IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 246 OF 2021

(Appeal from the Judgment and Decree of District Court of Ilala at Kinyerezi, in Civil Case No 56 of 2020, before K.C Mshomba, RM, dated 27th May, 2021.)

GEOFREY MULUNGU.....1ST APPELLANT

ALLY SALUMU.....2ND APPELLANT

VERSUS

JOHN THOMAS.....RESPONDENT

JUDGMENT

Date of last Order: 08/12/2021

Date of judgment 18/02/2022

E.E. KAKOLAKI J.

In this appeal the appellants are challenging the decision of the District Court of Ilala at Kinyerezi handed down on 27/05/2021 in their disfavour, in which the Respondent/Plaintiff had sued them for a tort of nuisance. The Respondent was complaining of the appellants' act of building sewage water chambers/toilets tanks to his house's walls, which discharged waste fluids into his house under lease, the nuisance which caused him loss of business as the then existing tenancy agreement was terminated by the tenant in July

2012. As can be gleaned from the record, in between the Respondent unsuccessfully tried to find legal remedies from the Ward Tribunal, and DLHT, in which before disposal of the matter before the DLHT, parties agreed to settle their matter out of Court, by renovating the plaintiffs house at a sum of 6,377,600 with a settlement deed signed in 2017 but not registered. However, Appellants did not honour their promise hence in 2018 Respondent renovated the said house alone. It is from that basis Civil Case No. 56 of 2020 on claim of tort of nuisance was filed by the Respondent praying for the following reliefs:

(i) payment of Tsh 30, 350, 000/= being the value of renovation of the damaged house,

(ii) payment of 115,200,000 being compensation for rent loss due to breached of tenancy agreement,

(iii) General damages to the tune of Tsh.150,000,000,

(iv) Interests to the Court's rate, Costs of the suits and any other reliefs deemed fit by the Court to grant.

In determining the case the trial court adopted four issues for the parties to prove or disprove the case through. These are:

(i) Whether there was a tort of nuisance as claimed by the plaintiff.

(ii) Whether the plaintiff has suffered damage caused by such nuisance.

(iii) Whether the defendants are liable for causing the nuisance claimed for.

(iv) To what reliefs are the parties entitled to.

After a full trial of the case and basing on the evidence of PW1 and PW 2 plus nine (9) different exhibits tendered in court, the District Court of Ilala was satisfied that, the Respondent's case was made out on the required standard and proceeded to enter Judgment in his favour. Appellants were therefore ordered to pay Tsh. 17,257,500 being renovation costs and Tsh.23,400,000/= being loss of income through house rent following the interrupted nuisance by the appellants, all making a total sum of Tsh.40,657,500 plus cost of the suit. Unpleased by that decision, Appellants lodged this appeal and preferred four grounds of appeal thus:

(1) That the trial Magistrate erred in law and fact by declaring the existence of tort of nuisance while elements that creates a tort of nuisance were not legally proved.

(2) That the trial Court erred in law and fact in relying on weak evidence adduced by Respondent.

(3) That the trial Court erred in law and facts by awarding unreasonable and excessive damages of Tsh 40,657,500/= against appellants while applying a wrong standard required in granting damages.

(4) That the trial Court erred in law by allowing that appellant to be represented by unqualified advocate

On the strength of the grounds above, the Appellants prayed this Court to quash and set aside the decision of Ilala District Court and allow the appeal, with costs.

At the hearing of the appeal the appellants appeared represented by Mr. Mwombeki Kabyemela, learned advocate while respondent enjoyed the services of Amini M. Mshana, learned advocate. By consensus of both parties, disposal of the appeal proceeded by way of written submission.

In his submission in chief in support of the appeal Mr. Kabyemela sought leave of the court to consolidate first and second grounds of appeal and argued them jointly and together, while the third and fourth grounds were argued separately. In this judgment, I am intending to determine them one after another in the order adopted by the learned counsel for the appellants. To start with the first and second grounds of appeal, it is the major complaint of the appellants that in the trial court elements creating a tort of nuisance

were not established by the Respondent and that the trial court was in error to find they were made out. Relying on the book of **Principles of Tort Law**, 4th Edition, (2000) by Vivienne Harpwood, Cavendish Publishing, United Kingdom, at page 237, Mr. Kabyemela argues the ingredients necessary for proving the Tort of Nuisance are three namely:

(i) Continuous interference.

(ii) The interference must be unlawfully.

(iii) Proof of suffered damages.

