IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 146 OF 2022

ALISAAR INDUSTRY COMPANY LIMITED ..... APPELLANT

VERSUS

WESTER URASSA alias MAMA ESTER t/a
NIKARA CLEARING ..... RESPONDENT

(Appeal from the Judgment and decree of the Resident Magistrate Court of Dar-es-Salaam at Kisutu)
(R.M Ngimilanga, PRM)
Dated 28th day of July 2022
In
(Civil Case No. 25 of 2021)

JUDGMENT

Date: 01 & 28/08/2023

NKWABI, J.:

Between the parties to this appeal, it is common ground that the parties had an oral contract for renovation of several premises. The respondent needed the services of the appellant for rehabilitation of her premises. The appellant accepted the offer on an agreed consideration. It appears that at some point, the parties to this appeal, hit a snag of disagreement. Having tried to resolve their difference without success through demands to be paid, the appellant filed the suit in the trial court in order to get justice.

As a consequence of the hearing of the suit, the trial court decreed the appellant's case dismissed after finding that the appellant's was not proved. It also ordered the appellant to pay the respondent general damages at T.shs 15,000,000/= after finding that she had caused damages to the respondent for breach of contract. The trial court finally decreed that each party had to bear their own costs.

Hurt by the judgment and decree of the trial court, the appellant has come to this Court for vindication. She listed four justifications for her grievances against the decision of the trial court as below:

1. That the trial magistrate erred in law and fact by failure to analyse the weight of evidence brought by the appellant before the court.
2. That the trial magistrate erred in fact and law in awarding excessive general damages to the tune of T.shs 15,000,000/= to the plaintiff in counterclaim had suffered any damages.
3. That the trial magistrate erred in law and fact in awarding the plaintiff in counterclaim the sum of T.shs 15,000,000/= even after stating that the defendant did not prove his claim on a balance of probabilities.

4. That the trial court erred in law by failure to ascertain whether the allegations in pleadings are admitted or denied and failure to record such admissions and denials as required by law.

On those grounds of appeal, the appellant is praying for:

i. That the appeal be allowed with costs.

ii. Judgement of the trial court be quashed and set aside.

iii. That appellant be granted all the prayers as in the plaint.

iv. Any other order this honourable Court deems fit and just to grant.

By parties' counsel consensus, this appeal was disposed of by way of written submission. The appellant was represented by Ms. Salha Mlilima learned advocate, while the respondent was represented by Ms. Gema Mrina, also learned advocate.

I will start considering and determining the 2nd and 3rd grounds of appeal which were argued together. On them Ms. Mlilima maintained that since the trial magistrate had held that the plaintiff in the counter-claim has failed to prove her claim on a balance of probabilities as there was no evidence to prove for the said claim. Though general damages are in the discretion of the court, since the claim was not proved to the required standard, then the trial magistrate was wrong to even grant the said

general damages. She cited **Alfred Fundi v. Geled Mango & Two Others** [2019] T.L.R. 42 CAT where it was underscored 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 judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same."*

Ms. Mrina was not moved by the argument of her friend. She was of the view that the trial court was correct in awarding T.shs 15,000,000/= as general damages and added that that amount is not excessive. She further contended that the judgment of the trial court is to the effect that the respondent proved the claims in the counterclaim by tendering the schedule (exhibit D1) and BBQ (exhibit D2) and that the judgment finally held that the defendant in the counterclaim breached the agreement as the said work was performed below the standard as agreed. To support her stance, she referred me to **Joao Oliveira & Another v. It Started in Africa Ltd & Another,** Civil Appeal No. 186 of 2020, CAT (unreported) where it was held that:

> *"... according to the evidence on record, general damages was for misuse of the first respondent's website as well as*

stealing the first respondent's customers which was proved through the evidence of PW1, PW2 and exhibit P3. Since general damages are awarded at the discretion of the court, in our considered opinion the amount of USD 20,000.00 awarded by the learned trial Judge is fair in the circumstances of the case. We therefore, find considerable merit in the submission by the respondents."

