IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 98 OF 2021

(Arising from the judgment and decree vide Civil Case No. 44 of 2020 of the District Court of Ilala at Ilala dated on 25th February, 2021, delivered by Hon. C.K. Mshomba-RM)

BEIJING NEW BUILDING MATERIAL (T) Co. Ltd ..... **APPELLANT**

VERSUS

SAMWEL AUNIEL MAFOLE *(Suing as administrator of the Estate of the late* ***NDEMANYISHO @GODSON ANUEL MAFOPHOLE*** *t/a NM LOGISTIC)* ..... **1st RESPONDENT**

ANDREW KAPALATA ..... **2nd RESPONDENT**

JUDGMENT ON APPEAL

S.M. MAGHIMBI J:

The Appellant herein being dissatisfied with the judgment of the District Court of Ilala in Civil Case No. 44 of 2020 ("the original suit") has appealed to this Court on the following grounds:

(1) That, the learned trial Magistrate erred in law and fact for failure to observe that the trial Court had no Pecuniary jurisdiction to determine a matter whose special damages amounted to TZS 7,122,000/-.

(2) That the trial Magistrate erred in law and fact in his finding that the 1st Respondent had Locus Stand while the evidence on record show otherwise.

(3) That the trial Magistrate erred in law and fact for failure to observe that 1st Respondent did not pay the Appellant for delivery of cement, therefore the Appellant was not obligated to transport the cement.

(4) That, the learned trial Magistrate erred in law and fact by failure to appreciate that computation of the time for failure to observe that the contract for sale of cement was distinct from the contract to transport cement.

(5) That, the learned trial Magistrate erred in law and fact for failure to observe that the private arrangement between the 1st Respondent and the 2nd Respondent did not bind the Appellant.

(6) The trial Magistrate erred in law and fact by granting the Respondent payment of TZS 8,000,000=/ as a resultant profit without proof.

On those grounds, the Appellant prayed that the appeal be allowed by quashing the judgment and decree of the trial Court with costs. The appeal was disposed by way of written submissions. While the appellant's submissions were drawn and filed by Mr. Rico Adolf Mzeru, learned advocate, the respondent's submissions were drawn and filed by Mr. Frank Kilian, learned advocate.

Brief facts of the case are that at the trial court, the Plaintiff successfully filed a Civil Case No. 44 of 2020. In his plaint, the plaintiff prayed for, inter alia, judgment and decree that the appellant and the 2nd defendant (The Defendant in the original suit) be ordered to pay him the following;

(i) The principal sum of TZS 93,000,000=/ being monthly business turnover exponentially diminished as a customary loyalty for reasons of unreliability of supply of cement erstwhile source from the Defendants.

(ii) Payment of TZS 100,000,000=/ being general damages for loss of actual and projected revenue from the business of cement which used to generate TZS 444,000=/ per month.

(iii) Interest for items (i) and (ii) above at commercial rate of 21% accrue of cause of action till the date of judgment and thereafter at 7% Court rate to full settlement.

(iv) Costs.

(v) Any other relief(s) Court deems fit to grant it.

The trial Court was satisfied that the Plaintiff's claims were meritorious and therefore allowing the suit and ordering the following relief(s):

(1) The 1st Defendant to refund to the Plaintiff a sum of TZS 7,122,000/-

(2) Payment of TZS 8,000,000/= being the intended resultant profit in withholding the Plaintiff's asset/Capital in terms of money.

(3) The 1st Defendant to pay TZS 10,000,000/= being general damages for the suffered loss of reputation and trust in business on the part of Plaintiff.

(4) Costs of the suit awarded to the Plaintiff.

The 1st Defendant was aggrieved by the trial Court decision hence this appeal on the mentioned grounds.

In his submission in chief, Mr. Mzeru submitted that the trial Court erred in law by entertained the suit while the amount claimed by the Plaintiff as general damage was within pecuniary jurisdiction of the Primary Court. To fortify his stance, he referred this Court to the provision of Section 18(1) of the Magistrate Court Act, Cap 11 R.E 2002, as amended by the Written Laws (Miscellaneous Amendments) Act, No.3 of 2016 which provides for the pecuniary jurisdiction of Primary Court for recovery of civil debt, if the value of the subject matter does not exceed fifty million, and thirty million for recovery debt arising from contract. He then argued that the District Court has no pecuniary jurisdiction to try this matter praying that this Court declare proceedings and judgement of the trial Court a nullity.

Mr. Mzeru submitted further that compensation against impaired business good will cannot in any juncture be special damages, as it is not squarely fit the definition of special damages. To buttress his argument he cited the case of; **Beatus Alphonce Mtui & Another Vs The Director of Mapping and Survey, & Others, Land Case No. 101 of 2017** where it was held that here two categories of damages namely; General damages and Special damages differ in that General Damages are drawn from the Defendant's tort or breach that law presume to be result. That they are damages at large either nominal or substantial depending on circumstance of each case. That special damages are expenses incurred or monies lost and unlike General damages they have to be proved. Referring to the current case, he submitted that special damages at the trial Court was TZS 7,122,000/= and not 93,000,000/= as asserted by the 1st Respondent in its plaint. That since the Court is guided by the special damages in determining the pecuniary jurisdiction of the Court, the trial Court had no jurisdiction to entertain the matter as such jurisdiction is conferred on the Primary Court.

On the 2nd ground of appeal, Mr. Mzeru submitted that the 1st Respondent had no locus standi to file a suit as the administrator of Godson Auniel Mafole because there was no letter of administration bearing the names of Godson Auniel Mafole. He supported his submission

by citing the case of **Lujuna Shubi Ballonzi vs Registered Trustee of Chama Cha Mapinduzi [1996] TLR, 203,** whereby Samatta J, (as he then was) where he had this to say:

> *"Locus standi is governed by common law according to which a person belonging a matter to Court should be able to show that his right or interest has been breached or interfered with"*

He then submitted that the letter of administration tendered at the trial Court as exhibit (PE-1) by the Appellant bare the names of Ndemanyisho Auniel Mafole while a person with locus standi to institute the case as sole proprietor is Godson Auniel Mafole as it is reflected under exhibit PE-3 and exhibit PE-4 and not Ndemanyisho Mafole. That the Plaintiff did not adduced any document at the trial Court to show that the two names are the same person and during cross-examination, the Plaintiff admitted that the names on that exhibit were for two different people and that he had no document to indicate that both names were used interchangeably by Godson Auniel Mafole.

Mr. Mzeru submitted on the 3rd and 4th grounds together. His submission was that the Plaintiff in his testimony agreed that he paid for 600 bags of cement and not transportation costs as it is shown under paragraph 9 of the Plaint and corroboration of DW1's testimony. That DW1 stated that he was paid for the cement and not transportation of the

cement. Pointing to paragraph 9 of the said plaint, Mr. Mzeru submitted that the 1st Respondent admitted to send details of the order together with details of the truck that was supposed to collect the cement (Truck with registration No. T 998 DBZ) to the Appellant. Therefore by conduct, the 1st Respondent expected the transportation of the cement to be done by the truck on the message and the Appellant herein established that the cement was loaded on the truck with registration No. T 998 DBZ as shown under exhibit DE-4 (Out note). That the note prove that cement was loaded on the truck.

The counsel further contended that the trial Magistrate failed to consider at what point the Appellant was considered to have fully discharged its obligation in respect to the purchased cement as provided in Sale of Goods Act, Cap 214 R.E 2019. Hi argument was that the seller is said to have discharged his obligation once the ownership of the property transfers to the buyer. To support his argument, he referred the court to Section 22(1) of the Sales of Goods Act, Cap 214 R.E 2019. He then submitted that when the property therein is transferred to the buyer the goods are at risk whether delivery has been made or not, risk therefore prima facie passes with the property.

He went on submitting that the Appellant herein was contracted to sale cement (Specific Goods) to the 1st Respondent and after receiving instruction from the 1st Respondent (The Buyer) to load cement on the track. That the Appellant was bound to put the cement into deliverable state which was to load the truck and that once the truck was loaded and since 1st Respondent was the one who sent the truck, then he could have a notice thereof, then the property passes to the 1st Respondent (Section 20(b) of Cap 214 R.E 2019). That it is astonishing that the 1st Respondent was the one who sent the registration number of the truck for the purpose of loading cement, but after the failure of the truck to deliver the cement the 1st Respondent has opted to file a case against the Appellant without joining the truck driver who would explain the whereabouts of the cement they collected from the Appellant. He further submitted that since the Appellant's obligation ceased once cement was loaded on the truck, the trial Magistrate was erroneous to hold the Appellant liable.

