

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 104 OF 2021

(Arising from the judgment and decree of the District Court of

Temeke in Civil Case No.19 of 2019)

GROUP SIX INTERNATIONAL LTD..... APPELLANT

VERSUS

VICTORIA JAMES BUZIBA.....RESPONDENT

JUDGEMENT

Last order: 11th April 2022.

Date of judgement: 18th May, 2022.

MANGO, J

The genesis of this appeal originates from the proceedings and decision in Civil Appeal No.19 Of 2021 before the District Court of Temeke. The background of the matter as can be deduced from the records is to the effect that the Appellant was involved in an infrastructure upgrading at Mbagala area Temeke Dar es salaam. On 5th March 2018 when the Appellant

was continuing with his activities, it rained heavily, and caused rain water to overflow to residences. On 7th March 2018, the Respondent's house was broken. The Respondent alleges that his house was broken due to the Appellant's negligence. He alleges that, the Appellant did not make proper channels of water the act that led the Respondent's house to be demolished by rain water overflows.

The Respondent claimed against the Appellant the following relief(s): -

- (a) Payment of Tshs. Seventy Million and Eight Nine Thousand and five hundred only (Tshs 70,089,500/-) being value of the demolished house
- (b) Payment of Tanzania Shillings Fifteen Million (Tsh 15,000,000/-) being compensation for damages and physiological torture.
- (c) Interest on (a) above at the plaintiff up to the judgement and interest at Court's rate of 12 per annum of the decretal amount to the date of full settlement
- (d) Costs of the suit, and
- (e) Any other orders that this honourable court deems fit and just to grant.

The Trial Court ruled in favour of the Respondent and granted the following reliefs: -

- a) Payment of Tanzania Shillings Fifteen Million (Tsh 15,000,000/-) being compensation for damages and physiological torture.
- b) Compensation to the extent of destruction that has occurred on the Respondents house.
- c) Costs of the case.

The Appellant was aggrieved by the decision of the Trial Court and he preferred the instant appeal armed with seven (7) grounds of appeal as reproduced hereunder: -

- 1. That the Trial Court erred both in law when it failed to observe that, the issue of negligent on the part of the Appellant ought to have been explicitly pleaded in the plaint and given sufficient particulars.***
- 2. That the Trial Magistrate erred both in law and fact by failing to take cognizance of the facts that no evidence of negligence on the part of the Appellant was adduced or presented by the Respondent during the trial to even***

remotely link the damage so suffered by the Respondent to the Appellant.

- 3. That the Trial Court erred both in law and fact by interpreting the Appellant's expression of willingness to repair the Respondent's house as a blatant or implied admission of liability for the loss occasioned to the Respondent's house by water damage.***
- 4. That Trial Court erred both in law and fact by failing to take into consideration the fact that, the circumstances of the lodged case, the issue of ownership of the damaged house was relevant and should have been considered first and proved by the Respondent.***
- 5. That Trial Magistrate erred in law and in fact when she failed to observe that, since the Respondents claims of Tsh 70,089,500/- was specifically pleaded it should have been strictly and adequately proved by the Respondent.***
- 6. That the Trial Magistrate erred in law and in fact when she failed to provide reasons for granting General damages amounting to Tsh 15,000,000/-***

7. That the Trial Magistrate erred in law by correcting the judgement and inserting general damages while the same does not amount to clerical or arithmetical error.

On 11th April 2022 when the matter was called for hearing, the Appellant was represented by Mr. Rico Adolf, learned advocate while Mr. Herman Nombo learned advocate represented the Respondent. The Appeal was argued orally.

Submitting in support of the Appeal, the Appellant counsel mentioned specifically that, the Appellant was aggrieved by the award of 15mil to the Respondent as general damages and compensation of the damage as to be ascertained by the valuer. According to the learned counsel, the basis of the reliefs granted to the Respondent is the alleged negligence on the part of the Appellant which was not proved on the required standards.

