IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB- REGISTRY

AT ARUSHA

CIVIL APPEAL NO. 8 OF 2022

(Originating from Resident magistrates' Court of Arusha, Civil Case No. 35 of 2021)

ERICK JOHN MOLLEL .....APPELLANT

VERSUS

BRONWYN LISA WINCHESTER .....RESPONDENT

JUDGMENT

21st March & 30th May, 2023

KAMUZORA, J.

This appeal arises from the judgment and Decree of the Resident Magistrates Court of Arusha (trial court) in Civil Case No. 35 of 2021 that was delivered on 4th April 2022. Before the trial court, the Respondent sued the Appellant and was awarded Tshs 96,461,570/= as specific damages, Tshs 2,000,000/= as general damages and the Appellant was ordered to pay costs of the suit.

The brief fact of the matter albeit is that, the Respondent alleged to have entered into an arrangement with the Appellant in which, the Appellant agreed to purchase a motor vehicle on behalf of the

Respondent. That, the Appellant received a total sum of USD 41,6000 from the Respondent equivalent to Tshs 96,461,570/= being the purchase price. After the Appellant had successfully purchased the said motor vehicle, he declined from handling the same to the Respondent. It was the defence by the Appellant at the trial court that, they were lovers and that the amount which the Respondent deposited in his account was for their normal recreation and spending. That, the motor was his personal property and not purchased on behalf of the Respondent.

The trial court made a finding that the Respondent sent the money to the Appellant's bank account in Stanbic Bank because there was verbal agreement between the parties to purchase the motor vehicle for the Respondent. The trial court entered judgment and decree in favour of the Respondent. The Appellant being dissatisfied with the said judgment and decree has appealed to this Honourable Court on 6 grounds as follows: -

1) *That, the trial court erred both in law and fact when it failed to analyse and evaluate properly the evidence on record and as a result it reached at a wrong decision.*

2) *That, the trial court erred both in law and fact for acting on bias by wrongly and improperly admitting exhibits P1 and P2 and rejected to admit ID1.*
3) *That, the trial court erred both in law and facts when it held that the Respondent managed to prove that the money was sent to Appellant without enough evidence.*
4) *That, the trial court erred both in law and facts for granting reliefs to the Respondent while he totally failed to prove the case on balance of probability.*
5) *That, the trial court erred both in law and facts for amending the Respondent's claims contrary to the rules of pleadings resulting to delivering unjust decision.*
6) *That, the trial court erred both in law and fact for failure to properly record the evidence of the Appellant and his witnesses.*

When the matter was called for hearing, Mr. Kennedy Mapima, learned advocate appeared representing the Appellant while the Respondent was dully represented by Mr. Joshua Albert Mkumbwa, learned advocate. Hearing of appeal was by way of written submissions and parties complied to submissions schedule.

Submitting in support of appeal the Appellant's counsel started with the second and sixth grounds. He argued that the trial court was bias for rejecting to admit exhibit ID1 while it admitted exhibit P1 and P2. That, Article 107 A (1) and (2) of the Constitution of the United Republic of Tanzania insist that the court must be impartial and that parties must be

afforded equal rights and fair hearing. Reference was made to the cases of **Mufindi Paper Mills Limited Vs. Ibatu Village Council,** Civil Revision No. 555/17 of 2019 CAT and **Luckson Rutafubibwa Kiiza Vs. Erasmus Ruhugu,** Civil Appeal No. 375 of 2021, CAT.

The Appellant's counsel explained that before the trial court PW1 tendered exhibit P1 which was different from the one attached to the plaint but the same was admitted. That, exhibit PE2 was also admitted while it had no stamp duty. But when the Appellant tried to tender annexure ERIC-1 it was rejected as exhibit and admitted only for identification purpose, ID1. Referring the case of **James Funke Ngwagilo Vs. Attorney General** (2004) TLR 161, he argued that parties are bound by their pleadings. Pointing at page 40 and 41 of the trial court record he submitted that the trial court was bias for not recording the reply submission on objection against admission of exhibits. He thus prayed for the second and sixth grounds to be allowed.

The counsel for the Appellant also submitted jointly for the first, third and fourth grounds of appeal. He argued that there was no proper analysis of evidence by the trial magistrate. That, PW1 claimed that the first transaction was on 21/0/2017 but exhibit P1 contain no evidence of the said transaction amounting to USD 7000. That, the 2nd and 3rd

transactions of USD 45000 and 42000 were also unsupported. He contended that on 10th April 2018 there was payment of USD 25.00 and on 3rd December 2018 here was payment of USD15.00. Referring the case of **Nacky Esther Nyange Vs. Mihayo Marijani Wilmore,** Civil Appeal No. 169 of 2019 CAT, he insisted that the Respondent failed to discharge her duty of proving the case as the burden of duty lies on a person who alleges.

