THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA.

MISC. CIVIL APPLICATION NO. 26 OF 2020.

(Originating from Civil Appeal No. 09 of 2019, in the High Court of Tanzania, at Iringa, From Civil Case No. 16 of 2017, in the District Court of Iringa District, at Iringa).

BETWEEN

1. BERNARD KIHERI MARO.....1ST APPLICANT

2. FELISTA FUNGAREDY.....2ND APPLICANT

3. FINCA MICROFINANCE BANK.....3RD APPLICANT

AND

VEREDIANA CHACHA.....RESPONDENT

ORDER.

21st July, 2022 & 04th October, 2022.

UTAMWA, J:

The applicants, BERNARD KIHELI MARO, FELISTA FUNGAREDY and FINCA MICROFINANCE BANK hereinafter referred to as the first, second

and third applicants respectively (or the applicants cumulatively) filed this application by way of Chamber summons. The same is preferred under Section 5(1), (c) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (hereinafter called the AJA) and Rule 45(a) of the Tanzania Court of Appeal Rules, 2009 as amended from time to time (Henceforth the CAT Rules). The applicants sought the following orders against the respondent, VEREDIANA CHACHA:

a) That, the Honourable court be pleased to grant leave to appeal to the Court of Appeal of Tanzania (The CAT) against the judgment (impugned judgment) delivered by Hon. F. N. Matogolo, J. on 5th August, 2020 in Civil Appeal No. 09 of 2019,
b) That, costs follow the event.
c) Any other relief(s) this Honourable court may deem fit and just to grant.

The application was supported by an affidavit sworn by Mr Lazaro Joseph Hukumu, learned counsel for the applicants. It basically shows that, the applicants were aggrieved by the decision of the District Court, henceforth the trial court (from where this matter originated as Civil Case No. 16 of 2017). They filed an appeal to this court which was registered as Civil Appeal No. 09 of 2019. The said appeal was dismissed by this court (Matogolo, J.) through the impugned judgment.

According to paragraph 4 of the affidavit, the applicants intend to challenge the impugned judgment for the following grounds: that, this court could not decide in favour of the respondent without a proper

evaluation of the evidence before it, this court could not uphold the sum for specific damages awarded by the trial court since the respondent had neither pleaded nor proved the same, this court erroneously disregarded the fact that the respondent had not proved the case on the balance of probabilities and that, this court erroneously upheld the decision of the trial court despite the fact that the respondent's case was based on hearsay.

Ms Theresia Charles, learned counsel who held briefs for Mr Ambidwile, learned counsel for the respondent, informed this court that, the respondent, VEREDIAN CHACHA did not essentially object the applicants' application. She could not therefore, file any counter affidavit.

The application therefore, proceeded one sided, and by way of written submissions. The learned counsel for the applicant, submitted in support of the application that, there are serious points of law which call for the attention of the CAT. The respondent had not proved her claims against the applicant to the required standard as per section 110 and 111 of the Law of Evidence Act, Cap. 6 RE. 2019. These provisions support the principle that, whoever alleges must prove. He cited the case **Barelia Karangirangi v. Asteria Nyalwambwa, Civil Appeal No. 237 of 2017, CAT at Mwanza** (unreported) to support the contention.

The applicants' counsel submitted further that, the evidence adduced before the trial court showed that no applicant caused injuries to the respondent by any infringement to her rights. The evidence adduced by the respondent and her witnesses showed that, it was the respondent who handled her property (fishing nets) to the applicants. Therefore, this

cannot be termed as tort of conversion as it was the respondent herself who handled the fishing nets so as to settle the debt with the third applicant. He also argued that, the trial court record shows that none of the applicants detained the respondent, but she was arrested by the police upon the first applicant reporting to the police. Section 7(1) and (2) of the Criminal Procedure Act, Cap. 20 RE. 2019 imposes a duty to any citizen to report crimes. This legal stance was also underlined in the case of **Yohana Mujuni v. Isaya Bakoli (1969) HCD 23.** The act done by the first applicant cannot thus, be termed as an act of false imprisonment. The fact that the respondent was under police custody cannot be false imprisonment. Moreover, the trial court wrongly construed the act as tort of defamation since the ingredients of defamation were not proved. He added that, the ingredients of defamation, were highlighted in the case of **Hamis v. Akilimali (1971) HCD 111.**

The learned counsel for the applicant also faulted the impugned judgment in upholding the compensation awarded by the trial court. He submitted that, the respondent did not prove the claim for specific damages. It is trite law that for specific damages to be awarded they must be pleaded and proved. To support this argument he cited the case of **Alfred Fundi v. Geled Mango & 2 Others, Civil Appeal No. 49 of 2017, CAT at Mwanza** (unreported) and **Zuberi Augustino v. Anicet Mugabe (1992) TLR 139**. He further contended that the respondent was awarded general damages to the tune of Tanzanian shillings (Tshs.) 3,000,000/= without any justification.