In rejoinder submission, Ms. Mlilima pressed that the alleged renovation below standard is an afterthought as the appellant was not informed of the same.

Truly, in its judgment, the trial court stated thus:

"However, in proving the said claims, this court had the following observation that there was no any other documentary evidence such as payment receipt, invoices and delivery notes were tendered to prove counter claim 137,55,000/= being the amount paid as advance and unconsumed for the work as agreed and the amount injected to correct the defendant's mistakes or omission. Under the circumstance, this court finds that this claim of the plaintiff in the counter claim has not been proved against the defendant on the balance of probabilities."

It should be remembered that the claim of the respondent in the counter claim was specific damages. According to the judgment of the trial court, the respondent failed to prove such specific damages, and in my view, correctly so, the respondent therefore was not entitled for general damages. As correctly put by Ms. Mlilima, the general damages awarded to respondent were unwarranted. The case of **Joao Oliveira & Another** (supra) cited by Ms. Mrina, is distinguishable with this case because in **Joao's** case, the specific damages had been proved as opposed to the case at hand where the specific damages had not been proved. The award of general damages to the respondent by the trial court is hereby quashed.

Now, I turn to the complaint that the trial magistrate failed to analyse the weight of evidence brought by the appellant. It was avowed by Ms. Mlilima that PW1 and PW2 tendered concrete evidence. Exhibit P1 shows messages which DW1 approved the furnishings proposed also the debt owed by her and her commitment to pay. Exhibit P2 showed the ledger of accounts how much she was still owed by the defendant. She urged that failure to evaluate the evidence is fatal citing **Hussein Iddi & Another v. Republic** [1986] TLR 166. She prayed the ground of appeal be allowed.

Elaborating her position, in reply submission, the counsel for the respondent maintained that the documents tendered by the appellant did

not prove the claim of T.shs 86,910,000/=. The plaintiff was required to prove by submitting receipts used to buy materials, thus rendering her claim to be dismissed.

The counsel for the appellant reinforced her position in rejoinder submission saying that the appellant produced concrete evidence to prove her claim of T.shs 86,910,000/=. The respondent did not refute the messages when showed exhibit D1 where as that shows that the appellant did her job to the required standard by the respondent. The messages show evidence of her accepting the said debt.

Before all else, I will restate the current law that in the past it was fatal to fail to consider the evidence of the defence, but now that position has changed. See **Jafari Musa v. DPP,** Criminal Appeal No. 234 of 2019, CAT (unreported) it was stated that:

> *"We have considered this ground and the arguments thereon. We wish to begin by appreciating that, in the past, failure to consider a defence case used to be fatal irregularity. However, with the wake of progressive jurisprudence brought by case law, the position has changed. The position as it is now, where the defence has not been considered by the courts below, this Court is*

entitled to step into the shoes of the first appellate court to consider the defence case and come up with its own conclusion."

The position in **Musa's** case (supra) gives effect to the position of the law in **The Registered Trustees of Joy in The Harvest v. Hamza K. Sungura,** Civil Appeal No. 149 of 2017, CAT (unreported) where it was underscored that:

"... it is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."

See also the case of **Selle & Another v. Associated Motor Boat Company Ltd & Others** [1968] 1 EA where it was eloquently stated that:

"... An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions ..."

