

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM SUB DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CIVIL APPEAL NO. 7 OF 2022**

*(Originating from the District Court of Ilala at Kinyerezi Civil Case No.175 of 2018)*

**A1 OUTDOOR (T) LIMITED.....1<sup>ST</sup> APPELLANT**

**MZALENDO AUCTION MART &  
COMPANY LTD.....2<sup>ND</sup> APPELLANT**

***VERSUS***

**EURO COMMERCIAL LTD.....1<sup>ST</sup> RESPONDENT**

**EURO CONSULTANCY LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

*Date of last order: 03<sup>rd</sup> October, 2022*

*Date of Judgment: 10<sup>th</sup> February, 2023*

**MGONYA, J.**

The Respondents herein sued the Appellants before the District Court of Ilala at Kinyerezi via ***Civil Case No. 175 of 2018***. It was the contention of the Respondents that, on the 3<sup>rd</sup> day of November, 2018 early in the morning the 2<sup>nd</sup> Appellant under the instructions of the necessary party unlawfully and without colour of rights invaded the office and the business premises of the 1<sup>st</sup> Appellant and locked the doors to the office Suite Number 423 located on the 4<sup>th</sup> Floor, Harbour View Towers

along Samora Avenue by chains, crossed steel pipes and two silver padlocks. That the said act was unlawful, illegal and trespass to the 1<sup>st</sup> Respondent premises.

That due to unlawful action of the Appellants, the Respondents suffered specific damages at a tune of **TZS 200,000,000/=** and general damages of **TZS 600,000,000/=** for loss of business income and reputation. As a result, the Respondents sued the Appellants claiming among other reliefs; for an order for payment of specific damages to a tune of **TZS 200,000,000/= Tanzanian Shillings Two Hundred Million only**, for payment of General Damages to the tune of **TZS 600,000,000/= Tanzanian Shillings Six Hundred Million only**, the interest at the rate of **25%** of the principal sum from the date when the cause of action arose to the date of the judgment and the interest at the rate of **7%** on the decretal sum from the date of the judgment to the execution of the decree.

On the other side, Appellants denied the allegations and on top of that, the Necessary party (1<sup>st</sup> Appellant) raised a counter claim against the 2<sup>nd</sup> Respondent claiming for payment of **USD 50,036.99** as undisputed amount in respect of the outstanding balance of **USD 130,761.70** due to be paid by the 2<sup>nd</sup> Respondent.

As it were, after the full trial the judgment was entered in favour of the Respondents while the 1<sup>st</sup> Appellant counter claim was struck out. Precisely, the Respondents were granted the following reliefs;

- (a) The 1<sup>st</sup> Appellant (necessary party) to pay the Plaintiffs Tshs. 50,000,000/= (Tanzania Shillings Fifty Million) as general damages,***
- (b) The decretal amount stated in (a) above shall carry interest at the court's rate of 7% per annum from the date of judgment to the date of final and full satisfaction; and***
- (c) The 1<sup>st</sup> Appellant (necessary party) to pay costs of the Suit to the Plaintiffs.***

Discontented by both the Judgment and Decree of the trial court, Appellants filed this appeal challenging the decision of the trial Court. The Memorandum of Appeal was armed with six (6) points of grievances, namely:

- 1. That, the learned Magistrate erred in law and in fact by giving out Judgment and Order basing on unclear and unreadable exhibit tendered by the Respondent,***

- 2. That the learned Magistrate erred in law and in fact by granting relief to the Respondent where no proof was justified in respect to loss of income,***
- 3. That, the learned Magistrate erred in law and fact by granting the general damage to the Respondent whereas the proof of loss of income alleged by the Respondent on the day the cause of action arose was rejected in court,***
- 4. That the learned Magistrate erred in law and fact by failing to define how loss of Respondents' reputation affected their operations being a reason for general damages,***
- 5. That the learned trial Magistrate erred in law and in fact disregarding in total defence evidence, and***
- 6. That without prejudice to the third ground of appeal the learned trial Magistrate erred in law and in fact quantifying fifty million (TZS 50,000,000/=) as general damages.***

Being saved with the amended Memorandum of Appeal, the Respondents filed a Notice of preliminary objection accusing the appeal as an abuse of court process and questioning the jurisdiction of this court.

Hearing of this Appeal proceeded by way of filing written submission. It was **Mr. Gideon P. Opanda** learned advocate who acted on behalf of the Respondents while Mr. Mvano Mlekano, learned advocate acted for Appellants.

Being aware that, what the Respondents' counsel challenge points of Preliminary Objection emanates from the filed grounds of appeal, I find it useful to determine the same in the course of determining the merit of this appeal.

