IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 07 OF 2023

(C/F Civil Case No. 11 of 2021 in the District Court of Moshi at Moshi)

JANETH WILLIAM KIMARO and VIV MREMA (As Administrators of the Estate of the later MELLEO AUYE MREMA)

MICHELLE MREMA

..... APPELLANTS

VERSUS

BENJAMIN ABRAHAM MENGI

KAREN BENJAMIN MENGI [As Administratrix of the Estate of the Late MILLIE BENJAMIN MENGI)

.....RESPONDENTS

JUDGEMENT

Date of Last Order: 18.10.2023
Date of Judgment: 06.12.2023

MONGELLA, J.

The respondents herein filed a civil claim in the district court of Moshi at Moshi (the trial court, hereinafter) against the appellants for breach of contract. They sought for the following reliefs:

a) *Specific damages of Tanzania Shillings Seventy Hundred Million (Tsh 70,000,00) being the amount for transfer of shares.*

b) *General damages of Tanzania Shillings Fifty Million (Tsh 50,000,000/=) being the cover for the loss suffered by the plaintiffs for the no- payment of the principal sum.*

c) *12% interest at the Court Rate for item A.*

d) *Interest of 22% from the date of Judgment to the date of full payment.*

e) *Cost of the suit.*

f) *Any other relief the Honourable Court deems fit to grant.*

The brief background of the case is to the effect that: on 15.04.2009, the 1st plaintiff and the Late Millie Benjamin Mengi entered into an agreement with the late Melleo Auye Mrema and 2nd defendant for transfer of shares. The 1st Plaintiff and the late Millie Mengi, each agreed to transfer 1 share of Fiona (T) Limited to the defendants for consideration of T.shs. 70,000,0000/=. The payment was to be effected after the signing of their agreement. However, the same was never effected until the demise of 1st appellant.

On 13.02.2019, the appellants, the first being administrators of the estate of the late Melleo Auye Mrema and the 2nd being a shareholder of Fiona (T) Limited met with the 1st respondent and his son, Benson Mengi (PW2) at Moshi. In their meeting it was resolved

that the debt would be paid within six months from the signing date and only T.shs. 20,000,000/- was paid from the estate of the late Melleo. (check these facts).

The appellants denied the said claim and raised an objection as to the jurisdiction of the trial court which was dismissed in favour of the respondents.

To prove their claim, the respondents had two witnesses. The 1st respondent testified as PW1. He also tendered loss report on Members Extra ordinary meeting resolution dated 15.04.2009 which was admitted as exhibit P1; Members Extra ordinary meeting resolution dated 15.04.2009, admitted as exhibit P2 and; Members Extra ordinary meeting resolution dated 13.02.2019, admitted as exhibit P3. The other witness was one, Benson Mengi who testified as PW2.

The appellants had one witness, that is, the 2nd appellant who testified as DW1. Upon closure of the case, the trial court found in favour of the respondents and granted them the following reliefs; specific damages of T.shs. 50,000,000/=, general damages of T.shs. 20,000,000/=, commercial interest at 20% for specific damages from date of cause of action to date of judgment; and court interest rate at 7% for general damages from the date of judgement to full payment. Aggrieved by the Judgement and decree, the appellants have filed this appeal on the following grounds:

1. *That the learned trial magistrate erred in law and fact by holding that the court has jurisdiction to determine the said suit.*

2. *That the learned trial magistrate erred in law and fact by wrongly awarding general damages.*

3. *That the learned trial magistrate erred in law and fact by wrongly awarding 20% interest on specific damages from the date the cause of action became due to the date of the judgment.*

4. *That the learned trial magistrate erred in law and fact by wrongly awarding 7% interest on the general damages from the date of the judgment to full payment.*

5. *That the learned trial magistrate erred in law and fact by failure to consider properly evidence on record.*

The appeal was heard viva voce whereby both parties were represented by learned advocates. The appellants were represented by Mr. George Njooka and the respondents by Mr. Patrick Paul and Ms. Beatrice Chami.

Mr. Njooka commenced his submission in chief by praying to abandon the 2nd, 4th and 5th grounds of appeal and thus only submitted on the 1st and 3rd grounds of appeal.

