

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO. 29 OF 2022

BURAQ LOGISTICS LIMITED APPELLANT

VERSUS

MAKUNDI TRANSPORT &

GENERAL SUPPLIES CO. LTD RESPONDENT

**(Appeal from the decision of the District Court of Ilala at Kinyerezi
in Civil Case No. 75 of 2020)**

EX-PARTE JUDGMENT

25th May & 21st July, 2023

KISANYA, J.:

This appeal stems from the decision of the District Court of Ilala at Kinyerezi in Civil Case No. 75 of 2020 in which, the above named appellant was ordered to pay the respondent herein, a sum of USD 30,000,000 as general damages, interest on decretal sum at rate of 7% per annum from the date of judgment till payment in full and costs of the case.

A brief background facts leading to the appeal is that the appellant and the respondent entered into a contract, whereby the appellant was to transport the respondent's consignment of maize meal worth TZS 1,800,000,000/= to Bunia, Democratic Republic of Congo. According to the plaint and evidence adduced during the trial, 11 trucks which had the consignment delayed on different days. It was alleged that the delay caused

the respondent to incur penalty to the tune of USD 20,000/, additional costs of USD 4,100/=and loss of 32 maize bags valued USD 3,200/=. The respondent further averred to have suffered a total loss of USD 55,000. He therefore, sued the appellant claiming for general damages of USD 27,900/=:, special damages of US 55,000/=:, costs of the suit, and any other relief as the court deemed fit and equitable to grant.

The appellant admitted to have entered into a contract with the respondent. However, she disputed the respondent's claim. It is also pertinent to note here that, the plaintiff's preliminary objection on a point of law that, the trial court had no jurisdiction to entertain the matter was dismissed for want of merit.

In the course of determining the suit, the trial court was guided by the following issues which were recorded during the final pre-trial conference; *one*, whether there was a contract between the parties; *two*, whether there was a breach of the said contract; *three*, whether there were sufficient causes for the breach; and *four*, to what reliefs are the parties entitled to.

In the trial court, the respondent relied on the evidence of two witnesses namely, Godvictor Dismas Munisi (PW1) and X270 D/CPL Sanki (PW2). There oral testimonies were supplemented by two exhibits to wit, certified copy of the agreement (Exhibit P1) and seven waybills (Exhibit P2). On the other side, appellant called one witnesses namely, Qais Karim (DW1).

Having considered the evidence given before it, the trial court found the first three issues to have been answered in the affirmative. As regards the fourth issue, the trial court was convinced that special damages was proved. Other reliefs were granted in favour of the respondent as stated afore.

The appellant was aggrieved by that decision. She thus, filed this appeal which is predicated on four (4) grounds of appeal as follows:-

- 1. That, the trial Magistrate erred in law and in fact to entertain the suit in the event it has no jurisdiction.*
- 2. That the trial Magistrate erred in law and fact to award general damages to the plaintiff.*
- 3. That the trial Magistrate erred in law and fact to state that the Defendant admitted the delay.*
- 4. That trial Magistrate erred in law and fact to state that the balance of probabilities of the plaintiff was heavier than that of the defendant.*

At the instance of the parties, this Court ordered the hearing to proceed by way of written submissions. Mr. Qassi Karim, Managing Director of the appellant filed his written submission in compliance with the Court's order.

Submitting in support of first ground of appeal, Mr. Karimu faulted the trial court for entertaining the suit while it had no jurisdiction to entertain

the same. He started by referring this Court to the **Halsbury's Laws of England**, Vol. 10, para 31 in which the term jurisdiction is defined to mean:

"...the authority to which a Court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a forma away for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restrained by similar means. If no restriction or limitation is imposed the jurisdiction is said to be unlimited.

Basing on the said definition, Mr. Karim argued that the jurisdiction of the court is provided by the law. He submitted that the territorial jurisdiction of the trial court (District Court of Ilala) is governed by section 4 of the Magistrates Court's Act, Cap. 11, R. E. 2019] (the MCA) which established that court.

It was his further contention that the trial court had no jurisdiction to entertain the matter because, the appellant's head offices are situated at Mbagala Zakheim Dar es Salaam and the subject matter was an international transit cargo from Dar es Salaam to Bunia, DRC Congo. Relying on the decision of this Court in **Shungu Walyene Vs Jackson Mwasaka**, Misc. Land Appeal No. 04 of 2022, Mr. Karim submitted that the issue of jurisdiction can be raised at any stage, including appellate stage. It was his humble prayer that the appeal be allowed on that ground.

