IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CIVIL APPEAL NO 29 OF 2021

(Arising from RM Civil Case No 31 of 2020 in the Resident Magistrate Court of Musoma at Musoma

FINCA TANZANIA LIMITED .....APPELLANT

VERSUS

SHABAN SAID MGANDA ..... RESPONDENT

JUDGMENT

1st & 31st May, 2022

F. H. Mahimbali, J.:

The respondent in this case took a loan of 50,000,000/= from the appellant. He secured it by his certificate of right of occupancy having fully repaid the said loan, the respondent demanded the return of his certificate of occupancy which secured the said loan. The handing over was not smoothly done as it was done about a year later. The respondent was aggrieved by that act, in the course of follow-ups, he preferred two cases one at the District Land and Housing Tribunal and the other at the Resident Magistrate Court of Musoma. The decision of

the latter court awarded the respondent a total of 250,000,000/= of which, 150,000,000/= was specific damages for delay in handing back the respondent's right of occupancy which had secured the respondent's loan from the appellant.

The appellant has been aggrieved by the decree of the trial court which awarded the respondent a total of 250,000,000/=, hence this appeal.

The facts of the case can be put this way. The appellant had once advanced loan of 50,000,000/= to the respondent as per loan instrument exhibit P1, to be fully re-payed in eighteen months i.e. not later 4th September, 2020. As per terms and conditions of the said loan agreement (clause 5), the said loan was fully discharged on July, 2020 which was 64 days before the due date. That soon after the said discharge, the respondent could not return timely the right of occupancy which secured the said loan until when ordered by the District Land and Housing Tribunal (DLHT) in June, 2021.

The appellant did not object the averment that the said right of occupancy was in their possession as security and was not returned to the respondent timely but after 13 months. However, he raised an issue

of loss of the said certificate in the course of its transportation by the courier service company from Dar es Salaam to Musoma.

The trial court upon hearing of the case, awarded the aforementioned damages to the respondent.

The verdict of the said case is what has aggrieved the respondent. Thus, the current appeal. The same is preferred by three grounds of namely:

i. That the honourable Trial Magistrate, upon being biased, erred in law and fact to deny the appellant a fair trial.

ii. That the trial Magistrate erred in law and fact by failure to evaluate and improperly admitting exhibits on which biased his judgment on which biased his judgment.

iii. The trial magistrate erred in law and fact by failing/omitting to take some of the proceedings on witnesses' testimony testimonies and fabricated part of the testimonies for which/unsubstantiated damage/reliefs.

The hearing of the appeal was done by way of written submission, whereby Mr. Wilbard Kilenzi and Mr. Edson Philipo both learned advocates represented the appellant and the respondent respectively. The appellant's counsel during the hearing of the appeal, made a

lengthy written submission of which also attracted the lengthy response from the respondent's counsel. I am thankful for their useful submissions.

The main issue for consideration by this court now is whether the appeal is merited as per law.

On the first ground of appeal the grief is, the trial magistrate on being biased erred in law and fact to deny the appellant with fair trial. On this grief he narrated several conducts of the Magistrate in the conduct of the case which vividly established malice or biasness on his part. Such series of events connected in the course of the conduct of the matter are such as denying the appellant with a right to file third party notice against Courier Service Company who lost the said Right of Occupancy in its transportation from Dar es Salaam to Musoma. In attempt to join the said courier services as defendant in the said case, there were made several attempts by the appellant to make third party joined but the trial magistrate was reluctant to heed to the application by entertaining flimsy legal reason and meanwhile proceedings with the main case. When eventually the application was scheduled for hearing, the respondent's case had already been closed as the trial magistrate was not ready to stay the main case at the expense of the respondent's

rights. He pointed out further that while the trial magistrate refused the appellant's application on one, he had allowed several oral prayers/applications by the respondent. He exemplified such as prayers on proceedings dated 16th June, 201 (page 28).

Other incidences pointed out on biasness are refusal of the prayer to amend the written statement of defense by the appellant after the respondent had inordinarily filed list of additional documents after the First Pre-Trial scheduling conference without leave of the court and after some new facts were unearthed by the said new lists of the filed documents some of which arose from the withdrawn Land Application in the District Land and Housing Tribunal for Mara at Musoma.

The third incident on biasness was refusal of the appellant's prayer by the trial magistrate to file additional list of documents following the denial to file amended WSD and after the respondent had filed the additional list of documents inordinarily.

