IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

PC CIVIL APEPAL NO 17 OF 2022

(Arising from Civil Appeal no 11 of 2021 of Bunda District, Originating civil case no 12/2021 of Kenkombyo primary court)

EZEKIAL THOMAS .....APPELLANT

VERSUS

MAGOTI MAIGA ..... RESPONDENT

JUDGMENT

20th & 21st April, 2023

F. H. Mahimbali J:.

At the trial court, the respondent unsuccessfully sued the appellant for a claim of 1,733,160 allegedly loss of his crops destructed by the appellant's cattle. Dissatisfied by that finding of the trial court he appealed to the District Court of Bunda (first appellate court) where partly the appeal was allowed by varying the decretal sum to 800,00/= from the claimed amount of 1,733,160/=.

Not amused with that decision, the appellant has appealed to this court on the following seven grounds:

1) That, Respondent's appeal before District Court was time barred by statute as trial court delivered its judgment on 19/5/2021 but both position of appeal filed and seal of learned advocate engaged for drawing petition of appeal clearly shows that it was prepared at Bunda on 23/05/2021 after 34 days had passed from the date of judgment.
2) That, petition of appeal filed by the respondent before District court was incompetent bad in law for telling lies that it was presented for filing on 17/6/2021 a fact which is openly not true as petition of appeal filed clearly shows that it was written at Bunda on 23/6/2021 hence, cannot be presented before court on 17/6/2021 before it was written.
3) That, trial court in deciding the case in respondent's favor failed to note and to appreciate that Respondent's evidence before trial court was that of hearsay evidence in admissible in law.
4) That, Appellant District court erred both in law and in fact for failing to heed that Respondent failed to prove his case on the balance of probabilities as both pw2. Mafuru and PW3 Burwaye the only witnesses claiming to have found appellant's herds of cattle feeding on respondent's plantation were unable to tell the court marks on appellants herds of cattle they fund feeding on respondent's plantation.
5) That, Appellate District Court erred both in law and in fact for failing to heed that the respondent failed to prove on the balance of probabilities that appellant's heard of cattle were found at the scene and handed to

the appellant as neither handing over certificate was produced as exhibit nor a ten cell leader of any other area leader was called to prove that fact.

6) *That, Appellate District Court in deciding the case in Respondents favor failed to note and to appreciate that PW2. Mafuru claiming to have found appellant's herds of cattle feeding on respondents planation was not credible witness north to believe as he lied before trial court that destroyed crops was over 2 acres of land while the respondent on his part had it that destroyed crops was over ½ acres of land.*

7) *That, the appellate District Court erred both in law and in fact in deciding the case in respondent's favour on unfounded ground that it was not disputed during trial that the appellant was found at the scene and handed herds of cattle found feeding on respondent's plantation while in fact the appellant in his testimony denied to have been at the scene and to have been handed herds cattle in dispute.*

In digest to these grounds of appeal, they can be condensed only to two main grounds:

1. *The appeal before the first appellate court was time barred.*
2. *The claims before the trial court were not established, thus, the findings of the first appellate court were not justifiable as per law.*

During the hearing of the appeal, the appellant prayed to adopt his grounds of appeal and added that the first appellate court erred in varying the trial court's findings without there being proof of the said claims. Secondly that he was not given right to be heard by the first appellate court when the appeal was set for hearing. That, it was only the appellant who was afforded with that opportunity. Had he been given, he wanted to raise the legal issue that the appeal was time barred.

The respondent on the other hand who was also not represented prayed to adopt his reply to the grounds of appeal arguing that his appeal was not time barred and that there was sufficient proof of his claims at the trial court.

As to whether the appeal before the first appellate was time barred or not, I retrain from discussing it now as it is was not the ground of appeal before the first appellate court. The argument that the appellant was not given time to argue his appeal is not supported by evidence/record. The first appellate court clearly recorded that the respondent had nothing more to add apart from what he had filed in his reply to the appeal which reply had not raised the issue of the appeal being time barred.

Nevertheless, it is undisputed that the said appeal was admitted on 29/6/2021 but drawn on 23/6/2021. Since the trial court's judgment is dated 19/5/2021, appeal to District Court was supposed to be filed within a period of 30 days. In essence the appeal was time barred despite the fact of the said appeal appearing stamped "received on 17/6/2021" which then is contradictory to the date the said appeal was drawn and filed (23/6/2021). The stamping of the court appears to have been procured just to legalize the inordinate delay.

Moreover digesting the evidence of the claimant (respondent at the trial court), there has not been cogent evidence by the respondent to justify the said claims as decreed by the first appellate court. On this, I quote what the first appellate court (magistrate) considered while varying the trial court's decision:

> *"But as pointed out before, that in civil case, the standard of proof is on balance of probability and basing on the evidence at the trial court, there are minor differences in terms of the area to which the destruction occurred, Therefore this court thinks that it is prudent to award the appellant Tsh. 800,000/= as a compensation for destruction of crops and not Tshs. 1,733,160/=*

To my understanding, the claim of 1,733.160 is a specific damage caused by the appellant's cattle to the respondent's farm. So the varying of the trial court's award from nil award to award of Tzs: 800,000/= is not clear as what damage is covered by the said varying award.

