IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

APPELLATE JURISDICTION

CONSOLIDATED CIVIL APPEALS NOs. 13 AND 15 OF 2021

(Originating from the decision of the Resident Magistrates' Court of Dar es Salaam at Kisutu, in Civil Case No. 19 of 2018, by Hon. Mtega-PRM dated 24th day of November, 2020)

FARID MOHAMED SHERALLY ..... APPELLANT

VERSUS

SULEIMAN M. SULEIMAN ..... 1ST RESPONDENT

JUNIOR CONSTRUCTION CO. LTD ..... 2ND RESPONDENT

JUDGMENT

13th March, & 6th June, 2022

ISMAIL, J;

At stake in these appeal proceedings is the decision of the Resident Magistrates' Court of Dar es Salaam at Kisutu (Mtega, PRM) in Civil Case No. 19 of 2018. In the trial proceedings, the appellant sued for several reliefs emanating from an oral agreement for hiring of a bulldozer and an excavator. The cost of hiring the said equipment was USD 15,000.00 per month and TZS. 800,000/- per day, respectively. The contention by the appellant in the trial proceedings is that the defendants' undertaking was reneged on,

thereby bringing out an outstanding sum of TZS. 65,600,000/- and TZS. 120,790,000/-. The latter sum allegedly constituted special damages amounting to 40% of the sum of USD 128,500.00. The contention is that payment due to the plaintiff was paid belatedly.

In the end, the trial court drew the conclusion that the loss arising out of non-payment of the consideration for the hire of a bulldozer had not been proved. The court eventually settled on the following reliefs in the appellant's favour:

(i) Immediate payment of the outstanding amount of TZS. 65,000,000/- for the bulldozer;

(ii) Payment of USD 4,417 for the excavator; and

(iii) Costs of the matter.

This decision irked the appellant and the respondents in equal measure. Both parties have preferred separate appeals which challenge the decision of the trial court on different grounds. Whereas the appellant preferred three grounds of appeal, the respondents preferred two grounds of appeal of their own.

In view of the fact that the grounds of appeal emanate from the same decision, a decision was made to consolidate the appeals into one. This means that disposal of these appeals will be part of one process. In view thereof, the erstwhile plaintiff and the appellant in Civil Appeal No. 13 of

2021 will, henceforth be known as the appellant, while the defendants in the trial proceedings and appellants in Civil Case No. 15 of 2021 will be the respondents.

The grounds of appeal as preferred by the parties are as paraphrased hereunder:

1. *That the trial magistrate erred in law and fact to grant leave to the respondents herein to file their written statement of defence basing on an application for leave that was filed out of the prescribed time;*

2. *That the trial magistrate erred in law fact to find that the appellant had failed to prove specific damages in relation to the engine breakdown of the bulldozer while the respondents herein had agreed to pay the same and actually paid for the breakdown of the engine after the lapse of 257 days;*

3. *That the trial magistrate erred in law and fact by relying on authorities that discussed general damages as opposed to specific damages damages reaching at a wrong conclusion all together;*

4. *That the trial magistrate erred in law and fact by failing to evaluate and consider testimonies adduced by witnesses during trial; and*
5. *The trial magistrate erred in law and fact by holding that the respondents are indebted to the appellants the sum of TZS. 65,000,000/- and USD 4,417 while there was evidence to prove that the same was duly paid to the appellant.*

Disposal of the appeal took the form of written submissions, preferred consistent with a schedule of filing drawn by the Court. The appellant, who began by abandoning the first ground of appeal, enjoyed the usual privilege of setting the ball rolling. With regards to 2nd ground, the appellant's gravamen is that the trial court erred in its conclusion that special damages had not been proved. He contended that this was erroneous because the respondents had even paid the cost of the breakdown of the engine albeit after the lapse of 257 days.

