

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL APPEAL NO. 85 OF 2019

(Arising from Civil Case No. 34 of 2017 Temeke District Court)

NURDIN MOHAMED AHMED

@ SHEIKH KISHKIAPPELLANT

VERSUS

MIC TANZANIA LIMITED.....RESPONDENT

JUDGMENT

Date of Last Order: 08/07/2021

Date of Judgment: 21/02/2022

S.M. KULITA, J.

This is an appeal filed by **NURDIN MOHAMED AHMED @SHEIKH KISHKI** who is dissatisfied with the judgment and decree of Temeke District Court in the Civil Case No. 34 of 2017, delivered on 26/02/2019. In his appeal the appellant raised four grounds as here under;

1. That the trial Magistrate erred in law and fact for neglecting the evidence of the plaintiff and erroneously deciding the issue in dispute on the basis of the pleadings and final submissions.
2. That the trial Magistrate erred in law and fact for immensely failing to consider the admission of the defendant on the usage of the plaintiff's artistic works without his permission and erroneously reaching a conclusion that there was no infringement.
3. That the trial Magistrate erred in law and in fact for concentrating on the documentary evidences and ignoring testimonial evidence of PW-1 and PW-2 in relation to the infringement and thereby wrongly arrived at a decision that there is no evidence in the proceedings showing that the defendant has been selling and/or offering for sale the pleaded works.
4. That the trial Magistrate erred in law and fact in deciding the case against the law and evidence on record.

When this appeal was called on for hearing the court ordered the same to be disposed of by way of written submissions. The appellant was represented by Mr. Mashaka Ngole, Learned Advocate from Ngole and Associates Law Chamber while the

respondent was represented by Mr. Daimu Halfani, Learned Counsel from Misnak Law Chambers.

In his submission in respect of ground one of appeal Mr. Ngole submitted that, in resolving the issues the trial court used the alternative phrases, to wit "works listed in the pleadings" and "the listed works" instead of the framed ones, namely "ring back tones in dispute" and "literary works in dispute" which were in the list of documents filed in court. The Counsel is of the view that the use of the said alternative phrases which neither appeared in the pleadings nor in the framed issues led to the denial of the appellant's right to damages/compensation and injunction for the infringements admitted by the defendant. They were not redressed as per the provisions of sections 36 and 37 of the Copyright and Neighboring Rights Act [Cap 218 R.E. 2002].

Expounding ground two of appeal, Mr. Ngole submitted that the evidence on record indicates that there were appellant's speeches in the respondent's data base which were offered to his customers as **call tones** or **ring back tones** of which the respondent admitted to offer the same from the company known as **Spice Vas Tanzania Ltd** at the rate of Tshs. 150/= per week without appellant's authorization but the trial magistrate disregarded the

respondent's admission, thus arrived at a wrong decision that there was no infringement of the copy right.

He submitted that the respondent was required to prove that the works which are subject to the suit and those which were admitted to have been in the respondent's database were obtained from Spice Vas Tanzania Ltd.

In his argument in respect of ground three of appeal Mr. Ngole maintained the submission he had made on ground two of appeal.

Lastly, on ground four of appeal Mr. Ngole submitted that the appellant proved that there was an infringement of his artistic works, hence he was entitled to reliefs prayed in the plaint in accordance with sections 36 and 37 of the Copyright and Neighboring Act. He insisted that since DW1 admitted to have the appellant's work in the Respondent's data base, the trial court was obliged to award damages to the Appellant.

Mr. Ngole also submitted that as the amount earned by the respondent in use of the appellant's artistic work was not established, the trial court was therefore required to grant general damages. To support his argument he cited the case of **Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137** and the case of **Brayson Nalogwa Kituli (Suing as Personal**

Representative of Onesphory Nalogwa Kituli) vs. Alex Sirimara Machare & 2 Others, Land Case No. 275 of 2007.

Mr. Ngole concluded his submission by praying for this court to allow the appeal.

In his opposing submission the respondent's Counsel, Mr. Daimu Halfani submitted that during trial the appellant's witnesses, PW1 and PW2 were shown Exhibits P1, P2, P3, P4 and P5 which contained lists of the Appellant's artistic works alleged to be infringed, but those said songs were not pleaded in the appellant's plaint. He submitted that the trial court, in that regard erroneously admitted them. Mr. Halfani emphasized that since parties to the suit are bound by their pleadings. He said that the appellant failed to state part of evidence said to have been neglected by the trial Magistrate.

