IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IN THE SUB REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO. 117 OF 2023

HEMED OMARY KIMWAGA ..... APPELLANT

VERSUS

THINAMY ENTERTAINMENT LIMITED .....RESPONDENT

[Arising from the Judgment and Decree of the Resident Magistrates Court of Dar es Salaam at Kisutu in Civil Case No. 35of 2022 before Hon. MP. Mrio, PRM)]

JUDGMENT

3rd& 28th November 2023

CHUMA, J:

Before the Resident Magistrates Court of Dar es Salaam at Kisutu, the appellant in this matter sought against the respondent for, among others, payment of TZS 200,000,000.00 being an outstanding amount as per the terms of the agreement and TZS 600,000,000.00 named as general, punitive, and exemplary damages. However, after hearing both sides, the trial court rendered its judgment for the respondent by dismissing the suit with costs. Dissatisfied, the appellant preferred this appeal.

The bare facts of this case, although brief, are such that: In 2017 the appellant and respondent entered into a legal representation and consultation agreement where the appellant was a personal representative of the respondent in all labor and civil matters filed before the Commission for Mediation and Arbitration (CMA), the Resident Magistrate Court of Dar es

Salaam at Kisutu and High Court (Labour Division). They agreed that the appellant should be paid the fee depending on the nature of the case or dispute. After three years of performance, to be precise, in October 2020 the respondent issued the appellant with a notice revoking him from representation services in any of the matters pending in court. Seeing the notice of revocation as a wake-up call that his services were no longer needed and given the fact that he was not yet paid in full for the services rendered, the appellant issued a demand notice requiring the respondent to pay the outstanding amount as per the terms of the agreement. Such efforts were barren of fruits hence the appellant took the matter to court.

Not surprisingly, the respondent through its written statement of defence disputed all the claims leveled by the appellant. It contended that there was no breach except that after the appellant had misrepresented himself to the respondent as a qualified lawyer, he was paid all dues relating to the matters he attended. The respondent therefore prayed for the dismissal of the suit.

Ahead of the hearing, the trial court had three issues for deliberation: one, whether there was a contractual relationship between the parties, two, if the first issue was to be answered in the affirmative, whether there was a breach of the said contract and; three, to what reliefs were the parties entitled. After analyzing the evidence, the trial court answered the first issue in the affirmative that there was an agreement where the appellant was engaged to represent the respondent in labor matters. The second issue was resolved in the negative for the appellant failed to demonstrate that it was the respondent who terminated the agreement. The basis of the trial court

reasoning as reflected at p. 5 of the judgment was that the appellant failed to negate the fact made by DW1 that the agreement for representation was terminated by the High Court (Labour Division). The last issue on reliefs was also answered in the negative.

In the memorandum of appeal to this Court, the appellant raised the following grounds:

1. The Learned Trial Magistrate erred in law and fact by disregarding the Appellant's evidence that the representation agreement was terminated by the respondent.
2. Despite ample evidence from the appellant and unequivocal admission by the Respondent in the pleadings and evidence during the trial, the Learned Trial Magistrate erred in law and in fact, by finding the Appellant failed to discharge his burden of proving the Respondent terminated the representation agreement.
3. After holding that the appellant failed to prove that the respondent terminated the representation agreement, the Learned Trial Magistrate erred in law and fact by finding that the appellant was stopped by the High Court from representing the respondent in labor matters without any evidence from the record.
4. The Learned Trial Magistrate erred in law by finding that the appellant was paid fees for the representation of 20 cases by way of a Petty Cash Voucher tendered by the respondent.
5. The whole Judgment and findings of the Learned Trail Magistrate are not supported by evidence on the court's records and pleadings.

When the appeal was called on for hearing on 3rd November 2023, the appellant appeared in person, unrepresented. The respondent on the other hand had the service of Mr. Abubakari Salim from Rutasingwa and Associate Attorneys. By consent of the parties, the Court ordered the appeal to be disposed of by way of written submission.

The appellant chose to argue grounds 1, 2, 3, and 5 together because they are interrelated. He began by explaining various principles that govern proof and standard of proof in civil cases as well as the duty bestowed upon the first appellate court. The relevance and applicability of those principles will become apparent in due course.

Regarding breach of the representation agreement, the appellant faulted the trial court for ignoring the naked truth from exhibit P5, the SMS printouts, which proved that the respondent terminated the contract and was giving endless promises to pay the outstanding fees. He urged this Court to find that the respondent admitted in the written statement of defense and during the trial that there was a breach of the contractual relationship between them without any justifiable reason. The appellant amplified further that the trial court erred in believing the evidence of DW1 who testified that the contract was terminated due to the decision of the High Court, Labour Division which held that a personal representative should not represent a party to a case while the said decision was not produced in Court.

In response, Mr. Abubakari for the respondent blamed the appellant for coming up with new things in his submission that have no bearing on the grounds of appeal or to the issues framed before the trial court. That

notwithstanding, the learned advocate submitted that through exhibit D1 it was vividly clear that payment was effected to the appellant who acknowledged by signing the Petty Cash Vouchers. Mr. Abubakari cemented that the said vouchers were admitted without objection and the appellant during cross-examination did not dispute the signatures appended in the respective vouchers.

