IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 36 OF 2021

(Arising from decision of the Resident Magistrate Court of Mwanza in Civil Case No. 70 of 2018 dated 25/06/2021 by, B. M Lema, Resident Magistrate.)

CHARLES RICK MULAKI..... APPELANT

VERSUS

WILLIAM JACKSON MAGERO..... RESPONDENT

JUDGMENT

27th June & 5th August, 2022

ITEMBA, J.

This appeal emanates from the decision of the Resident Magistrate Court of Mwanza, in respect of Civil case No. 70 of 2018. At stake between the parties is the lease agreement of plot no. 45A located at Pansiansi within Mwanza.

Brief facts leading to this appeal are that: On 1st of November 2004, the appellant and respondent entered into a lease agreement. The appellant was building a house and when it reached at 'finishing' stage he leased the same to the respondent to run a barber shop under the conditions that the respondent will pay Tshs. 2,500,000/= per year and the said money will be used for finishing the house within one month. It was further agreed that in case the appellant failed to perform the agreement within one month he shall pay the respondent the 30% of

TZS 2,500,000/= each month an interest and delays in the respondent's business. In cross examination the plaintiff stated however that the contract which was admitted as Exhibit P1, was silent regarding the extent of renovation.

It was the respondent contention that, the appellant did not perform the contract. Hence the suit was filed. The appellant admits to have entered the contract with the respondent but that he only had a duty to change the wall colors, ceiling board do some changes in the other room which he did for about 25 days. There was no agreement for renovation. The respondent was dissatisfied and locked the place with a padlock and notified the appellant about termination of the contract as the same has expired. The appellant leased the same building to a different tenant who opened a laboratory. He explains that in 2015 during rainy season the building was destroyed by a tree which fell heavily on it and that as the respondent had locked the house, they had to open the door by the aid of the village leader.

Following the evidence adduced before the trial Magistrate, the judgment was entered in favor of the respondent and the decree was issued that the appellant was in breach of a contract and that he should

pay the respondent an amount of TZS 11,140,000 as specific damages and TZS 2,000,000 and general damage and costs of the suit.

Being dissatisfied with the decision the appellant through his memorandum of appeal has preferred an appeal before this court to challenge the decision of the trial court. In his memorandum, four grounds of appeal have been raised as reproduced, in verbatim, as follows:

1. *That, the trial tribunal magistrate erred on point of law and fact by delivering its judgment in favour of the defendant now the respondent without proving its case on the balance of probability.*
2. *That, the trial magistrate erred on point of law and facts by failure to analyze and evaluate evidence adduced by the appellant to strong in lieu of that of the defendant now the respondent.*
3. *That, the judgment delivered by the trial magistrate contravenes Rule 2 of the Civil Procedure (Approved forms) Notice 2017.*
4. *That, the trial magistrate erred in law by applying wrong principle of law in accessing and awarding general damages as a result the general damages awarded are inordinately high.*

Hearing of appeal was done by way of written submissions consistent with the schedule drawn by the Court. Submitting in support of appeal, the appellant submitted that, while the decision of the trial

court was delivered in favour of the respondent, the same has failed to meet evidential standards as provided under Section 110 (2) of the Evidence Act, [CAP 6. R.E 2019]. He alleges that, the respondent adduced mere words in his testimony in respect of breach of contract. The appellant has adhered to all minor repairs which was stated in clause 10 of the contract including painting two rooms and fixing gypsum. He supported these arguments with the decision of ***Paulina Samsonvs Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017 [2019] TZCA 453; (11 December 2019).

In regard to the second ground of appeal, he contends that, the trial court has failed to scrutinise the evidence which was tendered before it by the parties. He states that clause 10 of the contract does not specify what kind of repairs were supposed to be performed in the rooms in that respect he is of the view that the trial court would have opted to the provisions under ***Section 101 (b), 19 and 20 of the Evidence Act*** (Supra) in order to allow silent contract to be proved by oral evidence. He cited the decision in the case of ***Hatari Mashauri @ Babu Ayubu vs Republic,*** Criminal Appeal No. 590 of 2017 [2021] TZCA 41; (26 February 2021).

On vacant possession he avers that, the respondent did not give vacant possession to the appellant. And during trial he has not been

able to call an independent witness to prove that he actually conducted the same instead of bringing mere words. He supported his contentions by citing the decision in the case of ***Mukumi w/o Wankyo vs R,*** [1990] TLR 46.