On the last ground of appeal that the trial Magistrate erred to award the damage at a tune of TZS 8,000,000=/. He submitted that there was no justifiable evidence to prove that the 1st Respondent had suffered loss because there was no evidence at the trial Court to prove the same. He supported his submissions by citing the case of **Anthony Ngoo & Another vs Kitinda Kimaro, Civil Appeal No. 25 of 2014,**

(Unreported) in which, the Court of Appeal emphasized that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. Further that judges have discretion in the award of general damages but must assign reasons.

In reply, Mr. Kilian submitted that parties in a suit are bound by their pleadings. That the Appellant's allegation of the pecuniary jurisdiction is misleading the Court because through the Plaintiff's plaint filed at the trial Court show the cause of action articulated under paragraph 4 of the said plaint, the 1st Respondent's claims the principal sum of TZS 88,782,000/= being a special damages for breach of contract which were analysed at paragraph 13(a)(i) and (vi) as a compensation for impaired business good will. He went further to submit that even at paragraph 12 of the plaint, the Plaintiff's claim was TZS 93,000,000/=. He went on submitting that the trial Magistrate's assessment regarding the issue of special damage was correct due to wrongful act committed by the Appellant that affected and destroy the good will of the 1st Respondent's business to their clients.

He further contended that special damage is a damage suffered or directly connected to a course of action and amount of loss must be established by particularization of such loss. That at the trial Court, it was decided that the Appellant's failure to deliver cement consignment to the

Respondent that harmed his business and good will of his clients as a result of his claim at a tune of TZS 88,782,000/= being further compensation against impaired business good will is directly connected to the course of action which is breach of contract by failure to deliver the cement consignment. That the alleged specific claim which gives trial Court's jurisdiction is found on paragraph 4 of the plaint which was TZS 88,782,000/= and not TZS 7,122,000=/ as alleged by the Appellant, hence the trial Court had pecuniary jurisdiction to determine the matter.

On the allegation by the Appellant that the 1st Respondent had no locus standi, Mr. Killian submitted that this is an afterthought at this stage because at the trial Court the Appellant himself tried to rise this issue by way of preliminary objection. That during the hearing of the preliminary objection, the appellant withdrew the preliminary objection and therefore he cannot bring the same issue by way of appeal.

He went submitting that at the trial Court, the 1st Respondent adduced exhibit P-1, a letter of administration issued by Kawe Primary Court showing his appointment as administrator of the deceased Estate vide Probate Administration Cause No. 179 of 2017 dated October, 2017. That he also tendered business licence of the deceased as exhibit P-3, and all documents indicated that the deceased had been using the two names interchangeably. Further that the trial Magistrate had admitted

those documents and made findings to the effect that the deceased person was using these two names interchangeably.

On the third ground of appeal, his reply was that the Appellant's failed to prove the driver delivered the consignment to Respondent's warehouse. He submitted further that if the driver has to be paid by the Respondent once the cement reaches his office, it does not require two separate agreements and the Appellant never proved that unless paid transport the purchased cement ought to remain in his go down. Further that since exhibit D-1 does not prove that the cement was delivered to the Respondent, it is clear that the Appellant was duty bound to deliver the cement to the Respondent pursuant to Section 20(b) of Cap 214 R.E 2019 which make it mandatory that where there was a contract for sale of specific goods and the seller is bound to do something to the goods for the purposes of putting them into deliverable state, the property does not pass until such thing is done and the buyer has a notice thereof. He submitted that failure for the Appellant to honour his contractual obligation of delivering the cement to the purchaser makes the 1st respondent entitled to damages.

He contended that the awarded TZS 8,000,000/= was a result of prayer of the Respondent that he was entitled refund of monthly lost

revenue at the tune of TZS 444,000=/ per month counting from January 2019. His prayer was that the appeal is dismissed.

In a short rejoinder, the Appellants' counsel reiterated his submission in chief to the effect that the trial Court had no pecuniary jurisdiction to determine the matter, the Respondent failed to establish that he had locus standi at the trial Court and the awardable damages at a tune of TZS 8,000,000/= to the Respondent was based on unsubstantiated calculation. He reiterated his prayer that the appeal is allowed.

Having gone through the rival submissions of parties, it is clear that my task is to determine whether this appeal is meritorious as per the grounds raised and argued. It is trite law that in determining a first appeal, the first appellate Court has a duty to re-evaluate the trial Court's evidence and make a finding on the evidence or law in relation to the raised grounds of appeal. Having re-visited the grounds of appeal herein, they have raised four important issues that **One**, whether the trial Court has pecuniary jurisdiction. **Two**, is whether the trial Court's finding that the 1st Respondent had locus standi was correct. **Three**, whether the Appellant fulfil his contractual obligation to the 1st Respondent and **Four,** whether the trial Court's findings on specific and general damages that was awarded the 1st Respondent was according to the law.