Having heard the parties and due consideration for the evidence in the record, the Court appreciates the industry in the arguments presented by the parties which will assist to a great extent in the findings of this judgment. I can do no better than commend them for their excellent commitment. Back to the appeal. There was an argument raised by Mr. Abubakari that the appellant failed to direct himself well on the grounds raised in the memorandum of appeal. This argument should not take much time because what the appellant did was to generalize her complaints on grounds 1, 2, 3, and 5. Even if it were otherwise, according to Order XXXIX rule 2 of the Civil Procedure Code, Cap. 33 R.E 2019, the Court has jurisdiction to decide the appeal based on grounds of objection not set forth in the memorandum of appeal provided that both parties have been afforded sufficient opportunity to contest the case on that ground.

The prime question for determination is whether the trial court erred in not finding that the respondent breached the agreement. However, before dwelling on that issue, both parties are not in dispute that in civil litigation he who alleges has a burden of proof. That is the spirit of section 110(1) and (2) of the Evidence Act, Cap 6. R.E 2002, that whoever desires any court to give judgment in his favor as to any legal right or liability dependent on the

existence of facts which he asserts must prove that those facts exist. The party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities. In the case of **Paulina Samson Ndawavya vs. Theresia Thomas Madaha,** Civil appeal No. 45 of 2017 (unreported) referred to by both parties, the Court of Appeal stressed that when the dispute relates to a civil case, the standard of proof is on a balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. The Court held further that: -

> "It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case."

Furthermore, as correctly submitted by the appellant this being a first appeal, the Court has to re-consider and re-evaluate the evidence and draw its own conclusions. The same legal principle was expressed in the cases of **Makubi Dogani v. Ngodongo Maganga**, Civil Appeal No. 78 of 2019, and **Domina Kagaruki v. Farida F. Mbarak & Others**, Civil Appeal No. 60 of 2016 (unreported). In the latter case, the Court of Appeal held that:

> ...we wish to point out that since this is a first appeal, the Court has a right and duty to re-consider and re-evaluate the evidence and draw its conclusions (See **OKENO VS REPUBLIC** (1972) E.A.32. However, such jurisdiction must be exercised with great caution. The jurisdiction can

be exercised if there is no evidence to support a particular conclusion; or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong. (See **PETERS VS SUNDAY POST LIMITED (**1958) E.A424)

Reverting to the point at issue, I am of the settled view that the evidence on who breached the contract left nothing unturned. The appellant's testimony supported by exhibit P5, the printout texts dated 7th November 2020, proved on a balance of probability that the respondent, for unknown reasons, terminated the contract. If the trial court had considered that piece of evidence, it would not have relied on the hearsay evidence of DW1 that the High Court (Labour Division) banned the appellant from representing the respondent hence marking the end of the parties' contractual relationship. To appreciate the substance of the said text from one of the respondent principal officers to the appellant, I will let the relevant part speak for itself:

> *"Kampuni imevunja mkataba na wewe na hatuhitaji uendelee na kesi yoyote na hukumaliza kesi na ulishachukua malipo yako yote na documents ZOTE tunazo hivyo sina maongezi na wewe.....Kesi zako zote tumeshaingia mkataba mpya na kaka Aboubakar na kampuni yake na natumai ameshakupa maelezo yote hivyo huna haja ya kuhudhuria kesi yoyote kutoka kwenye kampuni zetu zote na hudai chochote kwa kuwa*

hukumaliza kesl. Natumai umenielewa n ahata ukimtumia message mkurugenzi yy hakukupa kazi."

The literal translation of the above extract is as follows:

"The company has terminated the contract with you and we don't need you to continue with any case you didn't finish the case and you have already taken all your payment and ALL the documents we have so I don't have anything to talk about with you... regarding your cases, we have entered into a new contract with Aboubakar and hls company and I hope he has given you all the information so you don't need to attend any case on behalf of our companies and you don't have any claim as you didn't finalize all cases. I hope you understand and even if you send a message to the director, he is not the one who hired you."

Those words do not need a master's degree to understand them. The intent and purpose of the author indicate that he intended to terminate the contract. If the trial court had not read the words upside down, it would not have decided as it did. The trial court misdirected itself in believing DW1's statement without taking into account that the alleged decision of the High Court (Labour Division) was neither shown nor received in court. Under the circumstances, it is clear that the respondent breached the agreement.

For the claims that the appellant was paid fees for representation of twenty cases by way of Petty Cash Voucher (exhibit D1), the appellant was

adamant that the said vouchers were deficient to prove payment because they are not clear on who was paying who or who was the payer and payee. According to the appellant, other vouchers are blank, they were not signed. Bolstering his point, the appellant implored this to have a glance at the case of **Entertainment Masters Limited v. Serafma Limited and Another**, Land Case 110 of 2021, High Court of Tanzania (Land Division) at Dar es Salaam (unreported).

