceedings of the trial court that, not only did PW1 testify that the appellant owed him this amount but the same was admitted by DW1 who told the court that the appellant owed the plaintiff an outstanding balance of the sum of Tshs 7,678,000/=.

Regarding the sum of Tshs 1, 048,000/= which was claimed to be costs for advocate, this court subscribes to the respondent's submission that, costs as

between advocate and client are claimed through Taxing Master who may award the costs upon examination and assessment of the actual costs incurred by the advocate (see Rules 10 of the Advocate (Remuneration and Taxation of Costs) Rules). From this provision, it can be fairly concluded that the cost incurred for hiring an advocate to prepare the demand notices ought to have been channeled to the Taxing Master which is the proper forum.

This court is aware of the fact that at the material time advocates had no audience before primary courts and that, this would have probably impended the respondent's ability to raise a bill of costs and to recover her cost under the ordinary taxation forum which could justify the presentation of the claim as special damages. Assuming that the approach taken by the respondent was correct, going by the principles above the plaintiff was duty bound to render proof of the actual costs incurred a duty which she miserably failed as no proof whatsoever was rendered as to actual amount paid to Mahay & Co. Advocates who apparently draw the demand notice on 19/12/2018 and the reminder thereto on 17/01/2021. I have observed that not only did the lower court found the approach to be correct but relied on the demand notice and the reminder thereto as sufficient proof of the legal costs incurred by

the respondent. This was a serious misdirection as being a special damages, it could not issue in the absence of specific proof of the actual costs incurred.

Lastly, with regard to the general damages of Tshs 10,000,000/=, the law is settled that there are no hard and fast rules in the determination of general damages as they cannot be approached with mathematical precision (**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). They are just approximated based on the averments made by the plaintiff. In this case, there were two uncontroverted averments the first being that, the appellant locked down the respondent's utensils/business chattels hence prevented her from doing business and consequently, she failed to repay the loan she had obtained from NMB Bank. These two were in my view sufficient materials for the trial court to assess the general damages payable and sufficiently justifies the award. As no materials has been rendered to show that the award was based on a wrong principle or that it was too low or overly excessive under the circumstances, I find no justification upon which to vary the concurrent finding of the lower courts on the award of Tshs 10,000,000/=.

In the upshot, the appeal partly succeeds to the extent that, the award of Tshs 1, 048,000/= being costs for advocates was unjustifiable and is consequently quashed and set aside. Other orders remain intact.

As the appeal has partly succeeds, I find it proper for the parties to share the costs. Order accordingly

Dated at **Dar es Salaam** this **26th** day of **November**, 2021.

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Signed by: J.L.MASABO

J.L. MASABO

JUDGE