IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL N0. 126 OF 2022

(Arising from the Judgment and Decree of the District Court of Ilala at Samora in Civil Case No. 85 of 2018 delivered on 17th April 2020 by Hon. E. LUKUMAI)

LETSHEGO BANK (T) LTD..... APPLICANT

VERSUS

DAUDI E. LUKAKA .....RESPONDENT

MACHO MENGI LIMITED.....RESPONDENT

JUDGMENT

21st November 2022 & 24th February2023

MKWIZU, J:

The genesis of this suit is a secured loan agreement between the appellant and 1st respondent for a total amount of 7,000,000/= (seven million Tanzanian Shillings) repayable in 12 months period. The 1st respondent could not however manage to repay the entire loan amount leading to the confiscation and auctioning of his offices' video production properties by the respondent.

Aggrieved by the defendant's action, 1st respondent rushed to court. He instituted Civil case No 85 of 2018 seeking specific damages of

56,000,000/=, payment of Tsh 90,000/= per day being the loss of income from the date of confiscation to the date of judgment, general damages plus the costs of the suit.

The trial court's decision was in favour of the 1st respondent. Confiscation of his property was declared unlawful. And he was awarded compensation to the tune of 50,000,000/=, 10,000,000 loss of income, and 7% interest in the decretal amount from the date of judgment to the full payment.

Unhappy with the trial court's decision, the Bank filed a memorandum of appeal with a total of seven (7) grounds of appeal to wit:

1. *That the Honourable trial magistrate erred in law in awarding compensation of Tshs. 50,000,000/= being specific damages without strict proof of the same and contrary to the findings of the court.*
2. *That the Honourable trial court magistrate erred in law in awarding compensation of Tsh 50,000,000/= as compensation and restitution for unlawfully confiscated properties a relief neither pleaded nor claimed by the respondent in his pleadings.*
3. *That Honourable trial magistrate erred in law and inin awarding the respondent the sum of Tsh 10,000,000/= as damages for the loss of income without the same being property proceed.*
4. *That the trial Magistrate erred in law and in facts in failing to provide reasons foe disagreeing with the Appellants adduced evidence and accepting and agreeing with the first respondent evidence.*

5. *That the Honourable trial magistrate erred in law and in facts in deciding that the confiscated properties were not pleaded as loan security by the first respondent.*
6. *That the Honourable magistrate erred in law and in facts in that decision is not supported by the evidence on record.*
7. *That the trial court magistrate erred in law and in fact by failing to analyze the evidence on record.*

The service of the 2nd respondent was effected through publication. He neither entered appearance nor filed any reply to this appeal hence this *ex-parte* judgment against him.

It is worth noting here that, this matter was handled by my sister Mgonya J who ordered the appeal to be argued through written submissions setting a plan for that purpose. When the parties came before me on 21/11/2022, I notified them of the position. Mr. Amoni advocate for the 1st respondent informed the court that they were not able to file reply submissions as directed the reason being late service on them with the written submissions by the appellant and that they had on 1st October /2022 written a letter to the court to that effect. They for that reason prayed for leave to file their reply to submissions out of time. Mr. Komba who represented the appellant had no objection to the prayer. Leave was thus granted, and the Respondent's counsel was required to file his reply to submission on 28/11/2022 and rejoinder if any on 5/12/2023.

Submitting in support of grounds one and two of the appeal, Mr. Leonard Masatu for the appellant contended that compensation of Tshs 50,000,000/= was awarded without being specifically pleaded in the plaint nor proved by the plaintiff. Supporting his argument with the decision in

Zuberi Augustino Vs Ancet (1992) TLR 137 and **Xiubao Cai V Maxinsure (T) Limited and Mohamed Said Kiaratu** , Civil Appeal No 87 of 2020 and **National Insurance Corporation and another Vs China EngineeringConstruction Limited,** Civil Appeal No. 119 of 2014 (All unreported), he said, the testimonies and evidence presented in the court by the plaintiff(1st Respondent) did not specifically prove and strictly lay down particulars of the claimed special damaged and therefore the amount of Tshs 50,000,000/= awarded as special damages and without providing reasons was contrary to the law.