While appreciating the findings of the court at page 14 of the impugned judgment that the claimed nuisance continued until when it was fixed in 2018, he argued that there is no proof of continued interference thereafter as what was observed by the trial court when visited the locus in quo were mere traces of the of the already repaired damages. He said, since the law requires proof of continued interference of the peaceful enjoyment of land and since the case at hand was instituted in 2020 without proof of continued interference from 2018 then the claim of nuisance was not proved to the required standard. Mr. Kabyemela opined that, the Respondent instead would have resorted to another course apart from tort of nuisance as it was discussed in the case of **Paniel Lotta Vs. Gabriel Tanaki & Others** [2003]

TLR 312. He thus submitted, the trial magistrate was in error to find the elements were proved.

In his rebuttal submission Mr. Mshana challenged the elements of Tort of Nuisance as stated by Mr. Kabyemela charging that, in the book of **Tort Law**, by Catherine Elliot & Frances Quinn, (2009), 7th Ed, Pearson Education Limited, England, at page 281, the claimant under Tort of Nuisance must prove three elements namely:

(i) An indirect interference with the enjoyment of the land;
(ii) That the interference was unreasonable; and
(iii) That the interference caused damage to the claimant.

According to him all the ingredients were met as it is not in dispute as rightly submitted by Mr. Kabyemela when admitting in his submission in chief at page 3 that, sewage water was discharged and caused damage in the Respondent's house. He argued since nuisance is traced from 2012 to 2018 when it ceased that was enough to prove the said tort of nuisance since even a single or temporary if it is grave can constitute nuisance and is actionable. He also relied on the book of **Principles of Tort Law**, by Vivienne Harpwood. He stated further that, during the trial, it was proved there was an indirect interference with enjoyment of the land by the Respondent and

that, the same was unreasonable for discharging waste water to his house something which was too far beyond normal bounds of acceptable behaviour. And that such interference suffered him damages which was proved through pictures and the receipts of the costs he incurred. As regard to the case of **Paniel Lotta** (supra) relied on by the appellants he said, the same was distinguishable as it was addressing on the issue of Res judicata which was not a matter at dispute before the trial court and in this appeal. In his rejoinder Mr. Kabyemela had nothing new to counter the submission by the Respondent apart from reiterating his earlier submission in chief while stressing on the point that, the Respondent had a duty to prove that, there existed nuisance after 2018, which duty he failed to discharge, thus prayed for the court to uphold this ground of appeal.

Having chewed out the submissions by both parties in these two grounds let me start with the elements establishing the tort of nuisance. What is gleaned from the parties' fighting submissions on the issue is that, they agree in all ingredients save for continuity of the interference in the first element, in which Mr. Kabyemela submits, it form part of the ingredients while Mr. Mshana disputes that. In this point I embrace Mr. Kabyemela's stance that, in a claim arising from a tort of private nuisance the claimant has to prove

that, there was a continuous interference of enjoyment of the land. The reason behind this requirement is that, a single act giving rise to a complaint will not normally constitute private nuisance as can be remedied at a very low cost depending on its gravity and unreasonableness, thus a need to prove its continuity. Vivienne Harpwood in his book **Principles of Tort Law**,(Supra) at page observed that:

> *"**Actions for private nuisance arise when there has been continuous interference over a period of time with the claimant's use or enjoyment of land**. In **Delaware Mansions Ltd v Westminster CC** (1999), the Court of Appeal held that a local authority had a duty to abate a nuisance caused by tree roots undermining the foundations of a block of flats. That duty was not nullified simply because the damage had occurred before the freehold interest was obtained. **There was a continuous nuisance in this case which could have been remedied at very little cost if immediate action had been taken. There is no set period of time over which the events must occur to amount to a private nuisance. Much depends upon the neighbourhood and the other surrounding circumstances. Temporary interferences do not usually amount to actionable nuisances**. However, a temporary, but very substantial state of affairs may amount to a nuisance,*

as in ***De Keyser's Royal Hotel Ltd v Spicer Bros Ltd*** *(1914), in which noisy pile driving at night during temporary building works was held to be a private nuisance…****A single act giving rise to a complaint will not normally constitute private nuisance, though it could be a public nuisance****." (Emphasis supplied)*

I find the above observation by the learned author of persuasive value and adopt them as a principle of law that, continuity of interference is a necessary element in proving **tort of nuisance**. I wish however to put it clear that, there is no time limitation for gauging such time of continuity as that will depend on the circumstances of each case, as even a single action if proved to be substantial though existed for a short period of time might be actionable in law. In that regard it is now settled that in proving a tort of nuisance three elements must be proved that there was:

(i) Continuous indirect interference with the enjoyment of the land;
(ii) Interference was unlawful and unreasonable; and
(iii) Damage caused by that interference to the claimant.

