IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

DC. CIVIL APPEAL NO. 11 OF 2021

(Originating from the District Court of Dodoma, Civil Case No.24 of 2019)

BRAC TANZANIA FINANCE LIMITED.....1ST APPELLANT

ANNA MLAWA.....2ND APPELLANT

VERSUS

GEORGINA DOMINIC BRUNO..... RESPONDENT

JUDGMENT

Date of Judgment: 12/07/2023

MAMBI, J

In the District Court at Dodoma the respondent (**GEORGINA DOMINIC BRUNO)** successfully sued the appellants for claim of payment of Tanzanian shillings Eleven Million two hundred and eight four thousand only (Tsh. 11,284,000.00), being liquidated damages and general damages. Eelier the respondent (Georgina Dominic Bruno) who was the Plaintiff claimed against the defendants BRAC Tanzania Finance Ltd and Anna Mlawa (hereinafter to be referred to as 1st and 2nd Defendants) jointly and severally for the payment of above stated money as liquidated

damages and general damages as assessed by the court, costs and further orders and reliefs the court may deem fit and just to grant.

Briefly the facts allege that the plaintiff has been a regular and non-defaulting borrower of the 1st defendant since 2016. The facts further allege that on the 15th day of April, 2019, the second defendant (2nd appellant) while under employment by the 1st defendant (1st appellant) and acting on his behalf and without any claim of right invaded the plaintiff's (respondent's) premises and took her properties as part of recovery of loan amounted to Tshs.4,984,000/=. The respondent at the trial court claimed that the appellants caused her to suffer loss of Tshs. 2,300,000/=. The trial District Court ordered10, 425,000 as general damages.

Having dissatisfied by the decision of the Trial District Court, the appellants preferred their appeal to this court basing on the following grounds that:

1. The trial court erred in law and fact by awarding general damages basing on specific damages which was not substantiated.
2. The trial court erred in law and fact by holding that the 2nd Appellant was the Agent of 1st defendant hence ending up giving irritational decision.

3. The trial court erred in law and fact holding that appellants were involved in confiscating the respondent property and ignored the appellants clear evidence that they were not involved.
4. Trial court erred in law and fact holding that the first appellant was properly joined to the case without considering that first Appellant was neither party to the case at Primary court nor the application for transfer.
5. That trial court erred in law and facts by holding appellant liable without considering the evidence that the respondent and group member had their own arrangement regarding the properties.
6. Trial court erred in law by determining the matter which it had no jurisdiction.
7. That the trial magistrate erred in law and facts by ignoring, abandoning and neglecting to take into account and consider evidence adduced by the appellants, hence biased and one-sided decision in favour of the respondent.
8. That the trial magistrate erred in law and in fact by making findings and conclusions not based on the facts and evidence available but on own speculations and assumptions.
9. That trial court erred in law and facts by relying on improper provision of law hence ending up giving irrational decision.

10. That the trial magistrate erred both in points of law and in fact by awarding general damages to the tune of **TZS 10,425,000/** the respondent without any justification of the same under required standards by the law.
11. The trial court erred in law and fact by extracting a decree which differs from judgment.

During hearing parties argued by way of written submissions. In their submission, the appellants through their learned counsel submitted that the trial court erred in law and fact by awarding general damages basing on specific damages which were not substantiated.

The appellants counsel argued that at page 17 of the judgment the trial magistrate pointed out that the plaintiff failed to strict prove the claims of specific damages as required. He argued however, that at the same page the trial magistrate used the amount claimed in specific damages in awarding general damages.

The Appellants counsel submitted that the decision of the trial court was not proper as general damages are discretion of the court and are not for enriching the plaintiff. He averred that it is trite law that award of general damages is discretionary, however the same should not be too low or too high or based in an incorrect reasoning. The learned counsel for the

appellants referred the decision of the court in FINCA TANZANIA & DOMMY AUCTIONERS vs BALTAZARY WAMBURA AND DANIEL MAKUYU MAGAI consolidated CIVIL REVISION NO. 26 & 28 HC MUSOMA (Unreported) at page 8.

The learned counsel submitted that in the present appeal the trial court used improper reasoning by applying the sum claimed in specific damages which was not proved. He argued that the general damages awarded to the respondent was too high. The appellants counsel referred the decision of the court in **RELIANCE INSURANCE COMPANY (T) LTD and 2 others vs FESTO MGOMAPAYO, CIVIL APPEAL No. 23 of 2019, (unreported) at page 21 to 22** *where the court held that; it is trite law that, interference of the award of damages is only permissible if it will be seen that the magistrate or a judge assessed the said damages by using a wrong principle of the law. If it happens so, the appellate court should disturb the quantum of damages awarded by the trial court.* The appellants counsel submitted that as the claims in specific damages were not proved therefore the magistrate applied a wrong principle to award the plaintiff/respondent general damages based on loss of business which was not proved to exist, thus, this court intervention is necessary to set aside the same.