Arguing ground two of the appeal Mr. Halfani submitted that the appellant had failed to prove whether he is the owner of the alleged ring back tones in Exhibits P1, P2, P3, P4, P5, P6 and P7. He stated that the appellant did not prove before the trial court that he is the owner of the said artistic works. He also clarified that the appellant failed to prove that he recorded or produced the said ring back

tones, alternatively the appellant did not have any knowledge as to when and where the alleged ring back tones were produced.

With reference to the Copyright and Neighboring Act in light of the categories of ownership of artistic works Mr. Halfani said that the appellant does not fit in any of the said categories.

Expounding ground three of appeal, Mr. Halfani submitted that during trial the appellant failed to satisfy the court that the alleged artistic works were sold by the respondent at the value of Tshs. 150/= per week to 1,000,000 subscribers. He submitted that the trial court reached into a conclusion that the respondent was not offering the alleged artistic works at such amount on the ground that the appellant did not have any documentary evidence to prove that allegations.

Lastly, on ground four of the appeal Mr. Halfani submitted that the appellant failed to prove before the trial court that there was injury and thus he was entitled damages at a tune of Tshs. 2,000,000/= per month and Tshs. 70,000,000/= as a total loss from 2014 to the date of institution of the suit. He is of the view that the trial court was right to arrive at the decision that the appellant has failed to prove his case. He said that the court could not compensate an uninjured party.

Mr. Halfani concluded his opposing submission by praying this court to dismiss the appeal for lack of merit.

Before I start to analyze the grounds of appeal and submissions filed by the counsels, let me say something about Intellectual Property Right, the subject which I find crucial in the matter at hand.

Starting with the issue of **registration of intellectual works**, as it was rightly settled by the trial Magistrate that the intellectual works are basically owned by the author. This is according to **section 2** of the **Copyright and Neighbouring Rights Act, 1999**, as amended from time to time, aiming to protect the author. As per **section 6(1)(b) of the Act**, protection involves original works including intellectual creations.

Hereinafter is my analysis on the issue of **Registration of the Author's works**, in which I have noticed that, **it is not mandatory** as per the **Copyright and Neighbouring Rights Act, 1999**, as amended from time to time, which is a relevant statute for the matter at hand. Starting with **section 5 of the Act**, my perusal over that section, particularly at **sub-section (1)** whose heading is ***works in which copyright may subsist***, contents of the provision tuned my mind to note that authors of

original literary and artistic works are entitled to copyright protection for their works. Therefore, **Intellectual Property Right** refers to **creations of the mind**, such as inventions, literary and artistic works, designs and symbols, names and images etc, used in commerce. In short it deals with the ownership of an idea or design by the person who came up with it. It is used in property law in which it gives a person the exclusive rights to a distinct type of creative design, meaning that nobody else can copy or re-use that creation without the owner's permission.

The Intellectual Property Law aims at **Safeguarding intellectual creators** and other producers of intellectual goods and services by giving them certain rights to own and in so doing, they control the use, reference and possession of those creations.

Thus, the question, whether the Appellant's work was registered or not has nothing to do with the current matter, that even without registration or agreement/contract Intellectual Property Right can be owned by one entity, typically the creator, in a form of sole ownership. Unlike right to **Patent** under **the Patent Act [Cap 217 RE 2002]** which requires the inventor to have registered his/her work in order to have its (patent) right, one do not have to register trademarks or copyrights in order to have the protection, though registration gives him more rights. **Section 3 of the**

Copyright and Neighbouring Rights Act which is about application of the statutes, does not provide that the statute applies for the registered works only. It protects the author even for his unregistered works. **Section 5(1) of the Copyright and Neighbouring Rights Act** states that authors of original literary and artistic works are entitled to copyright protection for their works. **Sub-section (3)** provides that works are protected irrespective of their form of expression, quality and purpose for which they are created. If the work is entitled to copyright protection as per **section 5** of the Act, **section 9** gives economic rights to the author and **section 8(f)** prohibits adaptation of the work without permission of the author. Apart from the above cited provisions, holder of the intellectual property work is also protected under **section 15** of the Act which states;

"The right of work protected under this Act shall be owned in the first instance by the author or authors who created the work"

Thus, the fact that the work has been innovated by somebody, it is intellectually owned by him. It is wrong for somebody else to interfere the same by using it without consent of the author.