The appellant contended that Exhibit P1, which was tendered in support of the appellant's case was not disputed by the respondents, and that the same was proof of the agreement by the parties. In the appellant's view, the decision ought to have considered this fact as well. He argued that the contents of Exhibit P1 were clear and unambiguous, carrying out a breakdown of what the respondents were to pay the appellant. It was argued that the respondents produced no document to fortify their contention that they cleared all the claims. This, the appellant argued, was helped by the failure by the respondents to object to the contents of Exhibit P1 when tendered in court. It came as a surprise that the trial court's findings which were not born out of the pleadings and evidence adduced in court. The appellant argued that the moment the appellant proved that payment was

delayed for 257 days, the trial court was bound to find that specific damages had been proved. He urged the Court to re-evaluate evidence and come up with its own conclusion that damages are payable for the period the equipment remained idle.

Regarding 3rd ground of appeal, the appellant took a swipe at the court's wrong use of the decision in ***Tanzania Saruji Corporation v. African Marble Company Limited*** [2004] TLR 155. He contended that, in this case, specific damages were pleaded and proved. The appellant implored the Court to cast an eye on the final submissions made after completion of trial proceedings in which issues framed were sufficiently submitted on and were all answered in the affirmative. The appellant called upon the Court to hold that the he is entitled to the reliefs claimed in the plaint.

He urged the Court to allow the appeal.

The respondent's rebuttal submission was preferred by Mr. Juventus Katikiro, learned counsel for the respondent. He argued that the testimony adduced by the appellant and his witnesses, including PW1 and PW3, showed that damages that constituted the claim in the suit had been fully liquidated. Learned counsel contended that this testimony tallied with that of DW1 who testified that the sum was settled by the 2nd respondent

following the appellant's decision to institute criminal proceedings (Criminal Case No. 364 of 2018) which have since been withdrawn. The respondents took a serious exception to the trial court's decision to order payment of compensation in the appellant's favour. He urged the Court to be persuaded by the decision in ***Antipas Romani Tairo v. Sikudhan Jafari***, HC-Misc. Land Application No. 531 of 2020 (unreported) in which it was held that the express mention of one thing excludes all others. The respondents urged the Court to hold that the trial court erred when it held that they are indebted to the appellant while the same was admitted to have been paid.

Responding to ground one of the appellant's grounds, the respondents submitted that the trial court was right in rejecting to grant compensation for the period of 257 days during which the bulldozer was allegedly idle. Mr. Katikiro took the view that, pursuant to an agreement dated 28th January, 2018, the appellant was paid a sum for repair of the damaged engine. In the absence of time within which such payment was made, the respondent's counsel argued, it is difficult to ascertain when and for how long the bulldozer remained idle. The respondents took the view that the burden of proof set out under section 110 of the Evidence Act, Cap. 6 R.E. 2019 was not discharged by the appellant. They supported their view with a decision of the Court of Appeal of Tanzania in ***Ernest Sebastian Mbele v.***

Sebastian Sebastian Mbele & 2 Others, CAT-Civil Appeal No. 66 of 2019 (unreported). In the respondents' view, the appellant failed to prove that, on account of the faulty engine, the bulldozer remained idle for 257 days for which compensation was demanded.

He urged the Court to hold that the trial court was right in its decision and prayed that the grounds of appeal in Civil Appeal No. 13 of 2021 be dismissed while Civil Appeal No. 15 of 2021 should be allowed with costs.

In his rejoinder submission, learned counsel for the appellant argued that Exhibit P1, an agreement for payment of the sum of USD 15,000.00 was made in January, 2018 while actual payment was made in November, 2018. This, he said, brings about 257 days for which compensation is claimed. The appellant maintained that the trial magistrate's decision was erroneous since the appellant proved how the sum claimed accrued. He argued that the reason cited by the trial magistrate for refusing to award damages is different from what the respondents contend. He argued that the court's basis for rejection is the absence of the vehicle inspection report and not failure to prove that the machine was idle.

Regarding the respondents' grounds of appeal, the appellant took the view that evaluation would not be done where no evidence had been adduced. He argued that the testimony of DW1 that the respondents cling

on was of no value as he did not know how much was paid. He also argued that the DW1's testimony was also full of admission that the appellant took the machine when it had not yet been repaired. He argued that mere assertion by DW1 that the whole amount due was paid would not be the basis for contending that the appellant was fully paid.