On the 1st ground, he averred that the trial court lacked jurisdiction to entertain the suit and a preliminary objection to that effect was raised before the trial court and argued by written submissions, but

was eventually overruled with costs. He however, still maintained his stance that the trial court lacked territorial jurisdiction to entertain the matter as per **section 18 (a) and (b) of the Civil Procedure Code** [Cap 33 RE 2019], which provides that a suit should be instituted where the defendants reside or where the cause of action arose wholly or partly. He was thus of the view that in accordance with paragraph 2 of the amended plaint, the appellants reside in Arusha and the same is true. He added that under paragraph 5 of the plaint and annexure P2, which was admitted as exhibit P1, it shows the agreement was made at a meeting held at Arusha.

Mr. Njooka argued further that in the typed judgment, the trial magistrate disclosed that the cause of action arose on 15.04.2009 which was the day the meeting was held at Impala hotel in Arusha. In that respect he had the stance that there was no dispute that the cause of action arose at Impala Hotel in Arusha. Further, referring to the trial court proceedings he argued that it is reflected therein that both defendants reside in Arusha.

Mr. Njooka further challenged the respondents' argument that the address of service does not constitute the place of residence of the defendants. He contended that **Order VII rule 1 of the Civil Procedure Code** requires the plaint to contain names, description and place of residence of the defendants and the same is a mandatory term. He argued that the position of the law is to the effect that a preliminary objection is based on a plaint and its annexures thereby supporting his argument with the case of **Babito**

Limited vs. Freight Africa NV-Belgium & Others (Civil Appeal No.355 of 2020) [2023] TZCA 17586 TANZLII.

Addressing the 3rd ground, Mr. Njooka challenged the trial court for awarding the respondents an interest of 22% while they prayed to be awarded 12% interest as found on item C of the prayers made in the amended plaint. He averred that the trial court ought to have awarded the respondents what they had requested and nothing else. He thus, prayed for the appeal to be allowed with costs, the decision of the trial court nullified and quashed.

The appeal was opposed by the respondents. In reply, to the 1st ground, Ms. Chami averred that jurisdiction is the creature of statute and as per **section 18 (a- c) of the Civil Procedure Code**, it is stated that a case may be instituted where the defendant resides or where the cause of action arose wholly or partly. She averred that while paragraph 2 of the amended plaint disclosed the residence of the appellants to be in Arusha, the same cannot be read in isolation of paragraph 8 of the same plaint which emanates from the agreement dated 13.02.2019, which was admitted as exhibit P3. She said that in the said exhibit, the parties had an agreement to pay the agreed amount, but the appellants defaulted, hence the institution of the suit.

She argued further that the said agreement was entered at Salinero Hotel at Moshi. She added that the shares which were subjected to transfer belonged to Fiona Tanzania Limited which was based in

Moshi and its registered address is in Moshi. In that regard, she had the view that the cause of action arose partly in Arusha and partly in Moshi, hence fits within the requirement under **section 18 (c) of the Civil Procedure Code**. In conclusion, she had the stance that the case was rightly filed in the district court of Moshi as correctly found by the trial court in its ruling of 08.089.2022.

Mr. Paul, picking up from Ms. Chami, prayed for the appeal to be dismissed as the trial court did have jurisdiction to entertain the suit. With regard to the assertion that the trial court in it's judgement interpreted the cause of action as arose in Arusha, he denied the assertion maintaining that most part of the cause of action arose in Moshi.

In reply to the 3rd ground, Mr. Paul supported the award of 20% interest by the trial court. He argued that the same was rightfully awarded as it had been prayed for under paragraph (d) of the prayers in the amended plaint. He had the view that Mr. Njooka wrongfully referred to paragraph (c) of the prayers which was an interest at court rate. He contended that the award of interest is governed by **section 29 and 30 of the Civil Procedure Code** [Cap 33 R.E 2019] whereby the same is awarded from accrual of cause of action to the date of judgement and it is done under the discretion of the court. In support of his argument, he referred the case of **Anthony Ngoo & Another vs. Kitinda Kimaro** (Civil Appeal 25 of 2014) [2015] TZCA 269 TANZLII.

He further contended that the awarding of interest is ancillary relief to reliefs of special damages and can be awarded by the court even if not prayed for. That, the respondent testified that he is a businessman and therefore the nonpayment of the agreed amount caused him loss which would have attracted interest. In that respect, he contended that the trial court rightly exercised its jurisdiction as provided under the law by awarding them the special damages at commercial rate of 20% interest. He prayed for this ground and the entire appealed to be dismissed with costs for want of merit and the trial court judgement and decree be upheld.