Since the position of the law is that this Court being a first appellate Court is entitled to reevaluate the evidence and come to its own conclusion, I

proceed to do so. Prior to doing so, I have to remind the parties the decision in **Bamprass Star Service Station v. Mrs. Fatuma Mwale** [2000] TLR 390 where it was stated that:

> *"It is trite special damages being exceptional in their character and which may consist of off-pocket expenses and loss of earnings incurred down to the date of trial must not only be claimed specifically but also strictly proved."*

See also **Director Moshi Municipal Council v. Stanlenard Mnesi & Roisiepiece Sospeter,** Civil Appeal No. 246 of 2017 (CAT) at Arusha, (unreported)

> *"Special damages, should be pleaded and strictly proved."*

The pertinent question here is whether the plaintiff proved her specific damages to the required standard. To prove the claim in this case in that standard, the authorities which have to be complied with is **Zuberi Augustino Mugabe v. Anicet Mugabe** [1992] T.L.R. 137 CAT and **Alfred Fundi v. Geled Mango & Two Others** [2019] T.L.R. 42 where, in the latter case, it was stated that:

> *"In the instant case, the Appellant had not produced any documentary evidence to substantiate and justify the claim. As such therefore, there was no verifiable evidence*

to prove that the appellant incurred costs. There should have been proof that he actually sustained those injuries following the said accident and consequently he incurred specified costs and medical expenses for his injuries and such costs and medical expenses should have been supported by respective medical receipts. These supporting documents were not produced before the trial court."

To me the question is whether exhibit P.1 (the messages) between the plaintiff and the defendant as well as exhibit P.2 (ledger account kept in her computer) and produced from there prove the claim brought to court by the appellant. The respondent argued that such exhibits did not prove the claim of the appellant. In exhibit P.1 no any amount claimed is indicated. Lastly, it indicates that the appellant insisted was committed to work which suggests that there was concern on the part of the respondent. Exhibit P.2 is the ledger account kept in the computer of the appellant. But as correctly observed by the trial magistrate, there is no any proof by invoices, delivery notes or anything. In the circumstances the trial court was justified to reach at the decision that the appellant's case was not proved to the required standard. In my view, it correctly dismissed the appellant's suit.

There is yet another complaint by the learned counsel for the appellant in respect of non-compliance by the trial court on Order X Rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2019. That the trial court did not ascertain each party admit or deny such allegations of fact. She claimed that the proceedings, judgment and decree have to be declared a nullity for non-compliance with the mandatory requirement. She did not cite any case law to that effect.

The respondent replied that the requirement was satisfied by framing the issues whereby judgment was entered accordingly. She asked the appeal be dismissed.

Reinforcing her arguments in rejoinder submission, the counsel for the appellant said framing the issues is provided under Order XIV while ascertain the admitted facts is under Order X of the CPC.

I have considered the arguments by both parties, I think that Order X of the Civil Procedure Code is directory rather than mandatory. The trial magistrate or trial judge may not act as such or omit to ascertain the admitted facts and the omission does not occasion injustice. The overriding objective principle too may come into assistance. I do not see how the omission prejudiced any party. In any case, the appellant was

represented by an advocate, I do not see why she did not assist the court. It appears that the complaint is an afterthought. The complaint fails.

As a postscript, however, the appellant did not plead any company resolution for the institution of the present proceedings. It should be remembered that companies authorise the doing of something through resolutions as per **Bunyerere Coffee Growers Ltd. v. Sebaduka & Another** [1970] EA 147 where it was stated that:

> *"When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes ..."*

Now, for a company to sue another party to the suit, the company has to have a resolution, companies are exempted to that requirement of the law only when they are defending a suit. See **Pita Kempap Ltd v. Mohamed I. A. Abdulhussein,** Civil Application No. 128 of 2004 c/f No. 69 of 2005 CAT (unreported) where it was ruled that, and I quote:

> *"In the present case legal proceedings were commenced by Abdulhussein, and not the Company, in the District Court of Kinondoni. Then the Company went to the High Court, still defending itself as the decision was against it.*

Even in this application to strike out the notice of appeal, the Company is defending itself against Abdulhussein by trying to avoid his appeal from being heard at all. Therefore, there is no need of any resolution. So, the preliminary objection is dismissed with costs."

All said and done, the appeal partly succeeds to the extent that the order that the appellant pays to respondent T.shs 15,000,000/= is quashed. In the circumstances of this case, each party shall bear their own costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 28th day of August 2023.

J. F. NKWABI

JUDGE