Submitting on the first ground of Appeal, Mr. Adolf submitted that, the Trial Court erred in law by failure to observe that the issue of negligence on the part of the Appellant ought to have explicitly pleaded in a plaint and given sufficient particulars. He argued that, the Respondent did not expressly plead Appellant's negligence and he did not give sufficient particulars of the Appellant's negligence. He referred this court to the 5th paragraph of

pleadings where the Respondent pleaded that, his house was demolished by water due to the defendant negligent act of constructing a road without making proper channels.

He argued that, such claim was not well pleaded at trial court as required by the law. He cited a case of **Donoghue v. Stevensons** in which it was held that, for one to plead negligence, he ought to show the duty of care and ought to show that, that duty has been breached and damages were suffered resulting from such particular negligence. He is of the view that, the Respondent did not establish existence of Appellant's duty of care towards the Respondent and the breach of the duty of care by the Appellant, if any.

He fortified his submission by the case of **Strabag international (GMBH)v.Adinani Sabuni**, Civil Appeal No.241 of 2018, Court of Appeal of Tanzania at Tanga in which the Court of appeal, when determining how negligence should be pleaded. In the cited case the Court of Appeal, quoted a paragraph contained in 'Mogha's Law of Pleadings in India, with precedents', which reads;

'In an action for negligence, the plaintiff must give particulars of the negligence complained of and damages he has sustained.

Without a pleading and proof, negligence cannot be countenanced and the decree for damages cannot be awarded.

The plaint must clearly allege the duty enjoined on the defendant with the breach of which he is charged.'

The learned counsel is of the view that, the Respondent did not plead the alleged negligence to that extent thus, he prayed the 1st ground of appeal be upheld.

The Appellant's counsel consolidated the 2nd and 3rd ground of appeal and argued them collectively. Submitting on the consolidated ground of the appeal he argued that Respondent did not produce any evidence to establish that it was the Appellant who blocked water ways. Citing section 110 of the Evidence Act, [Cap. 6 R.E 2019] the learned counsel argued that it was the Respondent's duty to prove negligent acts of the Appellant, the duty which was not successfully performed by the Respondent. Commenting on the basis of the trial Court's decision, he argued that the Hon. Trial Magistrate relied on weaknesses in the defence case rather than considering strength of the Plaintiffs case. He submitted that, it was wrong for the Trial Magistrate to determine the issue of negligence of the Appellant basing on weakness of his case. To cement his argument, he cited the case of **Habiba**

Hamadi and two others versus Hassan Ausi Mchopa (the administrator of the estate of the late Hassani Nalino) Civil Appeal No. 10 of 2022 Court of Appeal of Tanzania at Mtwara, in which, the Court of Appeal held that, burden of proof does not shift to the defendant on account of weakness of the defendant's case. He concluded his submission on this ground that, the alleged negligence was not proved by the Respondent.

On the 4th ground of appeal, which is the 3rd ground of appeal after consolidation of the 2nd and 3rd grounds of appeal, the learned counsel argued on failure of the Respondent to prove ownership of the disputed premises. He argued that, the Residential licence tendered by the Respondent during trial and admitted as exhibit P1, expired on 11th March 2019. The matter before the trial court was instituted on 13th March 2019 when licence had already expired. He highlighted the significance of having valid residential licence and argued that, according to section 23(1) of the Land Act, [Cap. 113 R.E 2019], if the licence expires, the holder of the licence is considered to have no legal right to occupy the land, hence no any right over the land. He referred the Court to the case of **Strabag** (supra) in

respect of the issue of ownership and concluded that the Respondent to have no right before the eye of law.

The counsel further submitted on the 5th ground (which now is ground number 4), that, the claim of 70 Million was only pleaded in the plaint but not expressly and adequately proved as required by the law. To support his arguments regarding proof of special damages he cited the case of **Zuberi Augustine v. Anicent Muyabe** (1992) TLR 13.