He urged the Court to allow the appeal by the appellant and dismiss that of the respondents, with costs.

As stated earlier on, the appellant's complaint in ground two relates to the trial court's holding that proof of specific damages was not done by the appellant. In the appellant's view, payment of the sum to meet the cost of repair served as sufficient testimony to the claim for specific damages. As submitted by the appellant, the trial magistrate took the view that there was no evidence of breakdown of the equipment, and the sole reason for such contention is that there was no vehicle inspection report. In my humble view, this finding was faulty, considering the fact that the respondents admitted that the engine of the said equipment was damaged. This is found at page 37 of the proceedings at which DW1 was quotes as saying as follows:

> *"Yes Engine of Bulldozer the property of FARID (the plaintiff) has been damaged. …. The plaintiff has picked his machine his machine from the defendant by then the said engine of Bulldozer was not repaired."*

This proves that up until the appellant picked the Bulldozer from the respondents, and until the date the payment of the sum for repair was effected, repair of the equipment had not yet been done. It is incomprehensible that the trial magistrate considered this to be a contentious issue which would call for evidence of an inspector by way of an inspection report. In law, any fact stated by a claimant in any pleading, if admitted or not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant is taken or treated to be admitted (See: High Court of Calcutta's decision in ***Balraj Taneja & Another v. Sunil Madan & Another***, AIR 1999 SC 3381. It was erroneous for the trial court to demand a proof of an uncontested fact.

Coming to the proof of specific damages, my starting point is on an acknowledgment of the fact that the settled legal position is that special damages may only be ordered where the claimant is able to plead and prove them. This position has been a household norm that has been restated time and again.

In ***Masolele General Agencies v. African Inland Church of Tanzania*** [1994] TLR 192, it was held:

"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…."

See also: ***Kiteto District Council v. Tito Shumo & 49 Others***, CAT-Civil Appeal No. 58 of 2010; and ***Cooper Motor Corporation Ltd. v. Moshi Arusha Occupational Health Services*** [1990] TLR 96.

The appellant's contention is that, counting of the days between the breakdown of the equipment and the date on which the payment for the repair was made constitutes a sufficient proof and a testimony that these special damages were specifically proved. The trial court felt that this was not good enough a proof. In the instant case, the quest for payment of the damages for the stated days was pegged at 40% of the sum that would be claimed for letting the equipment lie idle. The twin questions that arise is whether these damages are payable; and whether the same were proved.

In my considered view, there is little or no dispute that the bulldozer was, for a certain spell of time, immobilized, thanks to the breakdown that both parties are aware of and acknowledge.

Ordinarily, assessment of damages is exclusively the domain of a trial court. But in a matter where, as is the case here, the court did not determine the question of damages, the assessment of the eligibility or otherwise of the appellant's claim is within the remit of this Court. My assessment of the

matter is that, since the appellant's allegation that the equipment was broken down and that the cost of repairs was effected after a lapse of 257 days has not been denied, the appellant is justified to stake his claim for damages. This is a pleaded fact whose proof would only entail require doing what the appellant did *i.e.* to prove that there was a layoff of the equipment for some time and that, during the time of idleness of the equipment, the appellant was denied an opportunity to earn proceeds that would come from hiring of the equipment. Since it is not clear how much is at stake in the lost earnings, the question of whether 40% is the fitting recompense. Quest for answers compels me to resort to the invaluable guidance given in ***Zuberi Augustino v. Anicet Mugabe*** [1992] TLR 137 (CA), wherein the Court of Appeal of Tanzania made the following finding:

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved. Cost of repair was pleaded but not proved. The respondent merely stated it to be Shs. 500,000/=. However, the learned trial judge was satisfied that the engine of the bus was completely blown off and is in fact beyond repair. It is a notorious fact that prices are rising in astronomic proportions and that the amount pleaded cannot even buy a reconditioned engine. So though repair costs have not been specifically proved we allow the amount pleaded. Then as already said, non-use was not all pleaded. However, it*

was not disputed that the appellant was using the bus for passenger trips between Mwanza town and Kisesa and the engine was damaged in that process. He definitely got some advantage which he should not be left to benefit from his wrongful acts. We agree with Mr. Magongo that the respondent intended to sell the bus. But that could not preclude him from putting it into use."