Regarding the issue of specific damages, the Appellants' counsel submitted that it is trite law that the same must be specifically pleaded and strictly proved. For this, reference was made to the cases of **Vidoba Freight Co. Ltd Vs. Emirates Shipping Agences (T) LTD and another**, Civil Appeal No. 12 of 2019, CAT and **Finca Microfinance Bank LTD Vs. Mohamed Omary Magayu**, Civil Appeal No. 26 of 2020, HC. He contended that, no transfer document or statement from the bank that were tendered proving the Appellant's bank account. Pointing at PW1's evidence he stated that the vehicle bears the names of the Appellant. Referring the case of **Nacky Esther Nyage (supra)** he argued that it is a trite principle that the person whose name a motor vehicle is registered shall be presumed to be the

owner of the motor vehicle. He maintained that there was no proper analysis of evidence thus, the court reached into a wrong decision.

On the fifth ground, the Appellant' counsel referred the case of **James Funke Ngwagilo Vs. Attorney General** (2004) TLR 161 and submitted that, it is a trite law that a judge/magistrate cannot create pleading for parties. That, the function of pleadings is to give notice of the case which has to be met. It is the Appellant's prayer that this Appeal be allowed with costs.

Responding to grounds 2 and 6 the Respondent's counsel submitted that the Respondent's exhibits were properly admitted. That, the court's admission of exhibit P1 and P2 was based on relevance, materiality and competence as it was held in the case of **DPP Vs. Kristina D/o Biskaters Kaju,** Criminal Appeal No. 76 of 2016. He explained that in this case the Respondent prayed to tender her bank account statement and since the bank statement is from her bank, she was a competent witness to tender it. That, since the matter concerned claim for money, the exhibit was relevant and material to the case. On the issue of difference in documents attached to the pleadings and those tendered as exhibit, he submitted that the upper contents do not go to the contents of the documents. He referred the case of **DPP Vs. Sharifu**

Mohamed @ Athuman i and 6 others, Criminal Appeal No 74 of 2016 CAT at Arusha (unreport ed) on principle governing admission of exhibits.

Responding to the 2nd 3rd and 4th grounds, the Respondent's counsel submitted that there was proper analysis of evidence by the trial magistrate and the Respondent was able to prove her case on balance of probabilities as seen at page 8 and 14 of the typed trial court proceedings. On the issue of specific damages, the Respondent's counsel submitted that the Respondent pleaded and strictly proved the same. That, the Respondent's evidence was collaborated by PW2, Assistance Manager at Stanbic Bank who testified on the transaction between the Appellant and the Respondent. Based on the principle, *"he who alleges must prove"* as discussed in the cases of **Barelia Karangirangi Vs. Asteria Nyalwamba**, Civil Appeal No 237 of 2017 CAT (Unreported) and **Anthony M. Masanga Vs. Penina (Mama Ngesi) and another**, Civil Appeal No 118 of 2014 (Unreported), it was insisted that the Respondent was able to prove her case in standards required that is, on balance of probabilities.

Responding to the 5th ground the Respondent's counsel referred paragraph 3, 4 and 5 of plaint and submitted that the claim against the Appellant was clear. He was of the view that this ground intended to

mislead the court as the circumstance of this case is distinguishable from the case of **James Funke** (supra). In concluding, it was argued that the Respondent was able to discharge her duty by proving the claim against the Appellant in the standards required. It is the Respondent's prayer that the appeal be dismissed with costs.

In rejoinder, Mr. Mapima added that the Respondent admitted the difference in exhibit P1 and P2. He maintained that the hearing was not fair as it was conducted in favour of the Respondent hence, rule of natural justice was highly violated.

The Appellant added also that at page 4 of the plaint it was alleged that the money was transferred to the Appellant's account at Stanbic bank but in her evidence, the Respondent never mentioned the Appellant's bank. To him, the Respondent's evidence was contradictory and could not prove strictly specific damages claimed.

He further added that the Respondent admitted that her claim was reflected under the plaint, paragraphs 3, 4 and 5, contrary to what was stated by the trial magistrate at page 2 paragraph 2 of the judgment. The Appellant reiterated the prayer that the appeal be allowed with costs.