Having so found let me now proceed to determine whether the element of continuous interference of peaceful enjoyment of land was proved by the Respondent. I find the same to have been proved as it is not disputed by

Mr. Kyabemela that, the alleged release of waste sewage water to the Respondent's house occurred in 2012 until when it was fixed in 2018. Thus, nuisance continued until when it was remedied in 2018. The assertion by Mr. Kabyemela that the Respondent ought to have proved its continuity until when he filed the suit in 2020 in my firm opinion, is not the requirement of the law. I so find as it suffices to prove that, nuisance existed for a certain period and not until the time when the matter is preferred in court. As to the element of unlawfulness and unreasonableness of the act, I find the same to be unlawful and unreasonable since the appellants act of building sewage water chambers to the walls of the Respondent's house was not only unlawful act but also unreasonable to be tolerated by any reasonable man. In that regard I find the case of **Paniel Lotta** (supra) relied on by the appellants distinguishable to the facts of this case, hence dismiss the first and second grounds of appeal for want of merits.

Next for determination is the third ground of appeal in which the issue is whether the damages of Tsh 40,657,500/= awarded to the Respondent was unreasonable and excessive and the trial Court applying wrong standard. It is Mr. Kabyemela's argument that, the award of Tshs. 40,657,500/- to the Respondent was arrived at basing on wrong principle of the law as

compensation of loss of income in daily basis is a specific damage and not general damage. And that, general damages are not quantified rather are awarded at the discretion of the court unlike special damages which are to be specifically pleaded and proved. He fortified his stance on proof of spefic damages by citing to the court the case of **China Henan International Vs. Salvanda Rwegasira (2006) TLR 220**. He further argued this court being the first appellate court is duty bound to interfere with the said award and rectify the error as it has such power, since the trial court when awarding the disputed amount to the Respondent did not state as to how the same was arrived at. He relied on the case of **Cooper Motor Corporation Vs. Arusha/Moshi Occupational Health Services** (1990) TLR 96 (CA).

In his reply Mr. Mshana contested the submission that the awarded amount was not proved as per the requirement of the law. He said the trial court judgment at page 19-21 made it clearly on how the amount was arrived at as Tshs. 17,257,500/= was awarded as specific damages out of Tshs. 30,350,000/=, being expenses incurred by the Respondent in renovation of the house supported by the receipts and contracts of hiring contractors. To him therefore, it cannot be stated the award was unfounded in law. As regard to the payment for compensation for loss of income he agreed with

Mr. Kabyemela on the principle that, specific damages has to be proved, in which he contended in this matter, the tenancy agreement proved it all but it is fortunate to the appellants, as the same was not highly awarded since the court did not award it as indicated in the tenancy agreement exh. P2. As the award was not justly and accordingly awarded, Mr. Mshana invited this court to re-evaluate the evidence in exhibit P2 and substitute it with the appropriate amount as there is room for the court to correct the error committed by the trial court. He therefore invited the court to dismiss the ground save for substitution of the damages awarded for the claimed compensation for loss of income which was lowly awarded. In rejoinder Mr. Kabyemela had nothing to add on this point.

It is true as submitted by Mr. Kabyemela that, specific damages must be specifically pleaded and strictly proved as rightly stated in times without numbers one of which is the case of **China Henan International** (supra) where the Court of Appeal stated thus:

> *"…for a claim of special damages to succeed, the special damages in question must be specifically pleaded and strictly proved in court before they can be awarded."*

In this case however, I disagree with Mr. Kabyemela's assertion that in awarding the disputed amount of Tshs. 40,657,500/= covering both damages for costs of renovation and compensation for loss of income, the trial court applied the wrong principle of law for not stating as to how the same was arrived at, as damages for costs of renovation is justified. To start with the damages for costs of renovation, as rightly stated by Mr. Mshana in its judgment at page 19 to 21, the trial court awarded Tshs. 17,257,500/= for that purpose after satisfying itself that, the Respondent renovated his house at his own costs and incurred that costs covering both materials and labour charges. I have no hesitation in holding that, this award was rightly arrived at as the same is supported by exhibits P8 and P9, the contract for renovation between the Respondent and one Alphonce Dickson, and the receipts for the materials and other costs incurred during renovation, respectively. As regard to the rest of the amount Tshs. 23,400,000/= awarded as compensation for the loss of income to the Respondent, I find it was wrongly awarded as the same was arrived at basing on the discretion of the court after the court had refused to rely on the tenancy agreement exh. P2, in which Mr. Mshana urged this court to substitute it with the proper amount basing on exhibit P2. As correctly noted above the fact which is

uncontroverted by both parties, damages awardable to compensate the loss of income must be specifically proved. In this case, the trial court did not consider exh. P2 as the base for proving the claimed damages and proceeded to award Tshs. 300,000/= per month at the court's discretion, instead of Tshs. 1,200,000/ per month as stipulated in the tenancy agreement exh. P2. This court is therefore satisfied that, the trial magistrate when awarding that damage applied a wrong principle of the law in which, I agree with Mr. kabyemela that, the case of **Cooper Motor Corporation** (supra) is applicable under the circumstances of this case where the court held thus:

> *"…before the appellant court can properly intervene, it must be satisfied that the judge in assessing the damages applied a wrong principle of law."*

Having so found the remaining disputed issue is what course should be taken under the circumstances. As alluded to, Mr. Mshana urged this court to substitute the awarded amount with the proper one basing on exh. P2. With due respect to the learned counsel, I am unable to accept that offer as to so do will be tantamount to allowing the Respondent to bring the appeal through back door. If at all the Respondent knew that the trial court in awarding him that damage applied a wrong principle ought to have appealed

against that decision but he failed to so do. Since the grant of the said damages for compensation for loss of income was wrongly arrived at the only option is to set it aside which order I hereby enter. Thus this ground partly succeeds.

I now turn to the last ground in which Mr. Kabyemela submits that during trial, Respondent was represented by unqualified advocate one Pamela John Kihumo with Roll No. 1413 as per section 39 (1) (b) of the Advocate Act, Cap 341 [R.E 2019] since she had not renewed her practising certificate for 3 years consecutively 2018 ,2019 and 2020. He contended that, the certificate was renewed on 29th September 2021, thus the entire proceedings and pleadings filed by her should be nullified. He attached to the submission the extract from TAMS system to prove that, by the time when the pleading were filed before the trial court the advocate was not allowed to practice. Relying on the case of **Islam Ally Saleh vs Akbar Hameer and Another, High Court of Tanzania at Dar es Salaam**, Civil Case No 156 of 2016 (Unreported) the learned counsel prayed this court to nullify the proceedings and the judgment originating therefrom.

In rebuttal, respondent Counsel challenged the appellants' act of annexing document to prove the case at appeal stage. He relied on the case of

Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Versus Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd [2005] TLR 41 at page 42 where the court held that, submission is a summary of arguments and cannot be used to introduce evidence. Secondly, the counsel contended that, this matter was supposed to be raised at the earliest possible moments during the trial. He was of the submission that, this objection is an afterthought hence the same ought to fail. According to him, the case of **Islam Ally Saleh Vs. Akbar Hameer and Another**, Civil Case No 156 of 2016 (HC-Unreported) cited by the appellants, is distinguishable to the present case because, firstly, in that case the High Court was the trial court and not Appellate Court as in the case at hand. Secondly, even if there was misconduct by the counsel, still there are contradicting authorities on the issue of advocate misconduct. Thirdly, Appellants were not prejudiced by the act misconduct and fourthly in the cited case objection was raised by the opposing party but in the present case it is raised against the party itself. And lastly he argued, if this ground will be entertained it is the respondent who will suffer more than the appellants by prolonging proceedings based on the appellants' negligence.

I have examined the fighting submissions by the parties in the light of this ground of appeal. I think this ground need not detain me much for the reasons I will soon state. Firstly, as rightly stated by Mr. Mshana the same has never been raised before the trial court, discussed and determined as tit was the case in **Islam Ally Saleh** (supra). Therefore it cannot be raised and determined at the appeal stage. This was the position in the case of **Farida and Another v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (CAT Unreported) where the Court of Appeal held that:

> *"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."*

Secondly, by attaching the extract from TAMS seeking to prove that the alleged advocate was unqualified, the appellants will be going against the laid down principle of the law that submission is a summary of arguments and cannot be used to introduce evidence as adumbrated in the case of **Tanzania Union of Industrial and Commercial Workers (TUICO)** (supra) where it was held:

> ***"It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence****. In principle all annexures, except extracts*

of judicial decisions or textbooks, have been regarded as evidence of facts and, where there are such annexures to written submissions, they should be expunged front the submission and totally disregarded." [emphasis supplied]

Thirdly, even if I were to consider the extract from TAMS which course I have refrained from taking, basing on the above position of the law the attached extract ought to have been expunged and disregarded hence no proof of the appellant's allegation. Fourth, in all fours the appellant acted negligently in choosing and engaging the advocate as he ought to have conducted due diligence to establish whether the said advocate is competent or not given the present era where ICT is in place to assist advocates' clients to access the services. With all those reasons I find the ground is without merit and dismiss it.

In the event, the appeal is partly allowed to the extent explained above in the third ground of appeal. And for avoidance of doubt the award of damages of Tshs. 17,257,500/= for the renovation costs is upheld. Otherwise the rest of the appeal is dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of February, 2022.

E. E. KAKOLAKI

JUDGE

18/02/2022.

The Judgment has been delivered at Dar es Salaam today on 18th day of February, 2022 in the presence of the Mr. Mwombeki Kabyemela, advocate for the appellants who is also holding brief for Mr. Amin Mshana, advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
18/02/2022