It was also the contention by the applicant's counsel that, in the applications of this nature the law requires the existence of plausible grounds, that the intended appeal must raise issues of general importance and prima facie appeal. To bolster this position, he cited the cases of **British Broadcasting Corporation v. Eric Sikujua Ng'maryo, Civil Application No. 138 of 2004, CAT at Dar es Salaam** (unreported), **Sango Bay Estates Ltd & Others v. Dresdner Bank AG [1971] EA 17, Jackson Kitime v. Juma Ngamilaga & 3 Others, Misc. Civil Application No. 7 of 2018, High Court of Tanzania at Iringa** (unreported) and **Mustapha Athumani Nyoni v. Issa Athuman Nyoni, Misc. Land Application No. 38 of 2014, HCT at Songea** (unreported). He therefore, urged this court to grant this application so that the applicants can be heard by the CAT for the interest of justice.

I have considered the applicants' affidavit, the record, the law and the submissions by the applicants' counsel. In my settled view, the fact that the present application is not objected, is not alone, the reason why this court should not test its merits. That fact is also not the sole ground for this court to grant the application. These particular views are based on the understanding that, it is a firm and trite judicial principle that, courts of law in this land are enjoined to decide matters before them in accordance with the law and the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R.E 2002 (henceforth the Constitution). This is indeed, the very spirit underscored under article 107B of the Constitution. It was also underlined in the case of **John Magendo v. N. E. Govan (1973) LRT n. 60**. Furthermore, the CAT emphasized it in the case of **Tryphone Elias @**

Ryphone Elias and another v. Majaliwa Daudi Mayaya, Civil Appeal No. 186 of 2017, CAT at Mwanza, (unreported Ruling). In that precedent, the CAT held, *inter alia* that, the duty of courts is to apply and interpret the laws of the country. It added that, superior courts have the additional duty of ensuring proper application of the laws by the courts below. Courts do not decide matters according to the consensus of the parties to the proceedings. I will therefore, test the merits of the application at hand despite the fact that the respondent supports it.

The major issue for determination before me is therefore *whether the present application is meritorious.* Before I answer this issue, I find it proper to outline, some relevant principles related to the law on leave to appeal to the CAT as I hereby do below.

Applications for leave to appeal to the CAT in relation to appeals of the nature like the one under consideration are governed by Section 5(1) (c) of the AJA and Rule 45(a) of the CAT Rules as rightly indicated in the applicant's Chamber Summons. These provisions vest the High Court with the discretion to grant leave to litigants intending to appeal to the CAT. It is therefore, important to note that leave to appeal to the CAT is not an automatic right as one would think; it is within the discretion of the court to grant or refuse it. Certainly, such discretion, like any judicial discretion, is exercised judiciously and not arbitrarily. It must base on the facts before the court. No leave can therefore, be granted if the intended grounds of appeal are frivolous, vexatious, useless or hypothetical. These legal principles were underlined in the case of **British Case** cite (supra).

The law further guides that, the applicant must demonstrate that the intended appeal raises issues of general importance or a novel point of law or that, the grounds show a *prima facie* or arguable appeal; See the case of **Harban Haji Mosi and Another v. Omar Hilal Seif and Another, Civil Reference No. 19 of 1997, CAT** (unreported). In this precedent the CAT added that, the purpose of the law is therefore to spare the CAT the spectre of un-meriting matters and to enable it to give adequate attention to cases of true public importance.

In the case of **Lazaro Mabinza v. The General Manager Mbeya Cement Co. Ltd, Civil Application No. 1 of 1999 CAT at Mbeya** (unreported) the CAT also observed that, leave to appeal should be granted in matters of public importance and serious issues of misdirection or non- direction likely to result in a failure of justice.

The CAT further underlined in the case of **Gaudencia Mzungu v. IDM Mzumbe, Civil Application No. 94 of 1999** (unreported) that leave is not granted because there is an arguable appeal. There are always arguable appeals. What is important is whether there are prima facie, grounds meriting an appeal to it (the CAT).

The sub-issue at this juncture is therefore, *whether the application at hand meets the legal conditions highlighted above (or any of them), for granting the prayed leave.* In my settled opinion, the applicants' complaints that this court did not properly evaluate the evidence on record (in the impugned Judgement), the respondent did not plead the awarded specific damages and that her case was based on hearsay are not tenable. This is

because, they are all not supported by the record, especially the impugned judgment itself, the amended plaint before the trial court (presented in court on the 23rd November, 2017) and its proceedings.