In regard to the third ground of appeal, the appellant faults the trial courts' decision for contravening ***Rule 2 of the Civil Procedure*** (Approved forms). He contends further that the said forms require all judgments under the Civil Procedure to be delivered in a prescribed form No. E/1 something which was not done in the matter at hand.

On the fourth ground of appeal, the appellant complains that TZS 2,000,000/= awarded as general damages to the respondent were extravagant. He contends that the award should be loss flowing directly and naturally from the breach something which is deferent from the circumstances of this case at hand. He contends further that, the respondent never commenced business. In that respect he cited Section 73 (1) and (2) of the law of Contract Act and decision in the case of ***Amandus Zicky Masinde vs Nyamsera Marumba,*** Civil Appeal No. 88 of 2016 and ***Cooper Motor Ltd vs Moshi/Arusha Group Occupational Health Services*** [1990] TLR 96 (CA) both (Unreported). Based on these contentions he prayed his appeal be allowed with costs.

In rebuttal, the respondent through his learned counsel while submitting on the first ground of appeal has contended that, the issue in respect of this ground is not whether the premises were not maintained in the manner/standard agreed but rather it was that the respondent was claiming that no maintenance was conducted at all. He is of the view that it is irrelevant to inquire what kind of renovation was supposed to be performed.

On the second ground of appeal, he avers that, the evidence was well evaluated. He added that since what to be repaired was not area of contention between the parties, the respondent gave evidence on what type of repair was supposed to be undertaken by the appellant. In that effect he demonstrated how the appellant has failed to discharge his duty timely. In connection to that he suggested that in case this court finds that the evidence was not well evaluated it can step into the shoes of the trial court and analyze the same and pass judgment.

In respect of vacant possession, the respondent submits that the appellant refused to give him vacant possession until he gave him demand notice but still, he refused and the appellant never cross examine this piece of evidence during trial. He submitted further that the letter purportedly to be a notice of termination which was tendered by the appellant during trial was an afterthought. The allegations that

the tree felt on the top of the house roof he vehemently contends that there was no witness including the appellant himself who stated that they tried to know whereabouts of the respondent.

On the issue of the general damages the respondent submitted that since the respondent is in trouble for breach of contract by the appellant from 2015 to date it was justifiable for the court to award general damages to the tune of Tsh 2000,000/=. He added that award of general damages is the discretion of the court.

In regard to the issue which was raised by the appellant in the third ground of appeal that the trial judgment was not in conformity with the civil procedure (approved forms) he avers that, the impugned judgment complied with the standard required. He also contends that even if the trial court would have failed to comply with the required standard, still the appellant has not stated as to how noncompliance has occasioned injustice to the parties.

Gathering from the rival submissions, one singular issue of determination, relates to whether the grounds of appeal raised by the appellant carries significance warranting this court to intervene on the holding of the trial court.

Starting with the first ground, this is the heart of the appellant's complaint where he states that the respondent did not discharge his

duty to prove his case on required standard. From the rival averments, it is clear that the contention revolved around interpretation of ***exhibit PE1*** categorically on clause 10 of the said exhibit. The learned trial magistrate was of the view that the respondent proved his case on the required standard. I find no fault in this reasoning as the trial magistrate was right in his conclusion. Looking at page 9 through 10 of the typed proceedings, PW1 has narrated how the appellant has failed to repair the suit premise. I also subscribe to the contention by the respondent through his counsel that the area of contention is whether the appellant has failed to perform maintenances of the suit premise as agreed on their contract and not whether the maintenances were carried out in the standard agreed by the parties.

On the complaint that the appellant has never given vacant possession to the respondent, the appellant argues that there was no proof to such allegation that the respondent was denied occupation of the property. I had an opportunity to go through the trial proceedings and at page 10 of the typed proceedings the respondent stated that he had paid the agreed sum to the appellant but renovation was never done and at page 18 is shows that the house could not be handed over to the respondent. Similarly, I agree with by the respondents' counsel that the appellant has failed to cross-examine on this piece of evidence.