I have considered th e pleadings before the trial court, the judgment there to, grounds of ap peal and submissions by the counsel for the parties for and again t this appeal. The major issue for the determination by this c urt is whether the Respondent was able to prove her claim on balar ce of probabilities to warrant the grant of Tshs 96,461,510/= as specifi damages and Tshs 2,000,000/= as general damages.

Starting with the 2n and 6th grounds of appeal on the admission of exhibits, it is well estab shed principle that parties are bound by their pleadings and any amer dment is to be done with the leave of the court, see the case of **YARA T anzania Limited v Charles Aloyce Msemwa & 2 others,** Commerc al case No.5 of 2015 High Court Commercial Division DSM (unrepor ed), cited with approval in **Jumanne Iddi Chomboko (Adminis rator of the late IDD MWINYIKONDO CHOMBOKO) Vs. Fuk yosi Village Council and 2 others** Land Case No 240 of 2022 TZHC L nd 12723 Tanzlii where it was held that: -

> *"It is a cardinal p rinciple of law of civil procedure founded upon prudence that pa ties are bound by their pleadings. That is, it is settled law that p rties are bound by their pleadings and* ***that no party is allow ed to present a case contrary to its pleadings."*** (Emp hasis provided)

Upon perusal to the record, I noted that annexure P1 to the plaint and exhibit P1 both contains three bank account statements. The contents of Annexure P1 to the plaint is the same as exhibit P1. The only difference is that annexure P1 was not stamped or signed while Exhibit P1 was stamped with bank stamp and signed. The Appellant raised the objection challenging its admission before the trial court on the reason that they are different documents. The trial court's finding was that, the difference did not go to the root of the case.

The question is whether the stamp and signature renders the two sets of documents as different. As I have said earlier, the two set of documents are materially similar save for stamp and signature. Although not explained, the stamp was affixed and dated 21st July 2021 while the case before the trial court was filed and stamped with admission stamp on 29th April 2021. In other words, exhibit P1 was stamped and signed after the suit was filed in court thus, in no way annexure P1 could have such a stamp and signature. I therefore conclude that since the material contents of the documents which was the subject matter of the case before the court were still the same, the trial court was right to admit and consider exhibit P1.

As regard to exhibit P2 which is a contract for purchase of motor vehicle, procedures for admitting the same were followed and despite the Appellant's objection, the same was admitted in court. I do not intend to fault the trial court's reasons for admitting the same as they were correct under the law. Being not part to the said contract, the Respondent was not responsible to pay for stamp duty. Notice to produce a copy was issued but the Appellant who was a party to that contract failed to bring the original thus, a copy was properly admitted by the trial court.

Regarding the rejection of Appellant's exhibit ID1, I agree with trial court's finding in not admitting the same. The annexed document was a contract not signed or stamped at all but the tendered contract was signed by parties to the contract. It must be noted that a contract becomes valid where it is signed by parties to the contract. The said contract was filed as additional document on 8th September 2021 but was not signed by parties to the contract. During hearing on 4th March 2022, the Appellant tendered the signed contract. The same indicated that it was signed by parties to the contract on 06th December 2018. It is unfortunate that no explanation was made as to why the Appellant who was in possession of signed contract opted to attach the contract

that was not signed and brought a signed contract during hearing and not even when testifying in chief but after he was recalled to tender the same. The circumstance suggest that tendering the said contract was an afterthought. The situation in this case is different from that of the Respondent to whom the pleadings shows that exhibit P1 was signed after he had filed the pleadings. In that regard, I agree with the trial court decision in not admitting ID1 as exhibit. I therefore find no merit in the 2nd and 6th grounds of appeal hence, dismiss the same.

On the 1st, 3rd and 4th ground the Appellant is challenging the assessment of evidence by the trial court and reliefs granted visa vis relief sought by Respondent. The plaint indicates that the Respondent claimed against the Appellant for a principal amount of USD 41,600 equivalent to Newzealand Dollars (NZD) 61,525 and equivalent to Tshs. 96,461,570/ which was transferred from Respondent's account to Appellant's account. In his WSD and testimony, the Appellant denied having any business relation with the Respondent but claimed to have love relationship with her. He admitted to have purchased the motor vehicle but denied to have used the Respondent's money. He contended that the Respondent was his girlfriend and by virtue of their relationship,

he allowed her to deposi cash for the sole intention of using the same for their pleasure and en oyment.