Regarding the 10,000,000/= award for loss of income, the appellant's counsel said the same was awarded without proof. While acknowledging that general damages are awarded at the court's discretion, he said that discretion must be judiciously by giving reasons after taking into consideration the entire evidence in the record. Reference was made to the cases of **P.M Jonathan V Athuman Khalifan**, (1980) TLR 175 and **Storms Vs Hutchison 1905 A.C 515**.

Elaborating on ground four of the appeal, the appellant's counsel submitted that the trial court's decision lacks a reason for not accepting the appellant's evidence. To him, the confiscation was procedurally legal in terms of the loan agreement between the parties. DW3 informed the court that the Notice of default was served to the 1st respondent through Chairman Peter Msele and confirmed by Dw1. And the findings that DW1 and DW3's testimony is contradictory in respect of how the notice was served is an issue not born by the records as it is evident that the recovery

process together with the entire confiscation was well attended by the local authority officers and this is confirmed by DW3.

He on grounds five blamed the trial magistrate for deciding that the confiscated properties were not pledged as loan security by the 1st Respondent contrary to the evidence adduced particularly the Loan agreement signed by the parties admitted as exhibit D1 which indicated that the pledged properties are subject to sale in case of default by the borrower. He on this point relied on the cases of **Barmal Kanji Shah and Another V Shah Depar Devji** (1965) EA,91; **Maltex Commercial Supplies Ltd & Another V Euro Bank Ltd (in liquidation)** HCCC No. 82 of 2006 **Bank of Africa Tanzania Ltd Vs Rose Miyago Assea, Commercia**l Case No. 138 of 2017, HC of Tanzania at Dar es salaam (unreported).

Arguing the last two grounds together, the appellant's counsel faulted the trial magistrate for failure to properly evaluate the evidence on the record, particularly on the validity of the loan agreement, pledged properties, and the terms that mandated the appellant to auction the collaterals. Citing the court section 110(1) and (2) of the Evidence Act, and the case of **Selemani Rshidi Kibwasali V Bartholews Kayira & Another**, Civil Appeal No 64 of 2007 (unreported), the appellant's counsel censured the trial court for shifting the burden of proof to the appellant requiring her to prove that the confiscation process was lawful. He lastly urged the court to nullify and quash the entire proceedings, judgment, and decree of the Court.

In rebuttal, 1st respondent's counsel said, the prayer for the payment of 62,000,000/= in the plaint was brought as an alternative in case it is not possible to have the confiscated items returned. And that the figure of 62,000,000/= is an estimated value of all the confiscated properties because the receipt was taken during confiscation. He contended that ground two is meant to mislead the court because all the awards emanated from the 1st respondent's prayer in the plaint. The 50,000,000/= awarded amount is a corresponding amount of the confiscated properties.

Responding to ground three of the appeal, 1st respondent's counsel stated that general damage need not be strictly proved as the same is awarded at the discretion of the court. The 10 million Tanzania Shillings general damages were correctly awarded. He on this relied on the decision of **Yara Tanzania Limited Vs Charles Aloyce Msemwa &2 Others.** Commercial Case No. 5 Of 2013, Hc of Tanzania Commercial Division at Dar Es Salaam(unreported)

On the 4th ground, the 1st Respondent stated that both parties were heard, their evidence analyzed and the reasons for agreeing or disagreeing with certain evidence were duly given by the trial court. He supported the trial court's findings that the motor vehicle with registration No. T 721 CPA, Toyota Spacio is the only valid security subject of the loan in question after doubting the credibility of the list of collateral tendered in court as the property eligible for the realization of the amount secured is the mortgaged property.

