

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

AT DAR ES SALAAM

CIVIL CASE NO. 150 OF 2020

JOSIAH JOSEPH BENEDICT..... PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF CHAMA CHA MAPINDUZI..... DEFENDANT

JUDGMENT

Date of last order: 20/04/2022

Date of Judgment: 03/06/2022

E.E. KAKOLAKI, J.

By way of plaint, the Plaintiff herein instituted this suit against the above-named defendant for breach of contract praying for the Judgment and decree as follows:

- (1) Payment of Tsh. 862,542,000/= being a total amount invested in the business and damaged drinks closed in the place of business by the defendant.
- (2) Payment of Tsh. 150,000,000 (one hundred and fifty million thousand) general damages to be assessed by the court.
- (3) Cost of the suits

- (4) Any other reliefs the honourable court may deem fit and just to grant.

The facts of the case as gleaned from the plaint can be stated as here under. The plaintiff on 20/09/2010, 15/02/2011 and 13/03/2011 entered into lease agreements with the defendant (Exh. PE1 collectively) in respect of the premises located at Block L, Plot No 57 Mbagala Kibondemaji. It was in their terms of agreement that, the plaintiff would develop the premises in accordance with drawings and structures approved by the Dar es salaam Regional party secretariat to suit his purposes of running a bar, restaurant and functioning hall business. It was also their settled term of agreement that the plaintiff would be paying half of rent while the other half compensating his construction costs of permanent structures which according to the said three agreement are of different figures of Tshs. 17,000,000/=, Tshs. 65,000,000 and Tshs. 48,000,000 respectively. The Plaintiff kept on enjoying use of the premises without interference from the defendant until 20/03/2018 when he was served with a notice of change of rent from Tsh.1,300,000/= per month to Tsh.2,000,000 (exh. PE 2). As usual, half the amount had to be deducted to cover construction cost, whereas the plaintiff honoured the changes and continued to pay as

required. It is alleged that, sometimes in 2018 the plaintiff effected renovation of the functioning hall to meet new standards, the work that had all blessings of the defendant through the Mbagala Kuu party Ward Secretary in his dated 6/09/2018 (ehx. PE3). Thus, the plaintiff made a notable changes of the structure ready to proceed with business. However, on 12/11/2018, while in the mid of rendering services to customers, the defendant encroached his business premises and closed it down and on. 13/11/2018 issued with a notice to vacate the premises.

Following that closure of business the plaintiff lodged against the defendant a suit at the District Land and Housing Tribunal for Temeke District vide Land Application No 332 of 2018, in which later on amicable settlement was reached between the two leading to withdrawal of the application by the plaintiff (exh. PE 5 Deed of Settlement). It was agreed in that settlement deed that, plaintiff shall pay the outstanding rent, and proceed with business, and finalize the renovation in which the cost involved would be shared by the parties upon being established by the private valuer. It is further contended the Plaintiff adhered to the agreement but to his surprise, on 13/01/2020 defendant through her agent trespassed in the premise once again and closed the business activities without any notice to that effect.

Despite of several demands by the plaintiff for opening of the said premises, it is said the defendant ignored him. It is due to these acts of breach of contract by the defendant the plaintiff decided to institute this suit against her over the above claimed reliefs.

When served with the plaint, defendant without justification failed to appear or file her Written Statement of Defence the result of which an ex-parte hearing order was entered against them. However, later on she managed to set aside the said ex-parte order and ordered to file her Written Statement of Defence (WSD) on or before 26/08/2021, the order which again without justification was not complied with as this time she filed the WSD out of time on 27/08/2021. It was that blatant default of Court order that moved this Court to issue another ex-parte hearing order under Order VIII rule 14 (1) of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC), for failure to file the WSD.

During hearing, the plaintiff appeared represented by Mr. Mafie Advocate. In his urge to prove the case he brought in court two (2) witnesses including himself. PW1, Josiah Joseph Benedict and the plaintiff in this case informed the court that, as a businessman vide the lease agreements signed in between 2010 and 2011 (exh. PE1 collectively) leased a site from the

defendant located at Block L, Plot No 57 Mbagala Kibondemaji, for the purposes of construction of a function/social hall, bar and kitchen, the lease whose tenure which was ending in 2020. He said, in 2017 when requested for renovation of the social hall which was dilapidated by then, his request was denied on the reasons that, the CCM national chairman had directed for identification and verification of party's properties, so he had to wait. He went on testifying that, in 2018 the defendant increased his rent from Tshs. 1,3000,000/= per month to Tshs. 2,000,000/= in which Tshs. 1,000,000/= was to be deducted from the rent to refund or cover the incurred construction costs of the said structure. The Notice of the increased rent was tendered and admitted as exhibit PE2. He further testified that, on 2018 he was allowed to continue with renovation of the said social hall via a letter dated 16/08/2018 (Exhibit PE3). He stated that, while the renovation was in progress the business premises was closed down by the defendant on the reasons that, he was indebted to them rent to the tune of 11,500,000/=, of which he decided to pay the same after communication with his lawyer. PW1 tendered the payments receipts which were admitted as exhibit PE4. He continued testifying that, despite effecting that payments the defendant did not open his business premises the fact which prompted him to institute a

case in the District Land and Housing Tribunal for Temeke District. Nevertheless, the same was withdrawn following the requests of CCM secretary and the deed of settlement entered between parties (exh. PE5). PW1 further testified that, later on was issued with a bill of quantities (BOQ) by the defendant stipulating that, renovation costs should not exceed Tsh. 90,000,000/= (exh.PE6) while his proposed BOQ was Tsh.80,000,000/. To prove to the court that renovation was effect and business closed PW1 tendered in court six (6) pictures which were admitted as exhibits PE.7 collectively. It was in PW1's further evidence that, in January, 2020 some delegates from CCM headquarters went to the site and ceased the whole renovation activities before they closed the business and put their mark indicating that, the business area was closed by CCM headquarters. The pictures showing that closure were received and marked as exhibit PE 8 collectively. PW1 continued to testify that, when closing the premise, it was business peak time, and they had made fresh purchase of drinks on that day, and that since the stock was in the store which was locked as well, they could not render services to the customers. And further due to that stand still condition some of the customers did not even pay their bills hence the plaintiff suffered loss. PW1 insisted in his testimony that, due to the loss of

business he developed health complications such as hypertension and diabetes which extended to cost his marital affairs. He concluded by telling this court that, the pecuniary loss suffered is Tsh. 800,000,000 plus as well as general damages to the tune of Tsh. 150,000,000. He added that, the said Tsh.800,000,000/= million plus included the security cost incurred by the PW1 to guard his business premises which is ongoing to date. He thus requests the Court to award his claim as per the plaint.

His evidence was supported by **PW2**, Baraka Timothy Mbinga, who was the manager of PW1's business and whose testimony centered from the time in which the business premises was firstly closed by the plaintiff in 2018 to when was lastly closed in 2020, up to date. In essence he replicated PW1's evidence.

After full consideration of pleadings and plaintiffs' evidence, the issues to be considered are;

- (1) Whether or not there was lease agreement(s) between parties*
- (2) Whether there was breach of the said lease agreement(s)*
- (3) If the 2nd issue is answered in affirmative, Whether the plaintiff suffered any damage as a result of that breach*
- (4) To what reliefs are the parties entitled to.*

Starting with the first issue, the plaintiff places reliance on exhibit PE 1 collectively which are lease agreements between the plaintiff and defendant of site located at Block L, Plot No 57 Mbagala Kibondemaji. It is a rule of evidence law under section 110(1) and 112 of the Evidence Act, [Cap. 06 R.E 2019], that he who alleges existence of a certain fact and seeks to rely on to secure judgment in his favour must prove its existence. And that the onus of so proving lies on the party who alleges. See the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT-unreported). It was held by the court in the above cited case that:

As to the applicable standard of proof the law is settled that, in all civil cases it is on the balance of probabilities. See the cases of **Godfrey Sayi Vs. Anna Siame Mary Mndolwa, Civil Appeal No. 114 of 2012** (unreported) and **Berelia Karangirangi Vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (CAT-unreported). Scrutiny of the alleged lease agreements has left this court with full of doubts as to their authenticity and legality. I will explain why. Firstly, the same are certified copies and when tendered in court, no explanation was assigned by PW1 as to where the original ones are nor did he comply with the requirement of tendering secondary evidence. Secondly,

the same are purported to have been signed before and witnessed by the commissioner for oath on the defendant (lessor) party but to the contrary the attestation part is blank. **Thirdly**, even on the lessee side it is not indicated as to when were they attested or witnessed before the witness or commissioner for oath. It is from all those deficiencies this court is of the finding that, the said lease agreements (exh. PE1 collectively) cannot be relied upon by the court to satisfy itself of the existence of the agreement between parties in written form.

Having found that there was no written contract between the parties the sub issue is whether there is any other evidence to prove existence of the alleged lease agreements. The law is clear under section 110 of the Law of Contract Act, [Cap. 345 R.E 2019] that any agreement is a contract if it is made by the free consent (wills) of parties competent to contract, for a lawful consideration and with a lawful object as the same can be either in writing or orally made. Despite the fact that, PW1 has failed to prove that there existed written lease agreements between him and the defendant, from the evidence of PW1 and PW2 on record and in the absence of any other evidence to the contrary this court is satisfied that, there existed oral lease agreement between the parties for the plaintiff to build and run a social hall,

bar and kitchen business at Block L, Plot No 57 Mbagala Kibondemaji. I so find as there other supporting documents to exhibit existence of lease agreement(s) between parties such as exh. PE2, notice of change of rent per month, exh. PE3, a letter authorizing PW1 to continue with renovation exercise and exh. PE4 collectively, the rent payment receipts. So, the first issue is answered in affirmative.

Likewise, the second issue as to whether there was breach of contract or not is answered in affirmative. I so hold as evidence of PW1 and PW2 is so straight to the point that in January 2020, the defendant closed the plaintiff's business without notice and before recovery of his renovation costs as exhibits PE 7 and PE8 which prove both renovation exercise and closure of the business premises. Hence there is a proof that the defendant breached contract.

The next issue for determination is *Whether the plaintiff suffered any damage as a result of that breach*. In this case the plaintiff's prayers are centered on the claims that he lost his business and that due to the defendant's act of breaching the contract he suffered health complications. He therefore prays for specific damage to the tune of Tsh. 800,000,000/= as money invested in the business and the cost of damaged drinks after

forceful closure of his business premises by the defendant, costs incurred for security and Tsh.150,000,000/= as general damages plus costs of this suit. As to specific damage the law is very clear that, the same must be specifically pleaded and strictly proved. This well settled principle of the law is stated in numerous legal scholarly works and cases laws by both the Court of Appeal and this Court. Justice Yaw Appau, Justice of the Court of Appeal of Ghana, in his Paper Presented at the induction course for newly appointed circuit judges at the Judicial Training Institute, on **Assessment of Damages**, (www.jtighana.org) at page 6 particularly on proof of special damages observed and I quote:

*"Unlike general damages, a claim for Special damages should be **specifically pleaded, particularized and proved**. I call them three P's." (Emphasis added)*

The Court of Appeal in the case of **Zuberi Augustino Vs. Anicet Mugabe**, (1992) TLR 137 at page 139 had this to say on proof of special damages:

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

Again it was held in the case of **Masolele General Agencies Vs. African Inland Church Tanzania** [1994] TLR 192 (CAT) 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; the Trial Judge rightly dismissed the claim for loss of profit because it was not proved.
"

Similar observations were aired by the Court of Appeal in the case of **Peter Joseph Kilibika and Another Vs. Partic Aloyce Mlingi**, Civil Appeal No. 39 of 2009 (CAT-unreported) when cited with approval the holding of Lord Macnaughten in **Bolog Vs. Hutchison** (1950) A.C 515 at page 525 on special damages, that:

*"... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, **they must be claimed specifically and proved strictly.**"* (Emphasis supplied)

In light of the above authorities which I subscribe to, it is clear to me now that, though under section 73 of the Law of Contract, a party is entitled to compensation for loss or damages resulting from breach of contract, the duty and burden of proving on how the claimed compensation was incurred or arrived at lies on the plaintiff. In this case the plaintiff was duty bound to plead the claimed specific damages amounting to Tshs. 800,000,000/= and particularize them in his plaint and proceed to prove the same during hearing

of the case. It is the principle of law that, parties are bound by their own pleadings. See the cases of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 (CAT-unreported) and **Yara Tanzania Limited VS. Charles Aloyce Msemwa**, Commercial Case No. 5 of 2013 (HC-unreported). What is deciphered from the plaintiff's plaint is that, apart from the contents of paragraph 21 of the plaint providing for the jurisdiction of this court over the matter and the reliefs sought, mentioning the amount of Tshs. 800,000,000/= plus, there is nowhere else the same amount is either pleaded or particularized. Worse still when testifying in Court during hearing, neither PW1 nor PW2 tendered any evidence whatsoever to prove or justify the claimed specific damages by either giving particulars of the costs incurred or tendering receipts or valuation report proving the same. Besides, in his testimony before this court the plaintiff (PW1) said that, was deducting half of the rent to recover the construction costs incurred, the construction which according to him was completed in 2011 before he had even started renovation in 2018. It is not known as to what amount he used during construction of the social hall, bar and the kitchen as well as renovation of the said social hall and how much he had already recovered up to the time of the alleged closure of business

by the defendant. The produced receipts evidenced payments of rent only which is not in dispute at all. Similarly, as to the loss of business, it is not stated by the plaintiff on how much he was earning per day, monthly or annually and how much he lost from the date of closure up to date. Concerning the cost for the damaged drinks allegedly locked in the store when the business premises was closed down again the same is not accounted for. Further to that, the plaintiff failed to account for the alleged health complications developed due to loss of business for submitting medical chits or any other evidence whatsoever.

With such understanding of all of the above principles and analysis of evidence, I am satisfied and therefore of the finding that, the adduced evidence by the plaintiff did not prove the claimed specific/special damages to the required standard apart from mere mentioning the figure without justification. It is noted with regret that, the plaintiff was throughout represented by a professional advocate but still failed to discharge that noble duty of proving his case to the court's expectations which is on the balance of probabilities as the court always has to act judiciously basing on proved facts and not mere assertions.

I now move to consider the claimed award of general damages to the tune

of Tsh.150,000,000. Usually, general damages is awarded at the discretion of the court and such discretion must be judiciously exercised. The purpose of general damages being compensatory in nature is to remedy the plaintiff from the loss of reputation as well as acting as a room for compensation for the mental pain and suffering suffered by him out of the defendant's act or wrong. This was the position this Court in the case of **P.M. Jonathan Vs. Athuman Khalfan** [1980] TLR175 at page 190 Lugakingira J (as he then was) which was cited with approval by the Court of Appeal in the case of **Peter Joseph Kilibika and Another Vs. Partic Aloyce Mlingi**, Civil Appeal No. 37 of 2009 (CAT-unreported), where it was stated thus:

"the position as it therefore emerges to me is that general damages are compensatory in character. They are intended to take care of the plaintiff's loss of reputation, as well as to act as a solarium for mental pain and suffering".

Back to this matter, as it could be gleaned from the evidence adduced in court that, it is more than 2 years since the plaintiff's business premise was closed down, from 2018 up to the time of expiry of lease tenure 2020 and that, despite of several follow ups to have it opened the defendant ignored him. Despite of failure to prove the loss suffered under specific damages no doubt the plaintiff's act of breaching the contract suffered the plaintiff

damages resulting from the inconveniencies caused to him, loss of business and reputation as well as mental torture for loss of income hence deserving to be redressed. In view of the afore consideration, it is my considered finding that, an award of Tanzanian Shillings Forty Million (Tsh.40,000,000/-) as general damages would be adequate to redress the plaintiff under the circumstances, which I hereby award.

In the wholesome and for the above reasons, this court finds that, the Plaintiff's claims against the defendant are partly allowed and partly unproved therefore dismissed. Judgment is therefore entered in favour of the plaintiff to the extent stated hereunder:

1. The Defendant shall pay the Plaintiff general damages to the tune of Tanzanian Shillings Forty Million (Tsh.40,000,000/-)
2. Interest on the decretal amount at the rate of 7% per annum from the date of judgment to the date of payment in full.
3. Costs of this suit shall be borne by the defendant.

It is so ordered

DATED at Dar es Salaam this 3rd day of June, 2022



E. E. KAKOLAKI

JUDGE

03/06/2022.

The Judgment has been delivered at Dar es Salaam today on 03rd day of June, 2022 in the presence of Mr. Joseph Mafie, advocate for the Plaintiff Pancransia Protas, advocate for the Defendant and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

03/06/2022