It is now trite law that failure to cross examine on a particular point is tantamount to an acceptance. In ***Emmanuel Saguda @ Sulukuka and Another v. R,*** Criminal Appeal No. 422 "B" of 2013 (unreported), the Court quoted with approval an old ***English case of Browne v. Dunn*** [1893] 6 R. 67 which held that: -

> *'A decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unlless the testimony of the witness is incredible or there has been a dear prior notice of intention to impeach the relevant testimony'.*

This being the position of law, I do not find anything irregular in the trial magistrate's finding in respect of this issue therefore, this ground fails.

Ground two of the appeal raises an issue of failure by the trial court to analyse evidence. The appellant contention is that the trial court has failed to analyse the evidence adduced during trial proceedings.

Since ***exhibit PE1*** does not clarify as to what kind of renovation were supposed to be performed and DW1 the appellant herein has told the court that he repaired the suit premise by painting and fitting ceiling on the rooms hence, the court should hold that the appellant has conducted repairs before handling the respondent vacant possession. After carefully going through the trial court judgment, it is not correct to

say that the trial magistrate has failed to analyse the evidence. Though not in clear wording, on page 4 and 5 of the trial court's judgment the learned magistrate has referred the contract between the parties, (***Exhibit PE1)*** and the notice of termination **(E*xhibit D1)*** and he gave reasons on his suspicions on the said notice that it was altered. Even if the said notice and affidavit of the process server were not altered the mode of service was still questionable. The trial magistrate also considered the defence of the defendant and found it to be weak and tainted with contradictions. Therefore, it is my conviction that the trial court has properly evaluated the evidence which led to the conclusion that the appellant was in breach of the contract. **Sections 101 (b), 19 and 20 of Evidence Act** cited by the appellant are irrelevant because there was no need to invoke such provisions based on overwhelming evidence available on the part of the plaintiff now the respondent. In view of the foregoing, I am not convinced with the appellant's argument in respect of this ground, and I decline to accede to it.

In the 3rd ground of the appeal, the appellant contends that rule 2 of the Civil Procedure (approved forms) were not adhered to by the trial court's judgment. The appellant argues that the judgment must be delivered in a prescribed form No. E/1. Order XX rule 4 of the Civil Procedure Code, provides the contents of a judgment to the effect that;

'A judgment shall contain ***a concise statement of the case****, the* ***points for determination****,* ***the decision*** *thereon and the* ***reasons for such decision****".*

I find that the trial court's judgment is in conformity with the above provision. I don't find anything worth to detain us in this ground. Failure by the trial court to adhere with requirements under rule 2 of the said forms does not in any way occasion injustice to the appellant.

With respect to ground four of the appeal, I wish to dispose it of by stating from the outset, that the trial magistrate was right in his assessment of the damages and reasons given were quite in line with requirement of law in respect thereof. In addition to that, I take inspiration from the reasoning made by the Court of Appeal of Tanzania in ***Fredrick Wanjara, M/S Akamba Public Road Service Limited A.K.A Akamba Bus Service v. Zawadi Juma Mruma,*** CAT-Civil Appeal No. 80 of 2009 (unreported). The learned superior Bench had this to say:

> '... ***there are no hard and fast rules in the determination of general damages and they cannot be approached with mathematical precision.***
>
> *Generally speaking, the figure reached by the trial court is not disturbed on appeal unless it is based on some erroneous principle or it is so low or so excessive that it must have been based on some incorrect reasoning... (****Obongo and another v. Municipal Council of Kisutu****, (1971) EA 91).*

Assessment of damages is more like an exercise of discretion and an appellate court is particularly slow to reverse the trial judge on a question of amount of damages unless it is satisfied that it misapprehended the facts or has for this or other reason made a wholly erroneous assessment of the damage suffered. It is not what the appellate court would have awarded, but whether the judge has acted on wrong principles.'

Looking at the judgment of the trial court, it is quite clear that the trial magistrate exercised his discretion wisely, judiciously and in proper application of principles guiding award of damages. He did not link special damages and general damages which were pleaded and discussed separately and without any connection to one another. I find nothing misapprehensive in the trial court's assessment of damages to warrant my intervention. Consequently, I uphold the trial court's decision as I find no merit in the appeal. Accordingly, this appeal is hereby dismissed with costs.

It is so ordered.

DATED at **MWANZA** this 5th day of August, 2022.

L. J. ITEMBA
JUDGE