Having so said, I now proceed to determine the Appellants' grounds of complaint on merit. To start with the 1<sup>st</sup> ground, I had enough time to go through the Appellants' counsel submission in support of the first ground. Reading between the lines what have been submitted by the Appellants, I do agree with the Respondents' counsel that, what has been submitted does not relate to what has been complained in the first ground of appeal. As alluded above, the Appellants in their 1<sup>st</sup> ground of complaint faulted the trial Magistrate decision that it relied on unclear and unreadable exhibit tendered by the Respondent. That being the case, what I expected in their submission in support of the appeal is the explanations on what are those unclear and unreadable exhibit relied by the trial court. Astonishingly, Appellants' counsel came out with a new story where he submitted on what trespass is and went on to deny

that there was no proof of the same. Nothing was submitted in relation to the raised complaint. Therefore, for the interest of justice, I opt to determine the 1<sup>st</sup> ground of appeal solely without referring to what was submitted purporting to support the said ground. In doing that, this court has to go through the trial court's proceeding to ascertain whether there was any tendered document which was objected by the Appellants on the ground that it was unclear and unreadable exhibit.

Going through the trial court's records, it is from page 30 of the typed proceedings where the hearing of the suit commenced. After a thorough perusal of the proceedings, it is revealed that there were five exhibits which were tendered by the Respondents' witness. Among all exhibits, it is only Exhibits P1 (the Photographs) which were objected by the Appellants' counsel. The basis of his objection was on the way of tendering electronic evidence as provided under **Section 18 of the Electronic Transaction Act** and not that the exhibits were not clear or unreadable. That being the facts, I do agree with the Respondents' counsel that the 1<sup>st</sup> ground of appeal has been raised as a new fact.

As rightly submitted by the Respondents' counsel the Appellants never complained on the ground of unclear or unreadable exhibit before the trial court and also the complaint

that the trial Magistrate erred in law to decide the issue of trespass is not among the ground of complaint filed before this court.

It is the settled law that parties to a suit are bound by their pleadings. In ***ASTEPRO INVESTMENT CO. LTD VS. JAWINGA COMPANY LIMITED, CIVIL APPEAL NO. 8 OF 2015*** (CAT-unreported) it was stated that:

***"It is the trite law that parties to a suit are bound by their pleadings."***

Being guided with the above principle to the present Appeal, this court finds that, since the ground of unclear exhibit was never raised by the Appellant nor determined by the trial court, the same cannot be raised and determined at this Appeal stage. The law is very clear that, the higher Court cannot deal with an issue not raised before the trial court or the first appellate court. In the case of ***FARIDA AND ANOTHER VS. DOMINA KAGARUKI, CIVIL APPEAL NO. 136 OF 2006, CAT (Unreported)***, the Court of Appeal had this to say:

***"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."***

In the light of the above analysis, this court conclude that the **first ground of appeal is destitute of merit.**

With regards to the complaint in grounds 2,3,4, and 6 of the Appeal which were jointly argued, the thrust of complaints in these grounds is the award of general damages to a tune of **TZS 50,000,000/=** to the Respondents. The Appellants' counsel contention premised in the arguments that; there was no justification for the trial magistrate to award **TZS 50,000,000/=** to the Respondents. It was the learned counsel submission that, the trial court having reached a conclusion that the office was closed only for one day on Saturday, then there was no justification for awarding general damages in the sum of Fifty Million.

He argued further that, having established that the loss of income was not proved, the trial Magistrate erred in law and facts by considering the same in awarding general damages. According to him the awarded general damages is exorbitant and goes contrary to the principles of fair trial. The Respondents merely alleged to have suffered reputational loss of which was never proved in trial hence the awarded general damages have no legal basis. To bolster his argument the Appellants' counsel referred this court to various decision which laid down the principles in awarding general damages to mention few, the



cases of ***MAWENI LIMESTONE LIMITED VS. DAMATICO GENERAL SUPPLY, CIVIL APPEAL NO.28 OF 2018 CAT AT TANGA (Unreported) and ANTHONY NGOO & ANOTHER VS. KITINDA KIMARO, CIVIL APPEAL BO.25 OF 2014 CAT at Arusha (Unreported).***

On the adverse side, the Respondents' counsel strongly defended the finding of the trial court. He responded that, the act of tortious liability of trespass of entering into the physical premises of the Respondents without lawful order of the court and locked the door, legally attracts damages.

In his rejoinder, the Appellants' counsel reiterates what he submitted in his submission in chief.