Taking an inspiration from the foregoing reasoning, I consider that an amount equivalent to 25% of the expected earnings serves as a sufficient recompense due to the appellant. I, therefore, slash the claim from 40% pleaded by the appellant to 25% for the period of 257 during which the equipment laid idle.

I also order payment of interest thereon, at the current commercial rate, from the date the equipment became immobilized to the date of the decision. Besides that, I order that interest, at the court's rate, be paid to the appellant from the date of the decision to the date of full payment of the sum due.

Moving on to the cross objection, the respondents' submission in support of the two grounds of appeal raises the argument that the trial magistrate failed to evaluate the testimony which proved that the respondents had fully liquidated their outstanding liabilities due to the

appellant. The basis for this contention is the testimony of PW1, PW2, PW3 and DW1, all of whom testified to the fact that the appellant was duly and fully paid the sum of TZS. 65,600,000/- and USD 4,417.00.

I have reviewed the testimony adduced by the witnesses during trial. Save for the testimony adduced by DW1, nowhere, in the entirety of the appellant's witnesses' testimony, has it been admitted or testified that the claim of TZS. 65,600,000/- and USD 4,417.00 was settled. PW1, the only witness who testified on the outstanding sums, was adamant that the respondents still owe him the said sum.

DW1 was wavering in his testimony. While he attempted to tell the Court that the sum had been liquidated, he admitted that he did not have anything with which to justify his claim. DW1's testimony painted a sense of uncertainty on whether the respondents made the payment.

I am convinced that the trial magistrate was justified in his conclusion, especially where the respondents, on whose shoulders the burden of proving that they paid the sum due rested, failed to discharge the said burden. In the end, the trial court's verdict in unblemished in this respect.

My view is in line with the provisions of section 110 (1) of the Evidence Act, Cap. 6 R.E. 2019. The said provision has been a subject of judicial interpretation in a plethora of decisions in this and the superior Court. Thus,

in ***Godfrey Sayi v. Anna Siame (as legal representative of the late Mary Mndolwa)***, CAT-Civil Appeal No. 114 of 2012 (unreported), it was held:

> *"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on balance of probabilities."*

The upper Bench's reasoning in the foregoing excerpt beds well with the position propounded by the legendary Sarkar on Sarkar's Laws of Evidence, 18th Edn., ***M.C. Sarkar, S.C. Sarkar and P.C. Sarkar***, published by *Lexis Nexis (at p.* 1896). In his commentaries, the learned author held the following view:

> ***"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof****. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason .... Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..."*** [Emphasis added].

In the end, the trial magistrate was constrained to live the script made by this Court in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113, in which it was held:

> *"**According to law the person whose evidence is heavier than that of the other is the one who must win**. In this instance each party called two witnesses in addition to himself at the hearing of the case in the Court of first instance. In measuring the weight of evidence in such cases as the present one it is not, however, the number of witnesses whom a party calls on his side which matters. It is the quality of the said evidence. In this connection the evidence of a single witness may be a lot heavier than that of ten witnesses."* [Emphasis is added]

It is in view thereof, that I find both of the respondents' grounds of cross objection (cross-appeal) lacking in merit and, consequently, I dismiss them.

In sum, the appellant's appeal succeeds as shown above while the entirety of the respondents' appeal is dismissed. The appellant will have his costs.

Order accordingly.

Rights of the parties have been explained.

M.K. ISMAIL,

JUDGE

06/06/2022

DATED at **DAR ES SALAAM** this 06th day of June, 2022

M.K. ISMAIL,

JUDGE

06/06/2022