It being specific damage, there ought be specific proof on the alleged damages to the entitlement of 800,000/= and not basing on prudence. In law, specific damage is not based on prudence but on clear establishment

In my considered view, I find this award by the first appellate court varying from the nil award of the trial court as not being clear, but can be considered as a mere gift to the respondent by the first appellate court.

As per finding of the trial court on why the appellant was not awarded with the claimed amount as actual damages, my careful scanning of the said evidence, concedes with the findings of the trial court that what actually was awarded by the first appellate court is not specific damage. I say so because, for one to be awarded with specific damage, the claimant must strictly establish so. As per itemised claims into the respondent's statement of claim at the trial court, specific damage was not established.

Borrowing the words of my brother Karayemaha, J in **FINCA Microfinance Bank Ltd vs Mohamed Megayu**, Civil Appeal No 26 of 2020 that, the area of damages is not a virgin one. *"A lot has been discussed through case laws and literatures. Legendary principles have been accentuated. I wish, now, to borrow the words of Lord Blackburn in **Livingstone vs. Rawyards Coal Company**, (1850)5 App. Case 25 at 6 Page 39 which was quoted by Hon.Kihwelo,J. (as he then was) in **Njombe Community Bank & Another vs. Jane Mganwa**, DC. Civil Appeal No.3 of 2015 at page 17 where it was stated that damages are:"*

> *"That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation".*

In my view, therefore, damages are intended to put the party in the same position, as far as money can do so, as if his rights had been observed. In this case I think the issue of special damages should not detain me. Principles governing this are, as alluded to above, are very clear and elaborative. The case of **Njombe Community Bank & another vs. Jane Mganwa** (supra) quoting the dictum of Mcnoughten in Bolag vs.

Hutchson, (1950) AC 515 at page 525 promulgated the correct principle of law on specific damages which is universally accepted that special damages are:

> *"such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specifically and proved strictly".*

In the case of **Zuberi Augustino vs. Anicet Mugabe**, [1992] TLR137, the Court of Appeal held that:

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

It must be insisted here that what is awarded by the court should not be gifts to parties but be based on established claims as per legal standards. It being a civil claim, its standard of proof is only on balance of probability and not otherwise. Only a party with a weightier evidence than the other is the one who must win.

In the current case, it is not clear how the award of 800,000 got its basis. Thus it is award that is not founded on any established claims.

The trial court in dismissing the respondent's claims of 1,733,160/= had the following reasons:

> *"Je madai ya mdai ya Tshs: 1,733.160 dhidi ya mdaiwa ni halali? ...*
>
> *Kwanza kabisa katika ushahidi wake mdai pamoja na shahidi wake (SM1 and SM2) wote hawafahamu idadi ya ng'ombe waliofanya uharibifu lakini pia hawakutambua alama za ng'ombe waliofanya uharibifu hivyo kuacha shaka kama kweli ng'ombe hao ni wa mdaiwa kwa kuwa mdaiwa alidai kuwa ng'ombe wake wana alama ya RST.*
>
> *Pili, Mdai hakushuhudia ng'ombe wakifanya uaharibifu bali aliambiwa tu na waliokamata ng'ombe hao wakifanya uharibifu lakini pia wakamataji hawakuweza kumkabidhi mdaiwa ng'ombe hao hivyo kuacha shaka pia kama kweli ng'ombe waliokamatwa ni mali ya mdaiwa.*
>
> *Tatu, kwa mujibu wa tathimini ya Afisa kilimo kielelezo SM 'C') inaonyesha kuwa eneo lililofanya uharibifu ni nusu hekari lakini ushahidi wa shahidi mmoja wapo aliyekuwepo kwenye eneo la tukio (SM1) unaonyesha kuwa eneo liliifanyiwa uharibifu ni hekari mbili na hivyo kuacha shaka kubwa juu ya ukweli wa ushahidi huo hasa ukizingatia kuwa mdai hakuwepo kwenye eneo la tukio bali alipewa tu taarifa.*

Hivyo basi kwa kuwa ni jukumu la mdai kuthibitishia mahakama kwa kuhakikisha kuwa ushahidi wake unakua na uzito kuliko ule wa mdaiwa. Hivyo kwa pamoja mahakama hii imefikia mwafaka kuwa mdai ameshindwa kuthibitisha madai yake yote ya Tshs, 1,733,160/= kwa mujibu wa kanuni ya 6 ya ushahidi katika mahakma za mwanzo taarifa ya GAzeti la Serikari na 22/1964 na kwa mantiki hiyo kwa pamoja Mahama hii inahukumu ya kwamba madai ya mdai ya Tshs 1,733,160 hayajathibitika.

In consideration of the trial court's reasoning in reaching its verdict and the reasoning of the first appellate court in varying the decision of the trial court, I find no good basis as to why the first appellate court reached that finding. That said, the appeal is allowed. The decision of the first appellate court is set aside for being legally unfounded.

In its place, the decision of the trial court is restored. The appeal is allowed with costs.

DATED at MUSOMA this 21st day of April, 2023.

F. H. Mahimbali

JUDGE

Court: Judgment delivered this 21st day of April, 2023 in the presence of both parties, appellant and respondent and Mr. D. C. Makunja, SRMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE