

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL No. 02 OF 2020

(Originating from civil case No. 10/2019 tried at Resident Magistrate court of Arusha at Arusha)

GABRIEL JOSEPH KAVISHE.....APPELLANT

VERSUS

ALLEN GEORGE TIGWELLA.....RESPONDENT

JUDGMENT

8th February & 4th march 2022

MZUNA, J.:

The Appellant being dissatisfied with the judgment of Resident Magistrate court of Arusha at Arusha in civil case No.10 of 2019, knocked the doors of this court challenging the Trial court's decision for not granting him special damages as well as general damages as pleaded.

The facts are not in serious dispute. Briefly stated, the Appellant and Respondent entered into a contract in which the Respondent was to supply a Land cruiser pickup worth 55,000,000/= to the Appellant. It was mutually agreed and indeed a down payment of US Dollars 17,000 equivalent to Tsh

38,675,000/= was paid to the Respondent pending finalization of the last payment within 14 days from the date of the contract. There and then a motor vehicle could be handed to the purchaser. Unfortunately, the Respondent failed to honour the contract, leading to the institution of the suit which proceeded ex-parte after the defendant failed to file the Written Statement of Defence within time set by law.

The trial court awarded the appellant the advanced money U\$ 17,000 or its equivalent without special or general damages though pleaded. In this appeal which proceeded by way of written submissions, Mr. Severine John Lawena, the learned counsel appeared for the appellant whereas Mr. Fidolin Bwemelo learned Advocate appeared for the respondent. The appellant advanced two main grounds of appeal which are as follows;

- i. That the trial Magistrate erred in law and fact when it failed to consider the evidence of the Plaintiff therein and thus failed to order payment of special damages as pleaded in the particulars of special damages.*
- ii. That the trial Magistrate erred in law and in fact when it failed to take into consideration that the Plaintiff is a business man and thus the breach caused him to suffer general damages due to the failure of the Defendant therein to honour the contract.*

Based on the above grounds, two issues emanate therefrom:- **One** whether the trial court properly evaluated the evidence and thereby arrive

at a just decision? **Two**, whether, failure to award compensation occasioned a failure of justice?

The evidence adduced by the plaintiff Gabriel Joseph Kavishe, PW1 and the only witness was that the defendant was introduced to him by one Mr. Elias Cosmas as a broker for plots, houses and cars. He had the idea of buying a car for tourists. He therefor entered into an agreement with the defendant so as to buy a car for him. The first payment of U\$ 17,000 equivalent to Tshs 38,675,000/- was indeed paid as per the copies of payment cheques tendered in court as Exhibit "A". The contract evidencing such agreement which was entered into on 07/12/2018, was admitted as A2. The plaintiff said that he wanted the said pick up car for tourists activities and anticipated that he was to get U\$ 250 per day.

The purchase price was Tshs 55,000,000/-. The remaining balance of U\$ 7000 (Tshs 16,325,000/-) was mutually agreed to be paid after the car landed Arusha for safe handling after 14 days. The respondent never handled the car as agreed.

The trial court in disallowing the general as well as special damages based its decision on the reasons that the appellant "failed to prove" it.

The Appellant's counsel is challenging that finding for the reasons that the trial Magistrate having found in the judgment that there was a valid contract between the Appellant and Respondent which was breached by the Respondent and thereby the Appellant incurred a loss ought to have awarded the specific damages of Tshs 5,000,000/- as stated in the evidence as well as general damages which was pleaded by a mere statement. It was his view that payment of both specific and general damages ought to have been awarded as both were proved and to decide otherwise is wrong.

The learned counsel referred this court to the case of **Tanzania Saruji Corporation v. African Marble Company Limited** [2004] T.L.R 155 at page 157 where Lugakingira J.A (as he then was) held that;

"The position is that general damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of."

Failure to award such damages both special and general one, according to the learned counsel is also attributed by the fact that the trial Magistrate failed to analyze the evidence and hence fell into an error. For the above stated reasons he prayed for this court to allow the appeal and award specific damages of Tshs 5,000,000/ and other amount as may be assessed by the court as general damages.

Responding to the above submission, the Respondent's Counsel argued that the findings of the trial court was correct and therefore should not be faulted because by ordering a refund of the advanced money put both parties in the same sate as they were before.

The learned counsel relied on the case of **Tanzania Saruji Corporation v. African Marble Company Limited** (supra), where it was held that general damages are granted basing on court's discretion but special damages requires specific pleading as well as strict proof. The Counsel further submitted that the cited case by the Counsel for the Appellant emphasizes on the rule that special damages are unlike general damages as they need be specifically pleaded and strictly proved. The Counsel continued to submit that, as per the case cited above it was also clearly stated that;

"The Defendant's wrongdoing must therefore have been a cause or a particular significant cause of the damage."

That, the appellant's allegation that it was intended to be used for tourist business was not stated in the contract agreement. He prayed for this appeal to be dismissed.

In a short rejoinder, the Appellant's counsel submitted further that since the money paid to the Responded did not result into the delivery of the

intended vehicle i.e., Toyota Land cruiser, the Respondent benefited himself by injecting the paid amount of 17,000 US Dollars in his businesses. The Counsel further submitted that the appellant intended to use it for tourist business and therefore incurred loss and damages as well. Further that the amount given to the Respondent to bring such vehicle could have been used to generate more capital.

This court having passed through both Parties' submissions, have noted the following undisputed facts. First the Respondent received U\$ 17000 in anticipation that he was to deliver a motor vehicle to the Appellant. He did not honour the agreement and therefore breached it. The allegation in the written submission by the respondent that it was not intentional or beyond the Respondent's control is something which is an afterthought. There was no defence filed which means that court ought to have entered judgment upon proof of the claim.

Order VIII Rule 14 (1) of the Civil Procedure Code Ac, Cap 33 RE 2019 clearly provides that:-

14.

(1) Where any party has been required to present a written statement... fails to present the same within the time fixed by the court, the court shall

pronounce judgment against him or make such order in relation to the suit or counterclaim, as the case may be, as it thinks fit.

(2) In any case in which a defendant who is required under subrule (2) of rule 1 to present his written statement of defence fails to do so within the period specified in the summons or, where such period has been extended in accordance with the proviso to that subrule, within the period of such extension, the court may—

(a) ... upon proof by affidavit or oral evidence of service of the summons, enter judgment in favour of the plaintiff without requiring him to prove his claim;

*(b) **in any other case, fix a day for ex parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim.***

(Underscoring mine).

If I may start with the first ground of appeal, the evidence of the Appellant clearly proved loss as the Respondent benefited from his wrongful acts.

On the failure to pay special damages as pleaded in the particulars of special damages, it was held in the case of **Zuberi Augustino Versus Anicet Mugabe** [1992] TLR 137, at page 139 the Court, the position I associate myself with that;

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

Of course, the Appellant had never conducted Tourist business before, all the same it is an undeniable fact that this fact that it was for tourist business and is specifically pleaded in the plaint. I am also aware as it was so held in the case of **Masolele General Agencies v. African Inland Church Tanzania** [1994]TLR 192 (CA) that:-

"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one..."

Based on the above authoritative case laws, I am convinced that specific damages was pleaded and somehow proved. I would grant the appellant Tshs 4,000,000/- as special damages.

On the issue of general damages, it is pleaded even by a mere statement and therefore needs no proof, the case of **Tanzania Saruji Corporation v. African Marble Company Limited** (supra) is clear on this. That said, I would award the Appellant Tshs 1,000,000/- as general damages. I am also fortified to this view by the decision in the case of **Cooper Motors Ltd v. Moshi/Arusha Occupational Health Services** [1990] TLR 96, that in "*ordering for the payment of general damages is the*

discretion of the court, but the amount ordered to be paid as general damages should not be either inordinate low or high."

That said, this court orders the Respondent to pay a total of U\$ 17000 plus Tshs 4,000,000/- special damages and Tshs 1,000,000/= as general damages to the Appellant plus costs of the suit.

Appeal allowed with costs.



M. G. MZUNA,

JUDGE.

04/03/2022.