He also opposed the complaint on improper evaluation of evidence by the trial court, raised on the last two grounds, contending that there was a proper evaluation of evidence. He lastly prayed for the dismissal of the appeal with costs.

The appellant's counsel's rejoinder submissions are essentially a reiteration of his submissions in chief and therefore I will refrain from reproducing them in this decision.

I have read the party's submission for and against the appeal and the trial court's records. I find it pertinent to point out that, being a first appellate court, this court is duty-bound to - evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and come to its independent decision if need be. There are authorities without numbers on this position including **The Registered Trustees of Joy in the Harvest v Hamza K. Sungura**, Civil Appeal No. 149 of 2017 (unreported) where it was observed thua:

> *"The law is well settled that on first appeal, the court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand".*
>
> *…the obligation imposed on the first appellate court in handling appeal is not a light duty, it is a painstaking exercise involving rigorously testing of the reliability of the findings of the court below".*

The re-evaluation will entail an assessment of the reliability of the trial court's findings and measuring whether the burden of proof placed on

the plaintiff was fully discharged as per the requirements of sections 110 and 111 of the Evidence Act, Cap 6 RE 2019 which provides as follows:

> *"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".*

There is no dispute that the 1st respondent and the Appellant were in a lender-borrower relationship. That the 1st respondent defaulted to repay the loan. It is also not in dispute that the claimed video production properties belonging to the 1st respondent were auctioned to realize the outstanding loan amount.

There were three issues framed by the trial court. Whether the confiscation was lawful, whether the confiscated properties were pledged as security and the last issue was the reliefs. The first three grounds of appeal center on the last issue of the reliefs that were prayed for and awarded by the trial court. The fifth ground of appeal stems from the 2nd original issue at the trial court questioning whether the confiscated properties were among the pledged securities and the fourth, sixth, and seventh grounds are a grievance on how the evidence was evaluated and considered.

I propose to begin with the fifth ground of appeal questioning whether the confiscated properties were pledged as securities by the 1st respondent. There is no dispute that the parties had a valid loan agreement. DW1's testimony was to the point that the 1st respondent's office equipment and one vehicle were pledged as security. The loan

agreement together with all its annexures was tendered as an exhibit in court and was admitted as exhibit D1 without objection from the 1st respondent (original plaintiff). One of the attachments to the loan agreement is a list of the pledged securities including the video production equipment namely the Camera, projectors, computers, printer, screen, studio projector, chairs/sofa, TV, Radio, and others. The list is duly signed by the 1st respondent.

I have taken trouble also evaluating the entire cross-examination by the 1st respondent's counsel to DW1. There is not even a single question that was directed to challenge the mortgaging of the auctioned video production properties by the 1st respondent designating his acceptance of the fact. This principle was well articulated by the Court of Appeal in **Nyerere Nyague v R,** Criminal Appeal No. 67 of 2010 (unreported) where the court held:

> *"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said."*

The list of collateral properties attached to the loan agreement was discredited by the trial court for lacking the signature of the co-owner of the said properties. I do not buy the trial court's findings on this point, because the issue of co-ownership is the trial court's own version neither articulated in the document itself nor the 1st respondent's evidence. Had that been the case, the 1st respondent would have so stated. His silence on the matter is a clear indication that he had no reservations about the authenticity of the said document. The obvious from the evidence on the

records is that the auctioned properties are among the pledged properties by the 1st respondent.

I have as well examined the loan agreement. It has specific terms regarding the moments of the breach. As rightly submitted by the appellant's counsel, clause 5.3 provided for the consequences of default by the borrower. The clause reads:

> *"Kwamba baada ya kushindwa kutekeleza taratibu za mkopo kulikofanywa na nkopaji, Mkopeshaji atakuwa huru kwa mujibu wa sheria, pasipo kutumia msaada wa mahakama ya kisheria kuchukua umiliki na mali iliyowekwa dhamana iliyoorodheshwa kwenye* ***kiambatanisho 2*** *kwa ajili ya kuuza. Endapo Mkopeshaji ataamua kuuza mali, mkopeshaji atamlipa mkopaji salio lolote linalotokana na mapato ya uuzaji wa mali hiyo baada ya kutoa salio lililosalia la mkopo,riba, ada za adhabu, garama za uuzaji na/au garama zilizoingiwa kwenye mchakato wa urejeshaji deni"*

The above clause mandates the lender upon default by the borrower, and without recourse to court of law to take possession of the collateral and sale the same by public auction to the Highest bidder. This is what the parties here in had agreed upon.