On the second ground of appeal, the appellant challenged the award of general damages of USD 30,000 in favour of the respondent. The argument by the appellant was that, after failing to prove specific damages, the award of general damages was illegal and unreasonable. It is further contended that the learned trial magistrate did not exercise its discretionary power judiciously. Therefore, the appellant implored this Court to determine the correctness and reasonableness of general damages awarded by the trial court. To support his plea, he cited the case of **The Cooper Motors Corporation Ltd vs Moshi/Arusha Occupation Health Services** [1990] TLR 96.

As for the contention general damages are not awarded in a case where specific damages is not proved, Mr. Karim relied on the cases of **Macnaghten in Storms vs Hutchison** 1905 A.C 515, **London and Northern Bank Limited vs George Newnes Ltd** (1900) 16 TLR 433, CA and **P. M. Jonathan vs Athuman Khalfan**, [1980] TLR 175 pg 190. He further submitted that the principles stated in all these authorities are to the effect that, general damages are awarded at the discretion of the Court after the plaintiff has averred to have suffered damages; and the complained act must be caused by the defendant. He was of the firm view that if specific damages are proved, the court would not be in a position to link any damage claimed by plaintiff to the defendant's liability or action.

Arguing the third ground of appeal, Mr. Karim submitted that the trial magistrate erred to hold that the appellant admitted the delay. He contended that; the appellant delayed to deliver the international transit cargo from Dar es Salaam to Bunia Congo solely because during the material time there were was an active war at Bunia DRC Congo which made it impossible to deliver the consignment. According to him, that was the reason for non-performance of the contract on time, and not admission.

Mr. Karim prayed to abandon the fourth ground of appeal. In conclusion, he cited the case of **DPP vs Benard** [1988] TLR 18 and prayed for this appeal to be allowed with costs.

The respondent did not file her written reply to the appellant's submission as ordered by this Court. In that regard, I was inclined to fix the matter for ex-parte judgment. After issuing the order for ex-parte judgment, the respondent's counsel wrote a letter stating that the reply written submission was not filed because he was not served with the appellant's submission. In terms of the settled law, the respondent's failure to file the written submission is tantamount to failure to appear when the matter is called on for hearing. That being the case, I have decided to dispose of this appeal basing on the submission made by the appellant. It is my humble view that the claim by the respondent's counsel, that, he was not served with the appellant's written submission is the ground for setting aside the

ex-parte judgment. This is so when it is considered that the said reason was not recorded when the respondent's counsel appeared twice before the Hon. Deputy Registrar for orders.

From the record and the appellant's submission, the main issues for determination is whether the appeal is meritorious.

On the first ground of appeal, I agree with the appellant that, in terms of the settled position, the issue of jurisdiction can be raised at any stage of the case, including at an appellate stage. See also the case of **Sospeter Kahindi vs Mbeshi Mashini**, Civil Appeal No. 56 of 2017 (unreported) where it was held that:

"At this point we would hasten to acknowledge the principle that the question of jurisdiction of a court of law is so fundamental and that it can be raised at any time including at an appellate level."

As stated earlier, the issue of jurisdiction was raised at the earliest stage but was dismissed for want of merit. Considering that the ruling on that issue did not dispose of the matter, I find it appropriate to determine the first ground of appeal.

As rightly submitted by Mr. Karim, it is trite law jurisdiction of the court is created by the statute. It is a legal requirement set out under section 18 of the CPC that every suit must be instituted in a court within the local limits

of whose jurisdiction, the defendant resides, or carries on business, or personally works for gain; or a place where the cause of action, wholly or partly arises. As far as the district court is concerned, section 4 of the MCA is to the effect that, its territorial jurisdiction is limited within the district in which it is established.

According to Mr. Karim, the appellant's offices are located within Temeke District and thus, outside the territorial jurisdiction of the District Court of Ilala. With due respect to Mr. Karim, such fact is not supported by the record. It does not feature in the written statement of defence filed by the appellant and the evidence of DW1. Since the appellant averred in paragraph 9 of the amended plaint that, the trial court was vested with territorial jurisdiction to try the matter, the appellant was expected to state that her office or place of business is located outside the jurisdiction of the trial court and adduce evidence to such effect. This was not done.