Lastly he consolidated the 6th & 7th ground to be ground number 5 of appeal. In this, he submitted that, the Trial Court issued two judgements in Civil Case No.19 of 201. The 1st judgement was issued on 17th day of December,2020 the second judgement was issued on 31st March,2021 as corrected judgement. Where the 1st judgement did not include the general damages, the second judgement awarded the Respondent general damages in the tune of 15 Million.

He conceded that, under section 96 of the Civil Procedure Code, [Cap 33 RE 2019], the Court has powers to correct clerical and arithmetical errors in judgements and decree, but in this particular case the Trial Magistrate did not merely correct clerical errors, he introduced general damages which were not awarded in a previous judgement. Learned counsel for the

Appellant is of view that, such corrections cannot be considered to be correction of clerical or arithmetical errors under the ambit of the law.

He submitted further that, the Trial Court didn't provide sufficient reason why the Respondent was awarded such general damages in the corrected judgement.

In his reply submission, Mr. Nombo learned advocate for the Respondent submitted that the appeal is unmeritorious and it ought to have been dismissed with costs. Submitting on the first ground of Appeal, he submitted that the Respondent's pleadings conforms with the requirement of Order VI Rule 3 of the Civil Procedure Code, Cap. 33 R.E 2019]. He explained the dictates of the law as to what should be pleaded in a cause of action. According to his submission, the law demands pleadings on a cause of action to contain material facts constituting the cause of action. He submitted further that, in this case, the cause of action is negligence which was actually pleaded and established. He referred the Court to paragraph 3, 4 and 5 of the Plaint as paragraphs which contain facts constituting a cause of action. He narrated in nutshell that, the Appellant in the course of constructing a road blocked water channels. When it rained the water flooded into the Respondent's residence and caused the collapse of part of the house. He is

of the view that such facts do establish negligence on the part of the Appellant as follows;

- i. That the Appellant was the one who was constructing the road without constructing water channels a
- ii. That such constructions caused water to overflow towards the Respondent house and
- iii. That the water which overflowed to the Respondent's plot caused his house to break down

He thus concluded that the Respondent properly pleaded and successfully proved negligence on the part of the Appellant.

On the 2nd and 3rd ground of appeal, the learned counsel referred the Court to page 13 to 17 of the typed proceedings which contains Respondent's and his witness testimonies before the trial Court. He argued that, the Respondent(PW1), in his testimony, established that it was the Appellant who was constructing the road and blocked road side water drainage patterns. And that, it rained while the drainage patterns were still blocked and water flooded into his house and caused part of it to collapse. He also referred the Court to the testimony of PW2 who established that such flooding had never occurred prior to road constructions by the Appellant.

The learned counsel submitted on what he considers to be admission of responsibility by the Appellant. In this he referred the Court to the fact that the Appellant relocated the Respondent and paid for his rent as evidenced in exhibit P2. He also submitted on the willingness of the Appellant to repair the damaged part of the Respondents house as reflected in DW1's testimony before the Trial Court. Thus, he concluded his submission in this ground that, there was sufficient evidence that prove the Respondent's case as held by the Trial Magistrate.

On the 3rd ground of appeal he submitted briefly that, the issue of ownership was not disputed during trial. He considers the same to be an afterthought. He added that the expiration of the Residential licence does not amount to loss of rights by the licence holder over the land prescribed in the licence.

On the 4th ground of appeal, he submitted that, the Respondent did plead special damages but the same were not awarded. He stated that, he does not find it necessary to submit on a relief that was not awarded.

On existence of two judgements and variance of awards which was raised as the 5th ground of Appeal, he submitted that, the Trial Court merely corrected the judgement issued to rectify clerical errors as provided under section 96 of the Civil Procedure Code. He argued that, the original judgement did not award general damages while its decree provided for damages. He cited section 3 of the Civil Procedure Code and argued that, a decree is derived from a judgement, therefore, whatever is awarded in the decree must be contained in the judgement. Thus, the omission of an award of compensation for damages and psychological torture is a clerical error that can be corrected under section 96 of the Civil Procedure Code. In his rejoinder, the Appellant counsel reiterated his submission in chief.