The appellant counsel submitted that; there is clear evidence at pages 38, 44 and 45 of the typed proceedings that the properties of the respondent herein were taken by her fellow group members who were also her guarantors of the loan.

He further averred that the trial court misled itself in appreciating the agency relationship concept as contained under part X of the Laws of Contract Act Cap 345 R.E 2019. He argued that it is on the record that the properties were seized by the group members (guarantors of the respondent). The learned counsel further submitted that the group was not an agent for the 1st appellant, and there was no any authority given to group to undertake what was done. He was of the view that sections 138 and 139 are not applicable to this circumstance, and even section 148 of the Law of Contract Act would not be applicable.

Addressing the third ground the appellants counsel submitted that the Trial magistrate erred in law and fact in holding that the appellants were involved in confiscating the property of the respondent despite clear evidence that they were not involved. He argued that reference can be made pages 38-40 and 44-46 of the typed proceedings where there is clear and undisputed evidence that the properties of the respondent were taken based on the written agreement between respondent herself and other group members (guarantors). He was of the view that since the

respondent was indebted by other financial institution it was proper for the properties to be stored to her fellow colleagues to avoid confiscation by other financial institutions.

Addressing the fourth ground of appeal, the appellants counsel submitted that the trial court erred in law and fact in holding that the 1st appellant was properly joined to this case without considering that the 1st appellant was not a party to the case at primary court and not the party to the application to transfer.

On the 5th ground of appeal, the appellants counsel submitted that the trial court erred in law and fact by holding the appellants liable without considering that the respondent group members had their own arrangement regarding the properties. The learned counsel for the appellant went on arguing that the testimony of DW1 and DW2 at pages 38 to 40 and 44 to 46 of the proceedings are very clear that there was an agreement between the respondent and her fellow group members regarding the property which was taken since the group was the general guarantor of the respondent in the loan.

With regard to the 6th ground of appeal, appellants counsel submitted that the trial court erred on law in determining the matter which it had no jurisdiction. The appellant counsel averred that the act of joining the 1st

appellant without following the procedure and basing on the amount which claimed makes the trial court to lack pecuniary jurisdiction to entertain the matter thus giving the 1st appellant the right to raise the question of jurisdiction of the court to entertain the matter.

Addressing the 7th and 8th grounds of appeal the appellant counsel submitted that the trial magistrate completely ignored the testimony of DW1, DW2 and DW3. He argued that it is in the record that there were agreements between the respondent and the group members as guarantors on taking the properties as indicated under pages 39,44 and 45 of the typed proceeding. He contended that the group members acted with no instructions or order from appellants and the properties were out in the custody of DW2 thus, proving their arrangement. The appellants counsel further submitted that the trial court completely ignored the evidence by the appellants that the group was not owned by the first appellant but it was the condition that in order to get a loan one must belong to a certain group which will guarantee repayment of the loan. He argued that since the loan were collateral free, the group was the guarantor and DW1 was also a guarantor of the respondent.

The appellants counsel averred that the respondent has never been in arrears since she has started borrowing from the 1st appellant. The appellants counsel was of the view that failure to consider this led the

court to end up giving one sided decision condemning the appellants without any justifiable reasons.

The learned counsel also argued that, the trial court completely ignored undisputed testimony of DW1 at page 39 that there was no any evidence of ownership of business by the respondent brought to court.

With regard to the 9th ground of appeal, the appellants counsel submitted that the trial court erred in law by relying in improper provision of law hence reaching to erroneous decision. The learned counsel contended that the trial magistrate erred in law by quoting the provision of section 48(1) of CPC without considering that the provision is applicable in execution of decree of court and what happened in the case at hand was not execution of decree of court rather it was the personal arrangement between the respondent and her guarantors.

In respect to the 10th ground of appeal, the appellants counsel submitted that the trial court erred in law and fact by awarding general damages to the tune of 10,425,000 without justification. The appellants counsel argued that it is trite law that award of general damages remains discretionary but the same must be exercised judiciously and not with the aim of enriching the respondent. The learned counsel was of the view that

there was no justification by the trial court to award such amount relying on the income from business which was not proved.

In response, the respondent counsel submitted that, the respondent has been a regular and non-defaulting borrower of the Appellants since the year 2010. She argued that the point of contention can be traced back in the year 2019 where the 2nd Appellant who is the employee of the 1st Appellant invaded and entered into the premise of the Respondent and took the properties. The respondent counsel submitted that the appellant took 2 beds, Mattress, 1 cupboard, 2 Decoder, solar power system complete set, Television show case, Dinner table, sofa set complete 1 charcoal pan, and 2 plastic buckets(majaba).

With regard to the 1st ground of appeal, the respondent counsel submitted that it had no merit since the assessment of the general damages was sound and legally acceptable.

The respondent counsel finally submitted that, the 2nd appellant is an employee of the 1st appellant the fact which was also admitted by the appellants themselves on page 2 of their submission by stipulating that the 2nd appellant is a credit officer of the 1st appellant responsible for collecting loan installments from the group members she was supervising.

Addressing the 3rd ground of appeal, the respondent counsel argued that, it is the supervisor (who is the 2nd appellant herein) who authorized the group members to confiscate the respondent's properties in her house after being informed by another member of the group that the respondent herein had intention to leave to another region. She argued that this can be portrayed on page 5-7 of the judgment. The respondent counsel further submitted that it is not true that there was an agreement in writing between the respondent herein and the group members.

The learned counsel argued that, it is crystal clear that, it was proper for the 1st appellant herein to be joined as a 1st defendant in a trial court for a proper and smooth determination of the case before it, this is due to the fact that was the 1st appellant who entered into a contract with the respondent.

On the 5th ground of appeal, the respondent counsel submitted that there was no contractual agreement between the respondent herein and the group members rather the 1st appellant and the respondent herein.

On the 6th ground of appeal the respondent counsel further submitted that the trial court had jurisdiction to try the matter since the same was transferred from Dodoma Urban Primary Court to the trial court,

thereafter the respondent herein joined the 1st appellant the act which is permissible in law.

With regard to the 7th and 8th ground of appeal, the respondent counsel is still holding to what she submitted on the 5th ground above, the respondent counsel averred further that, the appellants submitted to the extent that, they agreed that the respondent herein had no any arrears in her loan and yet the 2nd appellant basing on the unproved information she received from another member of the group she proceeded to invade at the respondent's premises and confiscated her properties leaving her live a miserable life with her family since the properties they took were used by the respondent herein for doing business as PW2 testified, that her family entirely depended on them.

As regards to the 9th ground of appeal, the respondent counsel submitted that such misquoting of the law did not in anyhow occasion failure of justice between the parties herein. She added that the award by the trial court was neither excessive nor unentitled since the circumstance of the case required such entitlement.

On the 10th ground of appeal, the respondent counsel submitted in reply that, it was proper for the trial court to award general damages to such an extent due to the fact that the award of general damages is not

reached upon proof of the parties to a case rather it is the court discretion upon assessing as to what extent a party to the case had suffered. Therefore, questioning the extent at which the general damage was assessed by the trial court was to interfere with the court discretion.

On the 11th ground of appeal the respondent counsel submitted that there was nothing to reply since the same contained no allegation that needed a reply.

Having summarized submissions by both parties let me now at this juncture analyse their arguments and determine the merit for this appeal. I have perused and considered both submissions from the parties including the proceedings and Judgment of the Trial Court. From what I have observed, in my considered view one of the key issues that need to be determined in this appeal is whether the trial Court erred in law and fact in awarding the general damages. In other words, the issue is, firstly was the court order of payment of **TZS 10,425,000/** as special damages justified? Secondly, were the general damages specifically pleaded and, in any case, was the quantum awarded proper? In other words was there any damages suffered by the respondent as the result of the appellants' action?

I have clearly gone through the records and found that there is no dispute that the respondent defaulted the payment of money due but the procedure of recovering money was not justifiable. The records show that the appellants invaded the respondent at her premises causing the respondent to suffer some damages.

Looking at the second ground of appeal, the appellant is contending that the magistrate erred in law in awarding the damages that were not specifically claimed. The appellants have not clearly elaborated on how the magistrate erred in analysing the evidence and making the decision

It is a well-established principle of the law that in civil matters the burden of proof lies on the one who alleges. Reference can be made to section 111 of the Evidence Act Cap 6, [R.E. 2019] which provides that:

> *"A burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on their side."*

The Court in ***NATIONAL BANK OF COMMERCE LTD Vs DESIREE & YVONNE TANZAIA & 4 OTHERS, Comm. CASE NO 59 OF 2003 HC DSM,*** had once observed that: -

> *"The burden of proof in a suit proceeding lies on the person who would fail if no evidence at all were given on their side".*

On the issue of whether the respondent proved her case to warrant awarding of damages, as I alluded above there are ample evidence

proving that the respondent was invaded at her house and her houseware confiscated by the appellants.