Having seen the above explanation about intellectual property right, here is my **analysis on the grounds of appeal and submissions** filed by the parties;

I have given due consideration on the submissions of both parties and here is my analysis of which I make generally, without basing on each ground separately. I analyze them collectively as follows;

In his submission the appellant faulted the trial Magistrate for using the alternative phrases, to wit "**works listed in the pleadings**" and "**the listed works**" instead of the framed ones, namely "**ring back tones in dispute**" and "**literary works in dispute**" which were in the list of documents filed in court. The Appellant's Counsel alleged that the use of the said alternative phrases which neither appeared in the pleadings nor in the framed issues led to the denial of the appellant's right to damages/compensation and injunction for the infringements admitted by the defendant.

That compelled me to go through the records of the trial court and I noticed that it was an issue in the trial court's judgment that the disputed works were not among the ones listed in the pleadings. As rightly submitted by the appellant's counsel that the issues framed at the trial court before hearing were about **Ring back tones in dispute** and **literally works in dispute** but it is vividly

seen in her judgment, the trial Magistrate relied on what she termed the ***Disputed works*** and ***Works listed in the pleadings***. In her analysis the trial Magistrate relied on making comparison on the use of the appellant's work by the respondent, as against those listed in the pleadings, which was not the core issue of the matter. The real issue was a complaint by the Appellant that the Respondent has been using his works, to wit music/sound as Ring Back Tones for the subscribers of tiGO network without his (appellant's) consent.

As for the exactly **number of the appellant's works that the Respondent has been subscribing to its customers**, it is well known by the Respondent, the one who has been providing the disputed works to them. The basic issue here is infringement of the appellant's copy rights which has been successfully proved via print out messages (Exh. P6 and P7) that the Respondent had been using the Plaintiff's intellectual works by selling/offering them to tiGO subscribers. The records transpire that the respondent had been offering the appellant's audio works to tiGO customers at the rate of Tsh. 150/= per week for each subscriber.

In his submission the Respondent stated that the party to the case is bound by its **pleadings**, that the parties are precluded to testify on the matters not raised in the pleadings. As for the matter at

hand the Respondent alleged in his submission that the suit works were not pleaded in the plaint, in her analysis in the judgment the trial Magistrate was of the same view. Upon going through the original records I have noted that not all works mentioned in the pleadings were touched in the Plaintiff's case but some of them. This include **"Wajue Malaika ni Viumbe gani"** whose **Copyright Clearance Certificate** was tendered to court by the Plaintiff (PW1) himself and marked as **Exh. P4**. PW2 who was among the customers for tiGO who were interested with that work prescribed it from that network provider.

As for the issue of pleadings *vis-a-vis* the documents tendered to court as exhibits, it is misconception for the Respondent to allege that exhibits P3, P4 and P5 were not pleaded while the same had been added later under **Order XIII, Rule 1(1) and (2) of the Civil Procedure Code [Cap 33 RE 2002]** as additional documents that the Appellant was about to rely upon in his testimony. In law the additional documents that the party to a suit intend to rely upon for his/her case forms part of the pleadings. As for Exhibits P6 and P7, which are among the added documents, they are the print outs of the messages on deductions of Tsh. 150/= charges for the Appellant's songs that the Appellant's witnesses used to subscribe from tiGO. On that the plaintiff's

witnesses were trying to show the court that the Respondent used to charge its subscribers that said sum of money for the Appellant's songs/works they subscribe. Thus, I can agree with the appellant's Counsel that the trial Magistrate erred in law and fact when she declared that the Appellant submitted on the facts which were not pleaded. In fact the Plaintiff's (Appellant's) testimony in the trial court consists what was pleaded in the plaint.

Another thing that I have kept into consideration in my analysis is **Admission by the Respondent**. In their testimony as well as in their final submission at the trial court, the Respondent alleged that she obtained the appellant's work from SPICE VAS TANZANIA LTD as its agent. In short she admitted to have used the Plaintiff's work. As for the issue of consent the Respondent didn't produce any documentary evidence like contract/agreement, nor had she called any witness from that said company to prove the same. **"The one who alleges must prove"**, it is a common legal maxim in the legal jurisprudence. It has been incorporated in our law of evidence, including sections 110, 111, 112 and 115.