The fourth complained incident on biasness is the trial magistrate's move of conducting the Final Pre-trial scheduled conference exparte, while aware that the appellant's counsel was making appearance before High Court Musoma in Misc. Land Application No 46 of 2020 before Honourable Kahyoza, J as per page 33 of the typed proceedings.

The fifth incident of biasness which connected with the former incident, is the denial of right to propose additional issues after the former issues were framed in the absence of the appellant's counsel.

As per these vivid incidents in the conduct of the case at the trial court, the appellant's counsel aver that it is clear establishment of biasness by the trial magistrate. That some of these earlier incidences, even prompted the principal officer of the appellant to accuse the trial magistrate on biasness and asked him for recusal, the course he turned down unreasonably.

On the second ground of appeal, the appellant's grief is twofold. One, there was improper admission of documentary exhibits in secondary form instead of original. Two, there was failure in evaluation of the case's evidence which formed the basis of the trial court's judgment. On the improper admission of documentary exhibits in secondary form (exhibits P.3 and 6), it was submitted that the same contravened section 67 (1) (a) read together with section 68 of the Tanzania Evidence Act, Cap 6 R. E. 2019. He invited this Court to have a perusal of pages 36 - 56 of the typed proceedings and in particular pages 39, 46. Relying on section 65 of the Tanzania Evidence Act, Certified true copies are secondary evidence and have never qualified to

be primary evidence. The same can only be admitted subject to the envisage under section 67 of the Evidence Act, (supra). The only way such secondary evidence was to be admitted, was to comply with section 68 of the evidence Act. He underscored his proposition in the case of **Edward Dick Mwakamela vs Republic** (1987) TLR 122

> *"For the secondary evidence to be admissible, it must satisfy the provision of section 67 of the Evidence, Act 1967 on the admissibility of Evidence".*

On the basis, he attacked the admission of exhibits P1, P3 and P6. On the value of the respondent's evidence which led to the award subject of this appeal despite improper admission of exhibits P5 and P6 which are the respondent's claimed special damages of 200,000,000/= and grant of the same to the tune of 150,000,000/= as per reasoning of the trial magistrate at page 25 of the impugned judgment. The crux issue is, business plan cannot and has never been proof of earned income as it is a mere wishful document, it is not realistic. Furthermore, business plan cannot be proof of an earned income equal to special damage. If proved, could only amount to general damages.

The submission on third ground of appeal, can be considered as partly connected to the first and second ground of appeals. The grief is,

there has been failure or omission to take some proceedings on witnesses' testimonies and fabricated part of the testimonies from which based the foundation of the awarded damages/reliefs. Thus, I will consider them as part of biasness submission and failure to analyse evidence in record.

The respondent on the other hand resisted the appellant's submission alleging that what has been submitted by the learned counsel for the appellant is a total mislead to the court and amounts to professional misconduct.

In essence, the respondent's submission supported what has been decreed by the trial magistrate was proper and justifiable in the circumstances of this case.

On the issue of biasness as per first ground of appeal, he submitted that the submission is totally misleading. As the said filed applications were accordingly ruled by the court as per law, the accusations on biasness are untenable.

On the grievance of denial of leave by the trial magistrate for the appellant to amend WSD, the learned counsel was of the view that it

was the appellant's counsel to blame for absence and not the trial magistrate.

Responding to the issue of prayer to file additional issues of the case, he submitted that it was not necessary as it was the court's domain/discretion and that the court's proceedings don't establish if there was such a prayer.

On refusal to allow departure from the scheduling order the learned counsel submitted that, it was due to failure of the learned advocate of the appellant to cite an enabling provision of the law.

Responding to the issue of refusal to recuse following the complaint letter by the appellant that the trial magistrate was bias, he responded that there were not established events and conducts on the said complaints that qualified for recusal of the trial magistrate in articulation of the case of **Issack Mwamasika and Two others vs CRDB Bank Ltd,** Civil Revision No 6 of 2016, CAT at Dar es Salaam.

With the second part of the second grief of the appeal which concerns improper admission of secondary evidence (documentary exhibits) and failure to properly evaluate the evidence tendered before the trial court. He submitted generally that the respondent's case was

heavier than that of the appellant weighing it in scale of justice. He appreciated the trial magistrate rightly applied the law and principles of law in arriving at the said conclusion. He thus considered the respondent's case as proved to the required standard and the awarded total damages of 250,000,000/= (specific and general damages) was justicious and proper. On the other hand, he condemned the appellant's case as weaker and could not outshine the respondent's case on balance of convenience.