The appellant submitted further that since the case against the respondent was proved on the balance of probabilities [and based on the weight of exhibit P1, P2, and P3,] the respondent is liable to pay the sum of TZS 52,000,000.00 being the outstanding amount for twenty-one cases filed before Commission for Mediation and Arbitration (CMA). He added that the respondent was also liable to pay TZS 18,000,000.00 for six cases filed before the High Court Labour Division; TZS 30,000,000.00 being 15% charging fee of TZS 200,000,000.00 in the case between David Neary and the Respondent and; TZS 75,000,000.00 being 15% charging fee of TZS 500,000,000.00 agreed in the case between Focus Celestine Bigambo and the Respondent. It is also his contention that he is entitled to TZS 94,000,000.00 being a consultation fee for labour matters making a total of TZS 269,500,000.00.

In the end, having regard to the conditions outlined in the case of **Cooper Motors Corporation Ltd v. Moshi Arusha Occupational Health Services**, [1990] TLR 96 and **Stanbic Bank Tanzania Limited v. Abercrombie & Kent m Limited**, Civil Appeal No. 21 of 2001, Court of Appeal of Tanzania at Dar es Salaam (unreported), the appellant argued that

this is a fit case to grant both general and punitive damages as the respondent admitted to have breached the representation agreement deliberately without any tangible reason and failed to prove that she paid the Appellant his fees for work done.

Resisting the appellant's submission, Mr. Abubari argued that the sum of TZS 200,000,000.00 claimed before the trial court as specific damages was not strictly proved. That appellant fabricated the amount as he failed to demonstrate how such an amount was reached. Regarding the general and punitive damages, Mr. Abubakar supported the trial court findings that they were properly rejected.

Considering the submissions and the evidence advanced by both parties, the question is whether the High Court was justified in rejecting the payment of special, general, and punitive damages. Section 73(1) of the Law of Contract Act provides that when a contract has been breached, the party who suffers from such breach is entitled to receive compensation for any loss or damage caused to him by the other party. That position is general it needs not to be taken wholesomely without subjecting to specific principles. It is common cause that the claim of TZS 200,000,000.00 pleaded in the plaint falls under the head of specific damages in which the law is settled that it must be specifically pleaded and strictly proved. In other words, the appellant will only be entitled to TZS 200,000,000.00 upon strict proof. There is a death of decisions on this principle, see for instance, the cases of **Tanganyika Bus Service Ltd. versus the National Bus Service Ltd**. [1980] T.L.R 204; and **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R 137.

In this case, the appellant had the responsibility to prove three things: firstly, if he attended twenty cases for the respondent; secondly, proving the amount he was supposed to be paid for each case and; three, demonstrating that despite his performance he could not be paid. After examining the evidence, it seems there is no doubt that the appellant represented the respondent in prosecuting various cases. However, the court was left at a crossroads as there is no concrete evidence to prove that the appellant attended the total of twenty cases deserving payment of TZS 200,000,000.00. Even assuming that the appellant prosecuted those cases, there is evidence of Petty Cash Vouchers (exhibit D1) which were admitted without objection showing that the appellant was paid at different times and he signed to that effect. Given the facts, the appellant had the responsibility, which he failed, to prove which cases he was not paid for. His claims that the signatures on the payment vouchers are not his appears to be a lame argument. In the upshot, the claims of special damages were not properly substantiated.

Punitive damages are awarded to punish the defendant for outrageous misconduct and to deter the defendant and others from similar misbehavior in the future. In the case of **Peter Joseph Kilibika & another v. Patric Aloyce Mlingi**, Civil Appeal No 37 of 2009 (unreported), the Court of Appeal held that to justify the award of punitive damages, the plaintiff must demonstrate that there was arbitrary and unconstitutional action, bad faith, fraud, malice, oppression, outrageous, violent, wanton, wicked, and reckless behavior on the part of the defendant. I do not think the circumstances of this case fit squarely in that category. In the evidence of the appellant,

neither of the conditions were established to justify the award of punitive damages. The complaint is therefore baseless.

Concerning general damages, it is now settled that the respondent breached the contract. The question is whether the appellant was entitled to be compensated TZS 600,000,000.000 being general damages occasioned by the respondent's failure to heed the terms and conditions of the contract. In **Tanzania Sanyi Corporation v. African Marble Company Ltd** [2004] T.L.R 155, when interpreting section 73(1) of the Law of Contract Act, the Court of Appeal held that general damages are such that the law will presume to be the direct, natural or probable consequence of the act, complained of. After going through the plaint as well as the evidence from the record, it seems there is nowhere has the appellant explained how the breach of contract affected him. His explanation was largely focused on special damages and not on to probable consequences of the breach.

From the foregoing analysis and position, and save for the finding on breach of the contract, I find no merit in the instant appeal. Consequently, I dismiss it with costs.

It is so ordered

DATED at **DAR ES SALAAM** this 28th November 2023

W.M. CHUMA

JUDGE

28/11/2023