Section 110 of Tanzania Evidence Act [Cap 6 RE 2002] provides about Burden of proof which states;

"110.-(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist,

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"

Section 111 states about the person on whom burden of proof lies. The said section provides;

"The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side"

Section 112 is about burden of proof of particular fact which states;

"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person"

Basically the burden of proving fact lies upon a person who is in knowledge of that fact. This has also been provided under **section 115 of the Tanzania Evidence Act [Cap 6 RE 2002]** which states;

"In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him"

Therefore, it was upon the Respondent to prove at the trial court that she did not reap the appellant's work but obtained it from SPICE VAS TANZANIA LTD. She could have so done by providing documentary evidence on that or call the witness from that said company to justify her oral testimony. Otherwise the Respondent cannot evade the liability that she has been using the Appellant's works without his consent.

It is the view of this court that the trial Magistrate erred in law and fact for immensely failing to consider the admission of the Respondent on the usage of the plaintiff's artistic works without his permission.

In her submission the Respondent's counsel tried to transfer the liability to SPICE VAS TANZANIA LTD, the person whom she had sought to join as the **3rd party** but the trial court rejected upon the objection raised by the Appellant. But, joining the said person as a 3rd party, if not done by the Defendant/Respondent herself, the trial court as a master in adjudication, had it found necessary, could have so done by issuing instructions to the parties. On the

other way round, as the prayer to add the 3rd party was objected by the plaintiff and the court blessed the said objection, during trial, the Respondent had to bring any official member/staff from that said person/office (SPICE VAS TANZANIA LTD) to prove the said allegation. Failure of the Respondent to provide evidence on that during trial implies that the Respondent has no evidence to prove that what happened is the fault of SPICE VAS TANZANIA LTD and not her.

Upon going through the lower court's proceedings I have noticed that nature of evidence adduced by both parties is that, the Plaintiff was unaware and could have not known the involvement of SPICE VAS TANZANIA LTD in the disputed matter. It was therefore right for him not to include that person in the suit. Furthermore, I am of the considered view that the said SPICE VAS TANZANIA LTD was just mentioned by the Respondent as a person from whom she obtained the appellant's works in dispute, but there is no proof if the said allegation is true. That being the case, failure to join (*non-joinder*) of the said SPICE VAS TANZANIA LTD as the 3rd party has never led to any miscarriage of justice in the Civil Case No. 34 of 2017 Temeke District Court, the original case.

Though it is not directly stated, submissions of the Respondent's Counsel on the issue of denial of the trial court to join SPICE VAS

TANZANIA LTD as the 3rd party suggests *Trial de Novo* (retrial), but retrial is granted only if there is a possibility of contrary decision if the said order is granted. See **FATEHALI MANJI V. R [1966] EA 343**. In the current matter the lower court records transpire that the Respondent alleged to have got the disputable works from SPICE VAS TANZANIA LTD but there is no evidence adduced at the trial court to prove that.

Generally, non-joinder of SPICE VAS TANZANIA LTD as a 3rd party, whether it was a court's fault or not, it does not justify that Appellant's claims against the Respondent at the trial court were meritless.

From the above findings therefore, the fact that the work has been innovated by the Appellant herein, it is intellectually owned by him. It was therefore, wrong for the Respondent to use them without consent of the Appellant. As the Respondent has infringed the Appellant's Intellectual Property Right he has to indemnify the Appellant.

Having overturned the decision of the District Court, the issue to be determined now is, **the reliefs claimed by the Appellant**. In his plaint that he had presented at the District Court the

Appellant/Plaintiff sought for the following reliefs from the Respondent/Defendant;

1. The perpetual injunction restraining the Defendant, his agent and associates from using, selling and/or offering for selling to tiGO subscribers the audio visual works authored and owned by the Plaintiff.
2. The payment of the sum of Tsh. 2,000,000/= per month as loss of earning (Special Damages) from May, 2014, the date of accrue of cause of action to the date of institution of the suit which is equivalent to Tsh. 70,000,000/=.
3. The sum of Tsh. 800,000,000/= as General Damages for the infringement of the copyright.
4. The sum of Tsh. 30,000,000/= as Punitive Damages.
5. Interests at Commercial Rate on Special Damages from the date of the accrual of the cause of cause of action to the date of judgment.
6. Interests at Commercial Rate on General and Punitive Damages from the date of judgment to the date of full settlement of the decretal sum.
7. Costs of the suit provided for.
8. Any other relief that this court may deem fit to grant.

Now, **to what reliefs are the parties entitled?** From the analysis I have made regarding the evidence that have been adduced at the lower court, obvious the decision is for the Appellant, subject to the following consideration;

It has been proved that the Defendant was wrong to use the plaintiffs' artistic works through tiGO service provider without his consent. The plaintiffs claim for the **Special Damages** at the tune of Tsh. 70,000,000/= which is a loss of profit, this being a special damages it needs evidential proof. See the case of **ZUBERI AUGUSTINO V. ANICET MUGABE [1992] TLR 137**. This claim of Tsh. 70,000,000/= which is alleged to have arisen from the Appellant's monthly earning of Tsh. 2,000,000/= has not been proved at all, contrary to the principle of law which requires the specific (special) damages to be proved. Therefore, the claim of Special Damages being the compensation for the loss of business amounting Tsh. 70,000,000/= cannot be awarded for not being proved.

However, the appellant can be awarded General Damages. This is a position of the law in **Zuberi Augustino vs. Anicef Mugabe (supra)**. The same was held in **Brayson Nalogwa Kituli (Suing as Personal Representative of Onesphory Nalogwa Kituli)**

vs. Alex Sirimara Machare & 2 Others, Land Case No. 275 of 2007.

General Damages is awarded at the discretion of the court. It is a principle of law that the grant of the general damages is a jury question. The amount to be awarded is within the discretion of the court depending on the nature of the case, however the said discretion is supposed to be exercised judiciously. It is limited to the claims that the law presumes to be direct, natural or probable consequences of the act complained of, and not otherwise (see the case of **AFRICAN MARBLE CO. LTD V. TANZANIA SARUJI CORPORATION, Civil Application No. 38 of 1993, CAT at DSM**). As for the matter at hand, this damages can be awarded regarding the said legal position. Though the Plaintiff tried to show that he is seriously injured with the Respondent's act, I find the claim of Tsh. 800,000,000/= too excessive. I therefore grant it at the tune of Tsh. 200,000,000/=.

As for the **Exemplary (Punitive/Vindictive) damages**, it is used to be granted as a pecuniary compensation for the loss sustained by the plaintiff, but also as a kind of punishment to the defendant for his wrongful behavior and to deter dangerous conducts. See the case of **Deogratus Eugen Mallya @ Deogratus Mallya & Another vs. Alex Albani Lema &**

Another, Civil Case No. 4 of 2019, HC Moshi District Registry (unreported), see also ANGELA MPANDUJI v ANCILLA KILINDA [1985] TZHC 12; (11 May 1985).

Exemplary Damages is different from General Damages in the sense that, in the exemplary damages there must be proof of damage/injuries caused by the Defendant's malice, oppression or fraud. It is typically used to be granted in cases of intentional harm or extreme recklessness. The fact that the Plaintiff/Appellant have been real affected by the Defendant's/Respondent's act of using his intellectual works without his consent, apart from the General Damages, I find him entitled to the Exemplary/Punitive/Vindictive Damages at the tune of Tsh 30,000,000/= as claimed.

In upshot, the appeal is allowed. Decision is for the **Appellant/Plaintiffs** who is **entitled for the following reliefs from the Respondent/Defendant;**

1. Payment of **Tsh. 200,000,000/=** as **General Damages.**
2. Payment of **Tsh. 30,000,000/=** being the **Exemplary (Punitive/Vindictive) Damages.**
3. **Interest on the decretal sum** at the court's rate of **12% from the date of filing the suit** at the District Court **to the date of judgment** at High Court.

4. **Interest on the decretal sum** at the court's rate of **12%** from the date of judgment at High Court to the date of full payment.
5. **Perpetual Injunction** restraining the Respondent, his agent and associates **from using, selling and/or offering for selling to tiGO subscribers the audio/visual works** authored and owned by the Plaintiff.
6. **Costs** of the suit.



S.M. KULITA

JUDGE

21/02/2022