In his brief rejoinder, Mr. Njooka first addressed the contents of paragraph 2 of the amended Plaint being read together with paragraph 8 of the same and Exhibit P3. He averred that the appellants were sued in their capacity as administrators of the estate of the late Melleo Mrema thus they stepped into the shoes of the late Melleo Mrema who entered into the original contract. In that respect he considered the meeting held on 13.02.2019 being just a follow up meeting. He maintained his argument that the cause of action arose in Arusha as stated in paragraph 2 of page 5 of the trial court judgement. As to Fiona (T) Limited being based in Moshi, he averred that the same was never mentioned in the pleadings and the company is not a party to the suit.

As to the 3rd ground, he averred that the prayer on paragraph (d) was from the date of judgement and not from date the cause of action arose. He averred that prayer (c) is from the date of cause

of action. While he agreed to the award of interest being covered under **section 29 of the Civil Procedure Code**, he averred that the provision covers the period from the date of delivery of judgement to date of full satisfaction.

I have considered the submissions of both parties' counsels. Since the appellants chose to abandon the 2nd, 4th and 5th grounds of appeal, I shall address the 1st and 3rd grounds as argued by the learned counsels.

On the 1st ground, Mr. Njooka contended that the original suit was filed before a court without jurisdiction. He based this assertion on the requirement under **Section 18 of the Civil Procedure Code** as to territorial Jurisdiction. The provision provides that a case may be filed where the defendant resides or where the cause of action wholly or partly arose. Mr. Njooka was of the considered view that the cause of action arose in Arusha since the initial agreement was signed at Impala Hotel in Arusha and both appellants reside in Arusha, including the 1st appellant who is deceased and represented by Viv Mrema and Janeth William Kimaro. On the other hand, Ms. Chami opposed this argument averring that the cause of action arose partly in Arusha and partly in Moshi.

It is well settled that jurisdiction is a creature of statute. Territorial jurisdiction of the courts in civil cases is governed under **Section 18 of the Civil Procedure Code** which states:

"Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain;

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or part, arises."

In the case at hand, it is not disputed that the appellants as well as the late Melleo Auye Mrema resided in Arusha. What is in dispute is whether the cause of action wholly or partly arose in Moshi to render the district court of Moshi with jurisdiction to entertain the matter. The appellants deny the cause of action arising in Moshi on the ground that the cause of action arose on 15.04.2009 when the initial agreement between the parties was made. This is derived from paragraph 5 of the amended plaint which reads:

"5. That on 15th day of April 2009 Plaintiffs entered into an agreement with Defendants for transfer of shares of FIONA

> (T) LIMITED from Plaintiffs (Benjamin Abraham Mengi) (1 share and 2nd Plaintiff (Millie Benjamin Mengi) (1 Share) to the late MELLEO AUYE MREMA and MICHELLE MELLEO MREMA. A copy of said agreement hereby attached to form part of this plaint and marked as Annexture P2."

The agreement entered on 15.04.2009 was for transfer of two shares of Fiona Tanzania Limited made between Benjamin Abraham Mengi and Millie Benjamin Mengi (as transferors) and Melleo Auye Mrema and Michelle Melleo Mrema (as Transferees). This agreement was evidenced by a resolution made at an extra ordinary general meeting between the transferors. In the said meeting, the two did not only transfer their shares but also appointed the transferees as directors of Fiona Tanzania Limited. Members also agreed to pay a token of T.shs. 70,000,000/= to the transferors. This is all evidenced by the minutes of the extra ordinary general meeting, that is, Exhibit P2 (annexture P2). This meeting was held at Impala Hotel in Arusha.