Replying to the third ground of appeal that the trial magistrate erred in law and fact by failing/omitting to take some of proceedings on witnesses' testimonies and fabricated part of the testimonies for which awarded the respondent unproved/unsubstantiated damage relief, he emphasized that there was no any error in law committed and the trial court reached justicious decision. There should be a distinction between one's wish and the applicable law.

On the authenticity of proceedings, he was confident that it was very authentic and for it to be impeached, there ought to be clear proof of the said omission/fabrication as alleged. Mere saying is not sufficient. The same being court proceedings it is a serious document, the same cannot be lightly impeached without concrete evidence in support. On

this, he referred to this court, a case of **Ngusa Vicking @ Babu Sea and 3 Others vs Republic**, Criminal Appeal No 84 of 2004 ... *"Court proceedings are not impeached without evidence"*

He prayed that this appeal is devoid of merit as the grounds of appeal are devoid of merits and irrelevant. The same be dismissed with costs.

In his rejoinder submission, Mr. Hussein Dendela learned advocate for the appellant first reiterated his submission in chief and insisted that the trial magistrate mishandled the matter on both biasness in the conduct of the court proceedings and even at failure to evaluate the evidence. He reiterated that denial to amend WSD, denial to present third party notice, denial to add new issues, denial to file list of additional documents all this narrowed down the appellant's chance of proving his case.

As regards proof of the case, he reiterated that there was no proof of special damages of the case legally done. The same ought to be pleaded, particularized and proved. All these three Ps requirements are not established in this case.

In essence, he criticized the respondent's case as being weaker and thus, ought to have been dismissed as rightly done.

I have critically gone through the grounds of appeal, the submission thereof, authorities provided and the records of the trial court. I wish to emphasize that the standard of proof in civil cases that, it is on balance of probabilities. This position has been stated by the Court of Appeal in a number of decisions. In **Mathias Erasto Manga Vs Ms. SimonGroup (T) Limited**, Civil Appeal No. 43 of 2013 (unreported) for instance, while reversing the finding of the trial High Court, the Court held that:

> *"The yardstick of proof in civil cases is the evidence available on record and whether it tilts the balance one way or the other. Departing from this yardstick by requiring corroboration as the trial court did is going beyond the standard of proof in civil cases."*

The following two issues as per grounds of appeal need to be considered. One whether there was bias. Two whether the respondent's case was established as per law.

On ground number one of biasness of the trial magistrate, it is a grave accusation to the trial Magistrate. I must admit that as per nature of accusations fronted against the trial magistrate, some claims might be hard to establish. The claims that there were omissions and fabrications

in the proceedings by the trial magistrate as laying better and conducive conditions to back up the trial court's findings are serious allegations which needed strict proof. Until when electronic devices come into full use of recording court's proceedings, such claims of fabrications, doctoring or omitting relevant proceedings are hard to be established. The claims would be relevant had there been strict proof of the alleged misconduct of such a judicial officer which conducts not only vitiate court proceedings but may warrant to appropriate disciplinary actions against such an officer. As per court record, I have not seen evidence of fabrications or omission of recording of such court proceedings. There ought to be concrete proof to establish that.

However, claims of denial to amend WSD, denial to present third party notice and denial to file additional list of documents equally needs back up from the relevant court proceedings. I have gone through the trial court's proceedings on the respective claims. I am satisfied from page 25 to 26 of the typed proceedings of the trial court records establishes such a proceeding. However, in my considered view, I take the denial as more legal and not actuated with biasness. If any error in one of them, I consider them as legal. I say so because as per law, pleadings can be amended at any time provided the amendments

sought would have resulted in bringing out more clearly the real question in controversy between the parties (see **Wamuiga v. Central Bank of Kenya** [2002] 1 EA 314). I am also inspired with the observation of the Court of Appeal in the case of **Kilombero North Safaris Ltd Vs. Registered Trustees of Mbomipa Authorities Association**, Civil Appeal No. 273 of 2017 which quoted the case of Central Kenya Ltd (supra) wherein it was held that;-

> *" Neither the length of the proposed amendments nor delay were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs"*

Again in the case of **Eastern Bakery v. Castelino** [1958]EA 461 it was held, among other, by the defunct East African Court of Appeal that;-

> "*Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs".*

I also find it clear that under the circumstances of the case at hand the amendment sought by the appellant would not have

prejudiced or caused any injustice that could not be compensated by costs to the respondent. The amendment sought was not mala fide and was likely to cause no any serious injustice to the respondent. After the amendment the respondent had the right to be given time to prepare its defence including amending its plaint if need had been and it was also entitled to be compensated by costs.