The sanctity of contract principle states that once parties competent to contract for a lawful consideration with a lawful object entere into an agreement freely, the contract entered becomes sacrosanct. That is, the parties to the contract become bound by the terms and conditions and each must fulfill his/her part of the bargain. The position was emphasized

in the case of **Unilever Tanzania Ltd vs. Benedict Mkasa Trading as Bema Enterprises**, Civil Appeal No. 41 of 2009 the Court stated:

> *"Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves... [emphasis added].*

Also, in **Simon Kichele Chacha vs. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, Court of Appeal of Tanzania citing at Mwanza observed;

> *"It is settled law that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly Stated* ***in Abualy Abhai Azizi V. Bhatia Brothers Ltd*** *[2000] T L.R 288 at page 289 thus; The principle of sanctity' of the contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement" [Emphasis Added]*

The consent given to the terms of the loan agreement by the 1st respondent is an expression of his willingness to be bound by whatever outcome of the agreed covenants. Thus, the sale of the claimed properties resorted to after failure by the 1st respondent to reservice the loan falls equally under the agreed terms and is acceptable. I am on this persuaded by the English decision cited by the appellant counsel in **RTS**

Flexible Systems Ltd V Milkorei Alis Muller Gmbh and Co Ltd(UK Production)(2010) UKSC14, where it was observed that

> *"Whether there is a binding contract between the parties and if so upon the terms depends upon what they have agreed. It depends not on their subjective state of mind but upon consideration of what was communicated between them by words or conduct and whether that leads objectively to a conclusion that they intended to create legal relations…"*

The contention however was on the issue of Notice of default, while Pw1 says the 1st respondent was issued with the notice, the 1st respondent maintained the opposite position. I have evaluated the evidence, the loan agreement doesn't provide for the notice issue. The borrower was only required to pay the monthly installment, a failure that would result in selling the pledged properties. Nevertheless, in their evidence DW1 informed the court that they issued the 1st respondent with a default notice through the local authority (Afisa Mtendaji), the evidence that was supported by DW3. And further that the said notices (exhibit P1) were again tendered without objection from the 1st respondent. His silence, to my view, means acceptance of what the witness was telling the court. The fifth ground has merit.

Even if the confiscation was to be considered unlawful, still the award of 50,000,000/= compensation by the trial court would not have survived. This takes me to grounds one and two of the appellant's memorandum of appeal. As rightly submitted by the appellant's counsel, specific damages must be **specifically** pleaded and **strictly** proved. This is the position in

the case of **Zuberi Augustino Mugabe vs. Anicet Mugabe** [1992] T.L.R. 137 where the court held:

> *"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved. Cost of repair was pleaded but not proved."*

And in **Xiubao Cai and Maxinsure (T) Ltd's** case (supra) this Court, stressed that.

> *"Special damages are such a loss as will not be presumed by law. They are special expenses incurred or monies actually lost. For example, the expenses which a plaintiff or a party has actually incurred up to the date of the hearing are all styled as special damages; for instance, in personal injury cases, expenses for medical treatment, transportation to and from hospital or treatment centre, etc... Unlike general damages, a claim for special damages should be specifically pleaded, particularized, and proved. I call them three P's."*

Though paragraph one of the amended plaint assets the claim of 62,000,000/= as the amount equal to the properties illegally confiscated by the appellant, no cogent proof was presented by the plaintiff (now 1st respondent) to substantiate the claim. He did not specifically prove this claim apart from reiterating the same assertion in his evidence where he was recorded at page 15 of the trial court proceedings to have said "***the value of the confiscated properties was Tsh 62,000,000/=*** " and answering a question during cross-examination PW1 said, "***I have a receipt for purchase of the confiscated properties but some were***

taken during the confiscation". There was not even an attempt to tender the receipts that remained in his custody.