I have gone through the records of the trial court and considered submissions made by both parties to this appeal. Although a number of issues has been raised as grounds of appeal, the main issue before me concerns alleged negligence on the part of the Appellant and damages suffered by the Respondent.

On the first ground of Appeal which concerns the issue whether the Respondent explicitly pleaded the issue of negligence on the part of the Appellant, I find the same to be in partly negative on the following reasons.

My perusal of the Plaintiff, I found paragraph 5 to be the only paragraph containing facts constituting the alleged negligence on the part of the Appellant. The paragraph reads;

'That, on 7th March 2018, when the defendant were upgrading infrastructure in unplanned settlement in Mbagala Kuu Ward, caused the Plaintiff's house to be demolished by water due to defendant's negligent act of constructing the said road without making proper channels of water in case of raining'

From the paragraph, the Respondent managed to plead explicitly negligent act of the Appellant, that is, constructing the road without making proper channels of water in case of rain. He also managed to plead damages that is, the Plaintiffs house was demolished by water caused by the defendant's negligent acts. Unfortunately, he did not plead any duty of care on the part of the Appellant. Thus, I agree with the Appellant's counsel that, the Respondent did not plead the duty of care of the Appellant towards the Respondent. Despite that, such duty may be inferred as it was laid down in the case of **Donoghue v Stephenson (1932) AC562** while expounding the neighbour principle. The Court of Appeal of Tanzania in the case of **Strabag International(GMBH) Versus Aidan Sabuni**, Civil Appeal No.

241 of 2018 at page 21, summarised the neighbour principle in **Donoghue's** case in the following words;

*'you must take reasonable care to avoid acts or omissions, which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour? the answer seems to be **persons who are so closely and directly affected by the act that ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'**. (emphasis added)*

In the Appeal at hand, it is not disputed that the Appellant was hired by the Municipality as Consultant to construct the road which passes through Residential area, nearby the Respondent's premises and other persons' houses. By his duty as a professional consultant, the nature of the project he was hired to implement, construction of a road and, the place where the road was being constructed, nearby peoples' residences, it can be inferred that the Appellant had a duty of care towards all road users and persons who reside nearby the road. In that regard, the Appellant ought to have

conducted his activities while conscious of safety and welfare of the road users and any person who might reasonably be affected by the Appellants activities. According to DW1, Liu Jian Hua, the Respondent's house is approximately 20 Metres from the road which was under construction. Thus, the Appellant had an implied duty of care towards the Respondent. However, the Appellant cannot be held liable for breach of the duty of care in absence of proof by the Respondent. That moves this Court to determine the second ground of appeal which concerns the proof of the alleged breach of duty of care which is the main issue in this appeal.

On the second ground of appeal, I find the Respondent to have failed to prove both the pleaded negligence and breach of duty of care as I am going to explain hereunder.

It should first be noted that, the burden of proof lies on the party who desires the Court to give judgement in his favour basing on existence of the alleged facts. Such requirement is clearly stipulated under sections 110 and 112 of the Evidence Act, [Cap. 6 R.E of 2019]. In the matter at hand, it was the Respondent who alleged that the Appellant constructed the road negligently without constructing proper channels for rain water and thereby caused the rain water to overflow and damage his house. In such circumstances, the

Respondent ought to have proved that the Appellant constructed the road negligently as alleged and that the floods were caused by the negligent road constructions by the Appellant and that, the water floods were the sole cause of the destructions to his house.

During hearing, the Respondent testified to the effect that the Appellant blocked water ways which seem to be slightly different from his pleadings in which the Respondent alleged that, the Appellant constructed a road without constructing proper channels for rain water. Parties are bound by their pleadings and departure to one's pleadings is not allowed except by amendment authorised by the Court. See the decision of the Court of Appeal of Tanzania in **Barclay's Bank (T) Ltd versus Jacob Muro**, Civil Appeal No. 357 of 2019, Court of Appeal of Tanzania at Mbeya.