It is further not disputed that the cause of action was founded on breach of a contract. The respondent averred in paragraph 9 of the plaint that, the contracts were signed at Upanga in Ilala District. The appellant gave general denial to that fact without substantiating it with more particulars. In the circumstances, I am of the view that there is no sufficient facts or evidence for this Court to hold that the trial court had no territorial

jurisdiction to try the matter. Thus, the first ground of appeal is dismissed for want of merit.

In determination of the second ground of appeal, I propose to begin with the obvious that is, a well settled principle stated in a plethora of authorities that, general damages are awarded at the discretion of the trial magistrate or judge. I am at one with Mr. Karim that, the said discretion must be exercised judiciously. In so doing, the trial magistrate or judge is duty bound to consider whether the evidence on record justifies the award of general damages and assign the reasons for awarding the same. I am fortified by the case of **Alfred Fundi vs Geled Mango & 2 Others**, Civil Appeal No. 47 of 2017 (unreported), where the Court of Appeal held:-

"The law is settled that general damages are awarded by the trial judge after consideration and deliberation of evidence on record able to justify the award. The judge has the discretion in awarding general damages although the judge has to assign reasons in awarding the same".

In the instant case, the learned trial magistrate gave reasons when awarding the general damages. This fact is reflected at page 7 of the typed judgment as follows:

"It is trite law that unlike specific damages, general damages ought not to be specified by a party in pleading as it is within the court's discretion.

Nevertheless, it is my considered view that the plaintiff is entitled to USD 30,000 being general damages for all the misfortune it undergoes in the whole saga."

It is also worth noting here that, before arriving at the decision of awarding the general damages, the learned trial magistrate considered the evidence on record. He held, among others, that, the appellant had breached the contracts without excusable ground. Further to this, the trial magistrate recorded the respondent's evidence that, she was forced to offload the consignment from the appellant's trucks to her vehicles and report the matter to the police station and that she lost the contract with the World Food Programme. Reading from the judgment as a whole, I am of the view that those are the misfortune which were considered in awarding the general damages.

Mr. Karim urged me to consider that the general damages could not stand because specific damages were proved. As rightly held by the trial court, a claim for general damages, particulars of the quantum of damages claimed is not required. See the case of **Anthony Ngoo and Davis Anthony Ngoo v. Kitinda Maro**, Civil Appeal No. 25 of 2014 (unreported) in which the Court of Appeal went on citing the Black's Law Dictionary (supra) which defines general damages as follows:-

"Damages that the law presumes follow from the type of wrong complained of General damages do

not need to be specifically claimed or proved to have been sustained."

From the foregoing position, I am of the firm view that, general damages may be granted even if the special damages are not specifically proved. I am holding so basing on the case of **Vidoba Freight Co. Ltd vs Emirates Shipping Agencies T Ltd & Another** (Civil Appeal No. 12 of 2019) [2022] TZCA 740 (24 November 2022) in which the Court of Appeal was satisfied that the specific damages were not strictly proved but went on to confirm the general damages which had been awarded by the trial court. Considering further that, the trial magistrate gave reasons for awarding the damages, the appellant's complaint that discretionary powers were not exercised judiciously lacks merit. For the foregoing reasons, the second ground is meritless. It is accordingly dismissed.

Moving on to the third ground of appeal, the court is being faulted for holding that the appellant admitted the delay. Indeed, at the time of addressing the second issue, the learned trial court considered, *inter alia*, that, DW1 had admitted the delay of transporting the consignment. I was thus, inclined to review the record. Having done so, I have noted that DW1 stated as follows when he was cross-examined by the respondent's counsel:

"I admit that the consignment was delayed as per our filed defence"

In the light of the above evidence, I find no cogent reason to fault the trial court for holding the appellant admitted the delay. Mr. Karim's argument that DW1 was making reference to the delay caused by war at Bunia, DRC is not supported by the record. Such fact was neither pleaded in the written statement of defence nor stated in the evidence of DW1. Thus, the third ground lacks merits as well.

In the upshot of the foregoing, this appeal is without merit and is accordingly dismissed. I make no order as to costs because the respondent did not file the written submission in reply.

DATED ta **DAR ES SALAAM** this 21st day of July 2023.



S.E. KISANYA
JUDGE