There is no doubt th at the evidence of PW1 and PW2 together with bank statement (exhibi P1) proved that the Respondent deposited money to Appellant's account. The statement shows the amount deposited to Appellant's account from Respondent's account in different dates. It was noted by the trial court and this court that the amount deposited in Appellant's account marched the Respondent's claim. It is unfortunate that when examined on the deposited money, the Appellant pretended not to be aware of the money but later admitted the deposit and claimed that it was for their spending and not for purchase of motor vehicle. Looking at exh bit P1, the Respondent was operating account in New Zea and Dolla cur ency. Exhibit P1 collectively, Bank statements for the period from 26th November 2018 to 26th February 2019 indicate that the amount of NZD 4 291.27 was deposited to Appellant's account on 3rd December 2018 an I it is claimed by the Respondent. The statement for the period of 25th August to 24th November 2017 two figures of NZD 7,686.07 and NZD 10, 325.70 were deposited to the Appellant's account but only NZD 10,325 was claimed by the Respondent. The Respondent explained clearly tha the unclaimed amount was not related to the

purchase of the motor vehicle rather it was for a trip to Tarangire-Manyara. The statement for the period 26th February to 25th May 2018 indicate that the amount of 6,909.70 was deposited to Appellant's account and is claimed by the Respondent. Thus, the denial by the Appellant that he was not aware of the deposited amount was questionable. I am therefore inclined to take the trial court's view that there was oral agreement between the parties and on balance of probabilities, the Respondent's evidence was strong proving that the money deposited was intended for purchase of her motor vehicle and not for spending.

There is no dispute that the Appellant purchased the motor vehicle as he also admitted so in his evidence save that it was his personal property and not the Respondent's property. The evidence shows that the Respondent deposited money to Appellant's account from October 2017, April 2018 and December 2018. The Appellant alleged to have purchased the motor vehicle in 2018 but denied the contract tendered as exhibit P2 on account that he never purchased it from Issa Sharifu Shafii rather from Kibo Guide Company. However, his alleged purchase contract could not form part his evidence for failure to meet legal requirement hence, no evidence to support his allegation. The series of

event from the date of the alleged oral agreement, the deposits made in Appellant's account and time the motor vehicle was purchased all support the Respondent's case that she deposited that money for the Appellant to buy her a motor vehicle. Having said so, the trial court was correct to conclude that the Respondent proved her case on balance of probabilities.

On the 5th ground that the trial court amended the Respondent's pleadings, the trial court's record is clear. In the Respondent's plaint at paragraph 3, the claim is for specific damage of US Dollars 41,600 ($ 61,525 NZD) equivalent to Tshs. 96,461,570 being recovering compensation arising from the motor vehicle transaction. However, under relief paragraph the claim is for special damage of Tshs. 96,461,570 and in alternative, handover of the motor vehicle. The Respondent also claimed for general damage, interest, costs and any other relief. The trial court awarded the principal amount claimed but termed it as specific damage. It also awarded Tshs, 2,000,000 as general damage and costs of the suit. I do not see how the trial court went out of pleadings. The Respondent used the word specific damage and special damage in the plaint interchangeably but that does not affect the contents of the claim as what was awarded, was pleaded in

the plaint. Whether special or specific damage, they both need to be specifically pleaded and proved. See the case of **Anthony Ngoo & another Vs. Kitinda Kimaro,** Civil Appeal No 25 of 2014, CAT at Arusha (Unreported) the court held that,

> *"In relation to special damages, the law is settled. Special damages must be proved specifically and strictly."*

In proving specific damages, it is inevitable to produce documentary evidence proving the said specific damages. It is clear that through exhibit P1 and testimony by PW1 and PW2 the Respondent proved to have transferred the pleaded amount to the Appellant for the purpose which was not performed as agreed hence, proof of specific damage.

Regarding the award of general damage, this court is alive of the fact that general damages are presumed by the law to accrue from the wrong complained that are direct or are probable consequence of the act complained of. That is to say, once a wrong is proved then the court can award general damages. Thus, the trial court did not error in awarding general damage. The amount awardable is within the discretion of the court to determine and since the amount of Tshs. 2,000,000 was not complained of, I will not interfere with the finding of the trial court on general damage.

In the final analysis, I uphold the trial court's judgment and decree resulting there from. The appeal lacks merit and it hereby dismissed with costs.

DATED at **ARUSHA** this, 30th day of May, 2023

D.C. KAMUZORA

JUDGE