The argument by the trial magistrate that the prayer to amend WSD was made without citing an enabling provision of the law is in my considered view a naive legal reasoning. Denying a prayer to amend WSD or filling additional list of documents for want of formal application is not proper. Not every prayer in a court of law is done by formal application. Otherwise, courts of law would have been flooded by cases. Prayers such as extension of time to file WSD, to amend pleading, bail application etc, depending in the circumstances of each case can be done orally in the course of hearing the main case/application. Be it known that not every prayer made to court must be in formal application.

In this case, I have noted the trial magistrate's proceeding with the hearing of the main case while there was an application for third party notice pending before him. He provided much strength on the

hearing of the main case in disregard of the important application for the appellant's case. Where there is a main case pending and the defendant files an application for a third-party Notice, prudence dictates that the latter application must precede the main case. Otherwise, it will prejudice the defendant's case as it has been the case in this matter.

Though it's court's general discretion to grant or refuse presentation of third-party notice (see **Ibrahim Abdula Bahurmuz vs City Council of Dar es Salaam** (1967) HCD 179), but in my opinion the discretion must be judiciously exercised. Should it not be judiciously exercised the superior court is at right to intervene to scale justice (see **Lakhani vs Bhojani (**17 E. C. A. 7). This is because, courts of law are courts of justice and not mere academic pleadings.

In my candid view, apprehension of law is one thing, but doing justice is quite another. A trial magistrate who uses the law to evade justice to a righteous party just by applying it in favour of another for some unknown reasons is doing injustice to the righteous party even if he applies the law well. I recall one reminder by prof. **Ibrahim Hamis Juma** (The Hon. Chief Justice) to newly sworn in judicial officers, that applying law in deciding cases is one thing, but ask yourself inner mostly, is that justice? Courts of law should always in my view, before

making any decision, ask themselves inner mostly, is it a mere decision or there is justice in it.

On the discretion of granting an order to amend pleadings the wisdom of Biron, J (a.h.w) in the case of **Motohov vs Auto Garage Ltd, and others** (1971) H.C.D n 81 had this to say.

> " *Very few cases altogether allice, and each must be decided on its own merits. The overriding principle is laid down in the very rule itself, that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such a manner and on such terms as may be just, and all such amendment is not relay a matter of power of court but its duty so that substantial justice may be done."*

The test has always been this will the proposed amendments help raise the substantial questions in controversy between the parties and be made without causing injustice to the other side which cannot be compensated for my way of costs or otherwise?

The restrictive rule has been this as given by **Craws haw, J.A in Eastern bakery vs Castolino** (1958) E. A. 461.

> *"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting*

malafide, or that by his blunder, he had done some injury to his opponent which could not be compensated for by costs to otherwise ...

... It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs ... the court will not refuse to allow an amendment simply because it introduces a new case ... but there is no power to enable one distinct cause of action to be substituted for another not to change, by means of an amendment the subject matter of the suit ... the court will refuse leave to amend where the amendment would change the action into one of a substantially different character ... " (See also ***Shivij vs Pellegrin*** *(1972) HCD 76.*

From the foregoing, it is clear that court may refuse leave to amend where the party applying is acting malafide, or where the intended amendment is not necessary for determining the real questions in controversy between the parties or if it would take away from the other party a legal right which has since accrued to him by lapse of time; or where the party applying has been guilty of unconscionable and substantial delay in making the application.

Coming back to the appeal at hand, there is no legal justification by the trial magistrate to refuse amendment of the said pleadings after the respondent had filed his addition list of documents before leave of the court was sought and obtained. Though it was the trial court's own discretion, in my considered view as per circumstances of this case, the refusal was unjustified.

Another anomaly in the conduct of the said trial proceedings was on the recusal issue. The appellant's principal officer is recorded to have filed a complaint letter against the trial magistrate on the allegation of biasness. I agree, that recusal from the conduct of the matter is a personal volition of a trial judicial officer. I am aware of articulation in the case of **Issack Mwamasika and two others vs CRDB Bank Ltd**, Civil Revision No 6 of 2016, by Court of Appeal at Dar es Salaam. However, the articulations there in are not the exhaustive final list. Each case must be decided by its own merits. Wisdom must always dictate. If one party in a case genuinely believes that you will not do justice in the case, what inner calling convinces your that you must handle the matter. Let the parties build confidence to a judicial officer unless there are genuine reasons that recusal in a particular matter will not serve justice of the case but delay or shopping of a judicial officer.