To start with the first issue, Section 13 of the Civil Procedure Code, Cap 33 R.E 2019 ("CPC") requires a suit is to be instituted in the court of the lowest grade competent to try it. I have revisited the trial Court record and the impugned decision I noticed that, the amount claimed by the Plaintiff was TZS 7,122,000/= as tie down purchase price, refund of monthly lost revenue of Tshs. 444,000/- per month from January, 2019 to the date of judgment, a compensation against impaired business loss at Tshs. 75,000,000/- and interest. All these were categorised as special damage which was within the pecuniary jurisdiction of the District Court. Therefore in conclusion to the first issue, the trial court had jurisdiction to determine the matter.

The second issue on whether the 1st Respondent had locus standi at the trial Court need not detain me much. As correctly pointed out by Mr. Killian, the appellant had raised the issue as an objection which he later opted to abandon it. He cannot bring it this stage of appeal as it I trite law that an issue not raised during trial and in this case abandoned during trial, cannot be raised at this stage.

In considering the third issue whether the Appellant fulfil his contractual obligation to the 1st Respondent, I have revisited the held that:

"Things speak for themselves that if at all the 1st Defendant was sure that the said consignment was collected or rather picked by the

plaintiff, there could not have been hesitations as to reliance as to secondary evidence on argument that the said original is in possession of the Plaintiff unlike in alternative, relying on the side that person who collected the same is unknown as to his whereabout"

The magistrate also made a finding that if the said consignment was collected, the Appellant could rely on secondary evidence to that effect to prove the same was issued by him or his argent and that could be the plausible evidence that the 600 bags of cement was delivered by the 2nd Respondent herein. The above findings by the trial Magistrate was based on adduced evidence and I agree with trial Magistrate that the Appellant failed to fulfil his contractual obligation as required by the Law under Section 20(b) of the Sale of Goods Act, Cap 214. It is undisputed that the contract between the Appellant and 1st Respondent herein was for sale of specific goods which was 600 bags of cement. The seller, who is the Appellant herein was bound to do something to the goods for the purpose of putting them into a deliverable state as the property does not pass until such thing is done and buyer has notice thereof. Therefore, there was no proof that the said goods were delivered to the appellant.

As to the fourth issue, I am aware that the general damages are awardable by the Court where the trial Court considered the evidence on record justify the award. This position was emphasized in the case of;

Anthony Ngoo & Another vs Kitinda Kimaro, Civil Appeal No. 25 of 2014, (Unreported) (Supra) in which, the Court of Appeal stated that:

> *"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judges have discretion in the award of general damages. However, the judge must assign reasons."*

On the established principle above, I have also considered the fact the time that has passed between when the plaintiff/respondent realised that his consignment had been delivered to the time when he sued the defendants/appellant. The cause of action arose in January 2019 which to the date of filing of this case, more than a year had lapsed. Therefore the plaintiff could not claim for loss of business or interest as he took time to do so. That being the case, the order for general damages is set aside.

The order for payment of Tshs. 7,122,000/- being special damages is upheld as the same is proved and the trial magistrate stated reasons for his award at pg 11 and 12 of the impugned judgment. Since the 1st respondent was doing business and some of his cash was derailed by the appellant, the order for payment of Tshs 8,000,000/- as a resultant profit is also upheld.

In conclusion, this appeal is partly allowed by setting aside the order for payment of general damages to the tune of Tshs. 10,000.000/-. However, the appellant is still under obligation to pay the 1st respondent a refund price of Tshs. 7,122,000/- and a resultant profit at the tune of Tshs. 8,000,000/-. The trial magistrate did not peg any interest on the decretal amount and since the 1st respondent was satisfied with the judgment and did not appeal on that, I make no order as to the interest on the decretal sum. For the purpose of clarity therefore, the appellant shall pay the 1st respondent a total sum of Tshs. 156,122,000/- as explained above. Since the appeal is partly allowed, each party shall bear theiw own costs. This does not exonerate the appellant from paying costs of the original suit awarded by the trial court.

Dated at **Dar-es-salaam** this day of 26th **May**, 2023.

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S.M MAGHIMBI

JUDGE