At page 25 of the trial court's decision, the trial magistrate did acknowledge the plaintiff's failure to prove the value of each specific property to the tune of 62,000,000/= but went ahead to award him 50,000,000/= in lieu thereof contrary to the principles stated above. Certainly, this award was without justification. The two grounds therefore succeed.

The third ground faults the trial court for awarding the plaintiff (now 1st respondent) 10,000,000 as loss of income without proof of the same. It should be stated right away here that, both the plant and the plaintiff's evidence were not specific on this claim. The amended plaint for instance contains two versions of the claim on specific damages. In paragraph 3, of the amended plaint, the plaintiff asserts 56,700,000/= as a loss of income incurred after the illegal confiscation of his properties by the appellant. And in page 3 of the same amended plaint the following reliefs were pressed by the plaintiff.

i. *Specific damages shall be calculated based on my daily business calculations whereby per day is Tsh 90,000/= x7 per week equal to Tsh 630,000/=, and Tzs 18,900,000/= per 3 months equal to Tzs 56,700,000/= until final settlement*
ii. *N/A*
iii. *That the plaintiff prays for total amount which I was supposed to receive in my business per day which was 90,000/= x7 x30 days until the final settlement*

Testifying on this claim on page 16 of the trial court's records, PW1 said

"The said properties were the source of my income, I was earning Tshs 70,000- 100,000/= per day, they were varying depending on the condition of business. I have incurred loss of about 2700,000/= per month due to the confiscation of my properties. It is about 15 months now since my properties were confiscated. Making a total of about 33,000,000/="

This is specific damages claim which ought to have been specifically proved. The plaintiff's evidence was at variance with the claim in the plaint raising doubt about its legitimacy. The evidence adduced is more speculative in nature that even in an appropriate case, the claim would not have gained any legal validity to have it allowed. Being redressive in nature, the claims for the loss of income need to be realistic. Enough to conclude here that the trial court was in error in awarding the loss of income claim which was not proved.

The fourth, sixth, and seventh grounds of appeal are also allowed. It is from the above discussion that there is a failure by the trial magistrate to properly evaluate the evidence on the records. Had the trial magistrate objectively evaluated the evidence on the records, he would have realized that the plaintiff's evidence was weak to justify the tabled claims.

On the way forward, the Court in **Paulina Samson Ndawavya v Theresia Thomas Madaha**, Civil Appeal No. 45 of (Unreported) said:

"Legally, if a plaintiff fails to prove his case to the required standard, the said case crumbled without having to call the defence to fight it.

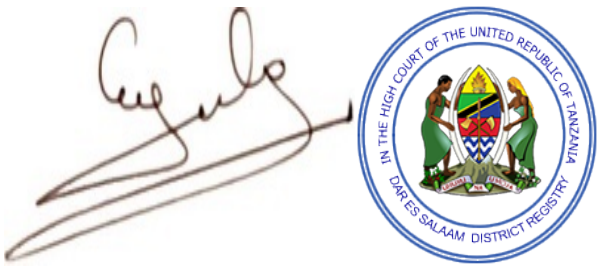
The court added that:

> "*it is again trite that the burden of* ***proof never shifts to the adverse party until the party the whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case****" [Emphasis supplied)*

All said and done, this appeal is allowed. The trial court's decision is quashed, and orders thereto are set aside. The costs to follow the event are as usual.

Dated at Dar es salaam this 24th Day of February 2023

COURT: Right of Appeal explained



E. Y Mkwizu
Judge
24/2/2023