In this particular matter at the trial court, unfortunately the recusal letter is not traced in the court file, but the trial magistrate failed to invite the author of it to address the court, instead he invited the respondent's counsel to address the court and then a ruling on refusal to recuse was delivered. Was the appellant/author of the recusal complaint heard? There is not proof of that undertaking.

As regards to the second ground of appeal, there are two issues raised. One, improper admission of the secondary evidence and secondly, on failure to evaluate the evidence properly.

The respondent in his written submission could not make any reply whether the admission of secondary exhibits in the circumstances of this case was justified. The law is always this, contents of documentary evidence are established by primary evidence i.e real evidence. Secondary evidence only comes into play subject to rule of secondary evidence. I wish in the first place, to state the obvious that, a copy of a document intended to be relied in evidence, whether certified or not falls in the same category of secondary evidence as envisaged under section 65 of the TEA of which, before being tendered in evidence, the requirement stipulated under the provisions of section 67 of the TEA,

have to be complied with. For ease of reference I hereby reproduce the two provisions:

"S. 65, Secondary evidence includes-

(a) certified copies in accordance with the provisions of this Act;

(b) copies made from the original by mechanical process which in themselves ensure the accuracy of the copy and copies compared with such copies;

(c) copies made from or compared with the original;

(d) counterparts of documents as against the parties who did not execute them;

(e) oral accounts of the contents of a document given by some person who has himself seen it."

S. 67. Proof of documents by secondary evidence

(1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases-

(a) when the original is shown or appears to be in the possession or power of-

(i) the person against whom the document is sought to be proved;

(ii) ***a person out of reach of, or not subject to, the process of the court;*** *or*

(iii) a person legally bound to produce it, and when, after the notice specified in section 68, such person does not produce it; [Emphasis supplied].

In terms of section 68 of the TEA, before the respondent could rely on the certified copy of the document there were two options open for him that is, one, serving the party in possession of the document with a notice to produce the document in court, or two, by requesting the court to issue summons to the party in possession of the document to appear in court and testify. Nonetheless, for reasons best known to the appellant himself, he resolved to opt to neither of the two. Yet, the trial magistrate admitted the same despite the fact there was objection on their admissibility. In the case of **Daniel Apael Urio V. Exim (T) Bank,** Civil Appeal No. 185 of 2019, CAT at Arusha made an emphasis on the production of original documents as compliance to the best evidence rule. Otherwise, rules on admissibility of secondary evidence be strictly applied before admission of the said copies of documents either certified or not.

In the current matter, that rule was not complied with. The reasoning by the trial magistrate as the document is a certified true copy is not an automatic right to admissibility as evidence. That has not been the law. I agree that the admitted exhibits (P1, P3 and P6) in their secondary form did not pass the rule of their admissibility, them being secondary evidence. The same are hereby discarded from evidence.

The next vital ground is whether there has been proof of the alleged specific and general damages as awarded by the trial court.

The appellant criticises the trial court award as being unfounded as per law. This is because for the said specific damages to be awarded must first be pleaded, particularized and proved. As per evidence in this case, there was such pleading. But particulars and proof of the said specific damages were not established as per law.

As regards general damages of 100,000,000/= there was no such pleading in the plaint.

I have gone records, evidence and submission inn place. The following are the prayers by the respondent in his plaint:

a) Payment specific damages to the tune of Tshs, 200,000,000/-

b) *Compensation amounting to Tshs 20,000,000/= for loss of having document on time.*

c) *compensation of Tshs 2,000,000,000/- being expenses and charges of moving from Mwanza to Musoma for making follow up of his documents.*

d) *Payment of compensation of related costs caused by the delay.*

e) *Expected profit amounting to Tshs 500,000 per day from 6th July, 2020 till the determination of the suit at the trial court.*

f) *Interest at commercial case from the commencement until determination of the case.*

g) *Costs of the suit.*

As to why the respondent claimed 200,000,000/= as specific damages, is mainly because the delay to get back his right of occupancy from the appellant after he had discharged the loan repayment. This then made him not to secure the prospect loan of 200,000,000/=. The trial magistrate was convinced that the said loan was an earning, thus a loss of earning. In substantiating this claim, the loan application and business plan was relied upon. Unfortunately, both of these documents were in secondary form, thus expunged by the Court. However, the

challenge has been this whether loss of loan grant perse is equivalent to specific damage. Whether the said loan was approved by Akiba Commercial Bank, whether the Business Plan was real. I am of the different view. In fact, there is no contest that the appellant after the discharge of the said loan by the respondent, had not timely handed back the said certificate of title which mortgaged the respondent's loan at the appellant's financial Institution. Despite that uncontested claim, the appellant is recorded in his testimony that just as the loaned money was processed from their headquarters, Dar es Salaam; equally, the storage of the said right of occupancy was safely kept at Dar es Salaam (HQ). However, upon request and discharge process of the said security, it eventually got lost in transits from Dar es Salaam to Musoma via Loyal Courier Services Ltd. Efforts were done to get it, and eventually it was done.

The respondent was then duly informed to go and collect his certificate of title but neglected. Surprisingly, he filed land application at DLHT to press for the said return. When all was over, the DLHT eventually made an order that the said copy be handled over to the respondent, the order he complied with. The respondent's concern then there has been delay for 13 months, thus the basis of the prayed reliefs.

The respondent maintains that the loss was real.

In my digest to the testimony of DW1, it is clear in his testimony and I reproduce part of it:

> *"Report on lost property of the Right of occupancy was made on 16/7/2020... Headquarter forced loyal logistics to prepare Right of occupancy. He prepared, on 16/12/2020 I got it, and on 19/12/2020 I told plaintiff to collect his right of occupancy he said he can't do so ..*
>
> *" I reported refusal by Shaban to our lawyer at Dar es Salaam, he wanted Tshs 200,000,000/=. He said that at any costs we shall pay him. We re –told him our lawyer. We also guaranteed him that when we got his right of occupancy, we shall give him, we guaranteed him to second Bank. He was on final process of securing his loan. The said bank and plaintiff came to our office we agreed to stand as guarantor to plaintiff. I know the plaintiff got that intended loan, Tanzania shillings 80,000,000/=. I checked through credit reference Bureau system connected to Bank of Tanzania. We did so by log in to the system. He got Tanzanian shillings*

80,000,000,000/= out of desired 150,000,000/= ...We gave his right of occupancy between June-July 2021"

My concern is on the credibility of Dw1's testimony. As witnesses must be given credence unless there are good reasons not to do so (see **Goodluck Kyando V. Republic** [2006] T.L.R 363). That every witness is entitled to unless there are suggestions to the contrary. With this testimony, the same was not challenged by the respondent. The essential part is on the return of the right of occupancy to the respondent by December 2020. He refused receiving the same. The DW1 further testified that he took charge of guaranteeing the respondent to Akiba Commercial Bank where he secured the new loan of TZS 80,000,000/=. With this unchallenged evidence, was there any loss of profit to the respondent occasioned by the appellant? There is no evidence to support that assertion. By the way loan application has never been proof of award unless it is approved. As he just applied it and no approval certificate was tendered in court, it cannot be substituted by the business plan since that is not actuality.

With all the end over done by the appellant to make the respondent get his lost collateral instrument and informed him to go and collect it in December, 2020 when it was ready but refused receiving it

for want of more damages, the same are now mitigated. As there was no any Bank Official from ABC who supported his assertion, there is no proof of the said loss as propagated.

Regarding costs of travel from Mwanza to Musoma for a follow up of the said right of occupancy, there is no proof, it being specific damages as pleaded. Similarly, loss of expected income of 500,000/- per day is also unrealistic in this matter for want of sufficient particulars and establishment.

The claim of compensation amounting to Tshs 20,000,000/= being loss for having the document on time is unrealistic as well as per evidence above. The same could fall in specific damage as well which needed strict proof. Other prayers (f and g) are as well irrelevant.

All this considered, the appeal is meritorious. Appreciating the delay occasioned by the appellant, but considering all the end overs done to get the collateral instrument back and the respondent's conduct of denying delivery of the said document on time just wishing to recover more money by suit is unwelcomed conduct and must be rebuked. Nevertheless, as I allow the appeal with costs, I award very minimal general damages to the respondent at the tune of Tshs. 500,000/= considering the aspect of decay of return of the said Right of Occupancy

but accompanied with good explanations. There has been no such much negligence. I so order and rule.

DATED at MUSOMA this 31st day of May 2022.

F. H. Mahimbali

Judge

Court: Judgment delivered this 31st day of May, 2021 in the presence of Ms. Mary Joackim learned advocate holding brief of Mr. Edson Philipo for the respondent. The appellant being absent and Mr. Gidion Mugoa-RMA being present.

F. H. Mahimbali

Judge

31/5/2022