Despite such departure to his own pleading, the Respondent did not prove the existence of rain water channels on the disputed road which allegedly were blocked by the Appellant in his constructions. The Respondent's failure to prove that the Appellant blocked water ways relieves the Appellant from the alleged negligent acts. I hold so while aware that, the Respondent's house was damaged by rain water because, evidence in record does not establish that the activities of the Appellant caused the floods and

destructions in the Respondents house was solely caused by the floods caused by the Appellant's activities. It was the testimony of the Respondent and PW2, **Abdallah Hassan Ndumike**, that it rained heavily before the Respondent's house being flooded and destructed by the floods. The floods are more linked to heavy rain than the Appellants activities. The issue would have been determined differently if the Appellant had caused water to flow from the water systems that pass through the area under constructions.

In addition, it was the Respondent's and PW2's testimony that, the Respondent's house was not the sole house in the street but it is only the Respondent's house that was destructed by the rain water. In such circumstances, it is hard to consider that the destruction of the Respondent's house was caused by the Appellant's negligent act which was not properly proved by the Respondent.

Before I move to the third ground of appeal, let me comment on the acts of the Defendant after the incident and their legal impact if any. Court record establishes that, the Defendant acted so nicely to the Respondent after the incident. He provided alternative shelter for the Respondent by paying for his rent and he was ready to repair the damaged party of the Respondent's house. The Respondent's counsel considered such acts as admission of

responsibility to the destructions that occurred in the Respondent's premises.

Admission is defined by section 19 of Evidence Act as;

'A statement, oral, electronic or documentary, which suggests any inference as to a fact in issue or relevant fact and which is made by any of the persons and in the circumstances hereinafter mentioned.'

According to the Evidence Act, statements that can be considered to be admission are listed in section 20, 21, and 22 of the Act. The statements include; statement by party to a suit or agent or interested party; statements by persons whose position must be proved as against a party to the suit and statements by persons expressly referred to by party to the suit respectively.

Evidence on record does not establish any statement made by the officers of the Appellant that can be considered to be admission on the part of the Appellant. According to the Respondent's testimony before the Trial Court, the Respondent was handed to the DMDP leaders by the District Commissioner and, he also wrote a letter to the Municipal Council. He testified further that, it was the Municipal Council which instructed him to move from the damages house and rent a house at the Municipality's expense. It was the Municipality which also instructed the Appellant to pay

the Respondent's rent as the Municipality had no money. The Appellant only agreed to reconstruct the Respondent's house during the meeting after the Insurance had refused to pay the damages suffered by the Respondent. It is not clear what transpired that moved the Appellant to agree to reconstruct the Respondent's house. With such evidence, the acts of the Appellant cannot be considered to constitute admission under section 19 of Evidence Act. Thus, the Respondent did not prove the alleged negligence on the part of the Appellant and the second ground of appeal is allowed.

The third ground of appeal is dismissed on the reason that, the issue of ownership over the disputed premises was not contested during trial and expiration of renewable residential licence cannot deprive the licence holder's rights over the land in respect of which the licence was issued. It is only a refusal to renew the licence that can be considered to estop the licence owner from claiming rights over the land. In the appeal at hand, the Appellant did not establish any failed attempt by the Respondent to renew his licence. Thus, I find this ground of appeal to be unmeritorious and I hereby dismiss the same.

The 4th ground of appeal should not detain this Court as both parties conceded that, the Trial Court did not award the disputed special damages.

l. The Appeal is hereby allowed. The judgement and decree of the
is quashed and set aside. Given the circumstances of the case, I
sts.

at Dar es salaam this 2nd June 2022



A handwritten signature in blue ink, appearing to read "Z. D. Mango", is written over the printed name.

Z. D. MANGO
JUDGE

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