The law permits the award two types of damages, specific and general, to the affected person by the acts of another. The Court in **LIVINGSTONE V RAW YARDS CAAL CO (1850) 5 Case 25)** clearly explained "damages", to mean: -

> *"The sum of money which will put the party who has suffered in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation".*

It is a trite law that general damages need not be specifically pleaded, they may be asked for a mere statement or prayer of claim. While special damages may consist of "out-of-pocket expenses and loss of earnings incurred down to the date of trial, and may be capable of substantially calculation", general damages are implied by law and may include "compensation for pain and suffering and the like. That is to say, in claim for general damages, particulars of the quantum of damages claimed will not be needed. Unlike general damages, the special damage must be specifically pleaded and strictly proved. Where the special damages are proved they must, as of right be awarded. See **The Cooper Motor Corporation Ltd v. Moshi-Arusha Occupational Health Services** [1990] TLR 96 where the court held that: -

"General damages need not be specifically pleaded; they may be asked for by a mere statement or prayer of claim"

The court ***Prehn V. Royal Bank of Liverpool***, observed that:

"General damages are such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man..."

See also **Perestrello Companhia Limitada v United Paint Co. Ltd., [1969] 1 W.L.R. 570**. The Court in this case observed that:

"If damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question".

The question before this court is that were special damages specifically pleaded and proved? The records shows that the respondent at the trial court claimed (Tsh. 11,284,000.00) as special damages. The records (judgment of the trial magistrate) at page 17 shows how she reached her decision of awarding the respondent **Tsh 10,425,000/** as general damages. However, the trial magistrate didn't show how she made her decision on the amount claimed without securitizing as to whether such amount was justifiable. It is true that the respondent suffered damages from the act of the appellants but the trial magistrate was required to properly asses the actual amount suffered by the respondent. I am of the stetted mind that the damages awarded by the trial magistrate was

excessive and they did not justify the damages suffered by the respondent.

Looking at damages that was suffered by the respondent the trial court was in better position to consider and award general damages after analysing and satisfying herself that the respondent actually suffered what she claimed. In the circumstance of this case despite the fact that the respondent was highly affected by the conducts of the appellants and the position of the respondent in my view the amount of the ward should have been Tshs **5,4250, 000/-** only and not tshs.10,425,000/= as awarded by the trial Magistrate.

The Court in ***BERNADETA PAUL v REPUBLIC (supra)*** observed that:

> *"An appellate court should not interfere with the discretion exercised by a trial judge as to sentence except in such cases where it appears that in assessing sentence the judge has* ***acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive".***

In our case in hand, it is clear from the record that the trial Magistrate acted upon some wrong principle and awarded damages which are manifestly excessive which warrants interference of this court inevitable.

In view of the above findings, it can confidently be concluded that, failure to properly consider the proper award of damages that seems to be excessive without justification warrant this court to reverse the decision of the trial court. In the circumstances I am satisfied that the trial court failed to justifiably use its discretionary power to impose lesser award against the appellants.

Thus, considering the circumstances, I consider substituting the amount of Tsh 10,425, 000/ with Tsh **5,425, 000/=** (Five Million and four hundred twenty-five thousand only.

I therefore think that an award of Tshs. **5,425, 000/=** (Five Million and four hundred twenty-five thousand) will be more justifiable as compared to Tsh 10,425,000/= that was awarded by the trial Magistrate.

With regard to the issue of whether the trial court had jurisdiction or not to entertain the case before it by having joined the other party.

Looking at the trial court records and the plaint with the claim filed at the court fall under the ambit of power and jurisdiction of the lower Court.

In the circumstance and from the reasons stated above I have no reason to fault with the decision of the trial Magistrate rather than upholding her decision save for the amount of general damages that I have substituted. Thus, this appeal is partly allowed and the appellants are hereby ordered

to pay the respondent Tshs. **5,425, 000/=** (Five Million and four hundred twenty-five thousand) only as general damages instead of tshs.10,425,000/= awarded by the trial court. This appeal is thus partly allowed to the extent of the orders I have made.

No order as to costs.

MAMBI

JUDGE

12.07. 2023

Judgment delivered in Chambers this 12th day of July, 2023 in presence of both parties.

MAMBI

JUDGE

12.07. 2023

Right of Appeal explained.

MAMBI

JUDGE

12.07. 2023