As far as the award of general damages is concerned, the law is settled that, general damages are awarded after consideration and deliberation of the evidence on record to justify the award. The trial court has discretion in the award of general damages, that the discretion must be exercised judiciously and in accordance with the evidence in record. See ***MAWENI LIMESTONE LIMITED VS. DAMATICO GENERAL SUPPLY*** (Supra).

More to it, general damages have been well expounded in the case of ***ANTHONY NGOO AND DAVIS ANTHONY NGOO V. KITINDA KIMARO*** (Supra) that:

***"general damages are those presumed to be direct or probable consequences of the act complained of."***

In the appeal at hand, the Respondents claimed the general damages to a tune of **TZS 600,000,000/=**. However, the trial court found the same to be in excessive hence it awarded **TZS 50,000,000/=** the amount which was strongly disputed by the Appellants on the reasons that the award is exorbitant and without any legal justification.

In the case of ***RAZIA JAFFER ALI V. AHMED MOHAMEDALI SEWJI & 5 OTHERS [2006] TLR 433***, this Court referred the cases of ***LIVINGSTONE V. RAWYARDS COOL CO. (1880) 5 APP. CAS. 25, 39*** and ***VICTORIA LAUNDRY V. NEWMAN [1947] 2 KB 528, 539***, to emphasize that, the purpose of general damages is to put the party who has been injured or suffered loss in the same position he had before he sustained the wrong for which he is seeking compensation.

This court being the first appellate court has a noble duty to ascertain as to whether the trial court in awarding the general damages directed itself to the principle guiding the award as indicated above. However, I am aware of the legal principle that the higher court should not interfere the award of general

damages except when it is satisfied that the trial court acted on a wrong principle of law, or has misapprehended the facts or for other reasons made a wholly erroneous estimate of the damage suffered. See. ***PETER JOSEPH KILIBIKA & ANOTHER V. PATRIC ALOYCE MLINGI, CIVIL APPEAL NO. 37 OF 2009 (Unreported)***.

I have had enough time of going through the trial court records as well as the written submissions in support and against the appeal. It is garnered from the parties' pleadings and the submission that there were ongoing conversations between the 1<sup>st</sup> Appellant and the Respondents whereby the 1<sup>st</sup> Appellant was claiming the outstanding payment from the Respondents. Efforts to settle it through arbitration failed as result the 1<sup>st</sup> Appellant entered into a contractual relationship with the 2<sup>nd</sup> Appellant (debt collector) to collect the said amount from the Respondents. In her effort to get the money paid, the 2<sup>nd</sup> Appellant on 03/11/2018 locked the Respondents office an act which led to the Appellants to be sued by the Respondents.

In a bid to justify the compensation the Respondents alleged to have suffered reputational and loss of business. After hearing the trial Magistrate held that there was no proof to justify the award of specific damages as the office was locked on Saturday and for a single day but he granted general damages.

Upon scrutinizing the evidence on record, I do agree with the Appellants that awarded general damages was exorbitant and it goes contrary to the principle of fair trial. The reason is; it is evidenced that the office was locked on **Saturday** when there was no any business which was going on and the said office was not open. When cross examined PW1 do not open their office on **Saturday** and **Sunday**. Therefore, the Appellants were not around rather it is PW1 who informed them about the incident. Also, the Respondents' witnesses testified that on **Monday** the said office was open although it is silent on who and how the same was opened.

More to it, apart from the Respondents' officers, PW1 (Co tenant) and the security guards, no any witness who testified before the court that, on the material date he went to the Respondents' office but he missed the service because the office was locked.

On that basis this court finds that, the Respondents failed to perform their statutory obligation to prove before the court how their status/ reputation was before the incident and after the incident to attract the award of such reparation that would restore them in the original position they had before the accident occurred.

As it has been decided by the lower court that there was no proof of loss of business, this court finds the same even in the issue of reputation. With regard to the circumstance of this case, the award of general damages lacks legal support. The trial Magistrate applied the wrong principle in his assessment of the award as a result the general damages was granted as a gift contrary to the requirement of the law.

In the view of the above deliberation and finding grounds 2,3,4 and 6 **have merit hence allowed.**

Turning to the 5<sup>th</sup> ground of appeal where the Appellants complained that, the evidence of defence side was completely disregarded. This ground should not detain this court much. Looking from the trial court judgment, the evidence of both parties was considered although the weight given to it depends on the analysis made. Therefore, **this ground is destitute of merit.**

For the reasons I have endeavoured to discuss above **I allow the appeal to the extent expressed above.**

Each party to bear its own costs.

It is so ordered.

Right of Appeal Explained.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya".

**L. E. MGONYA**

**JUDGE**

**10/02/2023**

ORIGINAL