

IN THE HIGH COURT OF TANZANIA
SHINYANGA DISTRICT REGISTRY
AT SHINYANGA

CIVIL APPEAL NO. 27 OF 2021

ASTRA PHARMA (T) LTD..... APPELLANT

VERSUS

JOSEPHINA MANYAKI MUMANGI

T/A KIGOMA MEDICS PHARMACY.....RESPONDENT

[Appeal from the decision of the District Court of Kahama at Kahama]

(Hon. Donasian J.A. RM)

dated the 23rd day of August, 2021

in

Civil Case No. 36 of 2020

JUDGMENT

29th August, 2022 & 27th February, 2023.

S.M. KULITA, J.

This is an appeal from Kahama District Court. The story behind this appeal in a nut shell is that, the appellant herein instituted a civil case at the District Court of Kahama claiming for an order of the court compelling the respondent to pay him, among the other things, Tshs. 24,922,800/= being the principal claim. This claim arose from failure of the respondent

to pay for the medical goods supplied to her by the Appellant in the cause of doing business.

In the cause of hearing the defendant admitted the debt. Finally, the appellant was awarded the said claimed amount of Tshs. 24,922,800/=. During the hearing of the case, the appellant tendered a letter from the respondent (exhibit P4) demanding to repay the debt by instalment at the tune of Tshs. 300,000/= per month for the reason that she was sick, hence incapable to settle the whole debt at once. As the appellant commented nothing on it, then the trial court relied on that proposal and ordered the same to be the mode of payment.

Further, as the respondent from the outset did not deny the debt, then the court found no need to award costs and interest on the claimed amount.

These last three issues aggrieved the appellant, hence this appeal with five grounds as follows; **One**, the trial court erred to pass a judgment which is not supported with evidence, **two**, the evidence was not properly analyzed and evaluated, **three**, the trial court based on extraneous matters which led to the wrong conclusion, **four**, the trial court wrongly departed from dealing with the pleaded matters, instead it relied on strange matters, **five**, the trial court wrongly ignored costs to the successful party.

On 21st June, 2022 the matter was scheduled for hearing. On that date, Mr. Kahangwa Denis, Advocate appeared for the appellant. As the respondent never appeared to court without any notice, the court ordered for the hearing to proceed *ex-parte*.

Submitting in support of the appeal in respect of ground number four of the appeal, Mr. Denis, Advocate stated that the parties are bound by their pleadings. That, in determining the matters before it, the court should rely on the pleadings of the parties. He explained that, the court ordered the respondent to pay the claimed amount in the instalment mode of Tshs 300,000/= per month, which was a result of the trial court entertaining the respondent's evidence that she was sick, attending medications in India and Tanzania, the allegation which was not pleaded in her written statement of defense. To him, this was erroneous and to support his argument he cited the case of **The Registered Trustees of Islamic Propagation Centre TPC vs. The Registered Trustees of Thaaqib Islamic Centre TIC, Civil Appeal No. 2 of 2020, CAT at Mwanza.**

As for the 1st, 2nd and 3rd grounds of appeal Mr. Denis was of the views that, the appellant was not bound to respond the respondent's prayer that she had raised during trial at the District Court, that she

wished to repay the claim at the tune of Tshs 300,000/= per month. He gave the reason being, that the respondent never raised it in her written statement of defense. She just raised it *suo mottu* during the hearing of the defense case, the act which gave the appellant no chance to reply on it.

Concerning the issue of Respondent's sickness, Mr. Denis was of the views that it was not properly settled, as the respondent never tendered any documents to court to prove that she was hospitalized or travelled to anywhere for treatments.

Further, Mr. Denis condemned the issue of evidence analysis. He said that, had it been properly done, the issue of payment by instalment would have not been reached by the court. He was of the views that, the prayer and order in respect of it were supposed to have been arisen and decided during the execution proceedings, whereby the same could be settled upon the consent of the decree holder.

As for the issue of interest, Mr. Denis was of the views that the court wrongly denied to award the same. To him, the reason was that the respondent never pleaded that she was sick, the reason which might have exempted her from being ordered to pay costs.

Arguing the issue of costs Mr. Denis alleged that, as the appellant's resident is situated at Mwanza while the business was done at Kahama in Shinyanga Region, obvious the appellant incurred costs on it. He insisted that, as the costs follow the events, then waiving to grant the same was supposed to be for a good reason. To support his argument, he cited the case of **Nkalle Tuzo vs. Phillimon Mussa Mwashilanga [2002] TLR 276.**

This was the end of *ex-parte* submissions by the appellant's counsel.

I have earnestly gone through said submissions, authorities supplied and the available records. The issue is whether the appellant's appeal is meritorious.

As rightly submitted by the appellant's counsel that, parties to the case are bound by their pleadings. The court too, is bound to rely on the evidence that falls within the parties' pleadings in making its findings. See, **Charles Richard Kombe t/a Building vs. Evaran Mtungi and Others, Civil Appeal No. 38 of 2012, CAT at DSM.** The same case provides for rationale of the stated principle being that, the opponent party should not be taken by surprise.

"It is a cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the court. The rationale behind this proposition is to bring the parties to an issue and not to take the other party by surprise".

I have gone through the trial court's records and noticed that, in the written statement of defense, the respondent never stated the issue of sickness. In it again, the respondent neither admitted the claim nor proposed the mode of payment. The record shows that the issue of sickness was only averred by the respondent when she was testifying in court and that was after the appellant had closed her case.

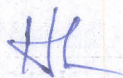
On that account, it is correctly argued that, in composing the judgment the trial court relied on matters that it ought not to rely upon. The appellant was taken by surprise on those issues that the Respondent had raised during the defense hearing, while the Appellant had already closed her case. It means the appellant got no chance to reply on them. As the respondent admitted the claim during the hearing of the case, the trial court was bound to enter a judgment on account of the admitted claim and leave the mode of payment to the execution court.

Concerning the issue of interest and costs, the records show that, the claim against the respondent arose since the year 2018. The record further shows that, the respondent was given the notice of intention to sue by the appellant in the year 2019, yet as the written statement of defense shows, the respondent remained deaf to it. The records further reveal that, since 30th September, 2020 up to 23rd August, 2021 the appellant has been prosecuting this case at the trial court.

With these premises, the trial court's act of denying costs and interest was unjust, the reasons behind being; **first**, that the Respondent remained deaf to the notice of intention to sue and **secondly**, she had not denied the claim in her written statement of defense.

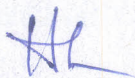
On the aforesaid account, I hereby order the respondent to pay the appellant Tshs 24,172,800/= being the principal amount set out in the appellant's plaint, of course after deducting the already advanced cash which the respondent has already paid. I further order the Respondent to pay interest to the principle sum at the rate of 7% per month from the date of filing the suit to the date of judgment, also interest rate of 7% per month from the date of judgment to the date of its payment in full.

In upshot the appeal is allowed to that extent. Respondent to bear the costs.



S.M. KULITA
JUDGE
27/02/2023

DATED at SHINYANGA this 27th day of February, 2023.



S.M. KULITA
JUDGE
27/02/2023