Nonetheless, there is sense in the applicant's complaints as far as proof of both general and specific damages is concerned. This because, the respondent's reliefs sought at the bottom of her amended plaint included the following: Tshs. 6, 000, 000/= (Six Million only) as specific damages, Tshs. 4, 000, 000/= (Four Million only) as general damages, some interests and costs of the suit.

The above mentioned claims by the respondent were detailed in the body of the plaint, thus: Tshs. 2, 000, 000/= (Two Million only) as loss of 500 kilograms of fresh fish which had been stored in freezers, Tshs. 1, 000, 000/= (One Million only) being the value of her fishing nets converted by the applicants from her and Tshs. 3, 000, 000/= (Three Million only) as expected loss of profit from the respondent's customers for the converted fishing nets she would have sold to them. The claim for Tshs. 4, 000, 000/= (Four Million only) as general damages, were claimed to be for the injuries suffered by the respondent due to the acts of the applicants which amounted to the torts of false imprisonment, defamation and conversion of her fishnets.

I will firstly converse on special damages listed above. According to the record, the trial court awarded the respondent the lump sum of Tshs. 5, 000, 000/= (Five Million) as special damages. This award was upheld by this court through the impugned judgment. Indeed, it is trite and settled

law that, special damages, unlike general damages, must not only be specifically pleaded, but must also be strictly proved as correctly submitted above by the applicants' counsel. Apart from the precedents cited by the learned counsel to support this legal position, the stance was also underlined by the CAT in the case of **NBC Holding Corporation v. Hamson Erasto Mrecha [2002] TLR. 71** (at page 77) and by this court in the case of **Bamprass Star Service Station Ltd. v. Mrs. Fatuma Mwale [2000] TLR. 390.** In the case of **Judge-In-Charge, High Court at Arusha and The Attorney General v. Nin Munuo Ng'uni [2004] TLR. 44,** the CAT also echoed the principle with an exception to cases founded on breach of basic fundamental rights, which is not the case in the matter at hand.

Indeed, it must be noted at this point that, special damages on one hand, are totally distinct from general damages on the other. In distinguishing the two kinds of damages the CAT in the case of **Tanzania Saruji Corporation v. African Marble Company Limited [2004] TLR. 155** made some practical descriptions of the two kinds of damages. It observed thus; general damages are such damages as the law will presume to be the direct, natural or probable consequence of the act complained of; the defendant's wrongdoing must, therefore, have been a cause, if not the sole, or a particularly significant, cause of damage. The CAT also observed that, when the precise amount of a particular item has become clear before the trial, either because it has already occurred and so become crystallized or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage.

Now, in the matter at hand, it is doubtful if the respondent in fact, strictly proved the special damages she had claimed before the trial court. This is so because, in the first place, though she testified that she was doing business of buying and selling fishnet and fishes, she did not produce any trade license to that effect. She did not also testify on when she had bought the 500 kilograms of fish and when she had stored them in the freezers. She also testified that, the fishes were spoiled due to the fact that she could not switch on electricity when she left her place upon being called by authorities following the complaints by the applicants against her. Nonetheless, she did not tell the trial court if no one could switch on the electricity in her absence though in her evidence she showed that she had a husband. The respondent did not further make any explanation on the technical fitness of the freezers and the reliability of electricity she was using at her place.

Furthermore, the respondent did not produce any receipt for buying the fishnet to vindicate the value thereof so as to justify the claim for Tshs. 1, 000, 000/= (One Million only) mentioned above. She did not also testify as to when and from whom she had bought the nets. In the **NBC Holding case** (supra), the CAT held basically that, failure by the respondent to produce receipts in proving special damages negatively affected the basis of his award he had obtained in the High Court; see the generality of its observations from page 77 to 78. Moreover, the respondent did not provide any proof of the trend for her fishnet business so as to show that she would get the profit at the tune of the claimed Tshs. 3, 000, 000/= (Three Million only) had the applicants not converted the fishnets.

The above demonstrated state of affairs, enhances my doubt on the fact that the respondent actually performed a "strict proof" for her claimed special damages before the trial court as required by law. This is more so because, the term "strict" connotes an adjective expressing something that is *inter alia*, exacting or requiring no showing of fault; see the Black's Law Dictionary, 9th Edition, West Publishing Company, St. Paul, 2009, at page 1558. I do not thus, think, that the evidence by the respondent which had the above listed potholes could afford any strict proof as per the law. It is thus, seeming that the award of special damages in the matter at hand was based on a mere reasonableness ground. However, according to the guidance by the CAT in the **NBC Holding case** (supra), reasonableness cannot be the basis for awarding what amounts to special damages, but strict proof.

Another aspect which enhances my above mentioned doubt on the respondent's proof for her special damages, is the way the trial court awarded them. According to page 11 of the printed version of the trial court's judgment (the second paragraph from the top), the respondent was awarded Tshs. 4, 000, 000/= (Four Million only) for proving that the fishnets had been taken by the applicants without her consent. She was also awarded Tshs. 2, 000, 000/= (Two Million only) being loss for the spoiled fish in the freezers. Nevertheless, at the same page (the fifth paragraph from the top), the trial court awarded the respondent the total sum of Tshs. 5, 000, 000/= (Five Million only) as special damages. My simple arithmetic tells me that, what had been awarded under paragraph 2 was Tshs. 6, 000, 000/= (Six Million only) which is totally dissimilar from

the Tshs. 5, 000, 000/= (Five Million only) awarded under paragraph 5 though both sums are related to the same heading of claim (i.e. Special damages). It is not thus, clear as to which sum of special damages had actually been proved by the respondent and ultimately awarded by the trial court.

In regard to general damages, the trial court awarded to the respondent the sum of Tshs. 3, 000, 000/= (Three Million only). The amount was also upheld by this court through the impugned judgment. Nonetheless, in my settled opinion, it is uncertain if this award was justified. This is because, in the first place, the award was an omnibus one for all the three kinds of torts claimed to have been committed by the applicants; to wit, i) false imprisonment, ii) defamation and iii) conversion. Nonetheless, the record does not reveal that the respondent had given evidence showing to which extent she had suffered for each tort. Moreover, the trial court did not assess the damages suffered by her for each of the three torts though the law guides that, damages must be assessed before the quantum is reached. It is therefore, unclear as to how the trial court reached to the conclusion that the respondent was entitled to that awarded sum and not less or more than that. It is more so considering the fact that, each tort among the three has its own ingredients, nature and its distinct way of hurting a victim.

Moreover, according to page 11 of the printed copy of judgment of the trial court (paragraph 5 from the top), it is clear that the trial court awarded to the respondent the said general damages at the sum of Tshs.

3, 000, 000/= (Three Million only) merely because, she had prosecuted her case in what it (the trial court) termed as "a neatness manner." Nonetheless, I doubt if this style of prosecuting a civil case envisaged by the trial court is actually know by our own law and can constitute a good basis for awarding general damages to a party to judicial proceedings. It is also very unfortunate that the trial court did not go further to explain what it meant by the phrase "a neatness manner" in the want of the required proof I have mentioned above.

Again, the way the respondent pleaded her general damages in the plaint before the trial court was doubtful. Under paragraph 6 of the plaint for example, she only averred that, she was claiming the said Tshs. 4, 000, 000/= (Four Million only) as general damages for the triple torts (false imprisonment, defamation and conversion). She did not however, show the sum claimed for each tort. It was not thus, clear as to how she claimed that lump sum and how the trial court awarded such claim at the tune of Tshs. 3, 000, 000/= (Three Million only) as discussed earlier.

Having observed as above, I am of the view that, the applicants' intended appeal to the CAT raises triable issues and has *prima-facie* chances of success. The same thus, calls for the attention of the CAT in an appeal. No wonder the respondent did not object the same in any way. I accordingly answer the sub-issue posed above affirmatively that, the application at hand meets the legal conditions for granting the prayed leave. I therefore, also determine the major issue positively that, the present application is meritorious.

Owing to the above reasons, I grant the application. The applicant is granted leave to appeal as prayed and shall act according to the law. Each party shall bear its own costs since, this application is a legal requirement for appeals to the CAT, and thus, no party is to blame for its institution. Besides, the respondent did not object it as hinted earlier. It is so ordered.

JHK UTAMWA

JUDGE

04/10/2022.

04/10/2022.

CORAM; JHK. Utamwa, J.

For applicants: Ms Venancia Rufumbo, advocate.

For respondent: Ms Venancia Rufumbo, advocate, holding briefs for Mr. Moses Ambindwile, advocate.

BC; Mr. Godfrey Mpogole.

Court; order pronounced in the presence of Ms Venancia Rufumbo, advocate for all the applicants who also holds briefs for Mr. Moses Ambindwile, advocate for the respondent in court, this 4th October, 2022.

JHK UTAMWA

JUDGE

04/10/2022.