Subsequently, on 13.02.2019, the 2nd appellant as a shareholder of Fiona Tanzania Limited, the administrators of the late Melleo Mrema (the 1st appellants), the 1st respondent and PW2 had a members extra ordinary meeting held at Salinero Hotel in Moshi in which they resolved to pay the token of T.shs. 70,000,000/=, which was allegedly never paid within 6 months. This is well seen in Exhibit P3

(annexure P3). These facts are found under paragraph 8 and 9 of the amended Plaint which state:

> "8. That Plaintiffs and Defendant had a meeting on 13th day of February 2019 with shareholders of FIONA TANZANIA LIMITED and the late MELLEO AUYE MREMA was represented by 1st Defendants who are the Administratix of the estate of late MELLEO AUYE MREMA. A copy of the minutes of the said meeting is hereby attached to form part of this plaint and marked as P3. (sic)
>
> 9. That, it was agreed that such debt shall be paid within a period of six months from date of signing, but to date is only managed to pay Plaintiff amount of twenty million only (TSH. 20,000,000/=) an amount which was paid from estate of late MELLEO AUYE MREMA. A copy of payment receipt herein attached to form part of this plaint and marked as Annexture P4." (sic)

As evident from paragraph 9, the amount of T.shs. 20,000,000/= was paid to the respondents in the six months, hence only a partial fulfilment of the agreement made on 13.02.2019.

From the foregoing facts, I hold the view that the cause of action arose partly in Arusha and partly in Moshi because; **one**, the initial agreement to transfer shares was made between the parties in Arusha, as much as no document was admitted in evidence on transfer of shares, the same is not in question and is evidenced by the 13.02.2019 meeting whereby the 1st respondent and PW2

attended as invited members. The 2nd appellant attended as the director and shareholder.

Two, it is in the subsequent meeting between the parties in this case that the payment of the token was negotiated to be effected within 6 months. I do not subscribe to Mr. Njooka's argument that the subsequent meeting was merely a "follow up meeting." This was a secondary agreement based on the former agreement between the parties in which, the parties agreed to pay the outstanding T.shs. 70,000,000/=. This agreement was partly executed, hence the suit before the trial court. This second agreement is in fact the link between the original members to the initial agreement and the surviving members of the agreement as well as the administrators of the demised member. This meeting, which was held in Moshi, clearly proves as a subsequent agreement and thus part of the cause of action.

In the foregoing, I am of considered view that trial court had jurisdiction to determine the suit as it rightly held in its Ruling on the preliminary objection raised by the appellants as to its jurisdiction. The 1st ground of appeal is thus without merit.

With regard to the 3rd ground of appeal, Mr. Njooka challenged the trial court for awarding the respondents an interest of 22% while they prayed to be awarded 12% interest as found on item C of the prayers contained in the amended Plaint. On the other hand, Mr. Paul supported the interest rate awarded on the argument that the

interest rate was prayed for at paragraph (d) of the prayers in the amended Plaint. He considered Mr. Njooka to have wrongfully referred to paragraph (c) of the prayers which was an interest at court rate.

The awarding of interests is governed under **section 29 of the Civil Procedure Code** which provides:

> "29. The Chief Justice may make rules prescribing the rate of interest which shall be carried by judgment debts and, **without prejudice to the power of the court to order interest to be paid upon to date of judgment at such rates as it may deem reasonable**, every judgment debt shall carry interest at the rate prescribed from the date of the delivery of the judgment until the same shall be satisfied."

Considering that there is a contention as to whether Mr. Njooka was referring to paragraph (c) or (d) of the reliefs; I find it pertinent to reproduce hereunder the ground of appeal for ease of reference:

> 3. *That the learned trial magistrate erred in law and fact by wrongly awarding 20% interests on specific damages from the date the cause of action became due to the date of the judgment.*

As seen in the reproduced ground of appeal, the appellants faulted the trial court for awarding 20% interests on specific damages from the date of accrual of cause of action to the date of judgement. In the amended Plaint, at paragraph (c) of the prayers it is clearly seen that the respondents prayed for 12% interest at court rate for the specific damages which was under item (a). In the judgement of the trial court, the respondents were granted 20% at commercial rate for specific damages from the date of cause of action to the date of judgment. This is found at page 13 of the judgement which reads:

> "Again, the plaintiffs are entitled to commercial interest at 20% of specific damages granted from the date the cause of action became due to the date of this judgement."

It is in the discretion of the court to award interest to special damages up to the date of judgement. This was well provided in the case of **Anthony Ngoo** (supra) and that of **Registered Trustees of St. Anita's Greenland Schools (T) & Others vs. AZANIA Bank Limited** (Civil Appeal No. 225 of 2019) [2023] TZCA 59 TANZLII. In the later the Court of Appeal stated:

> "In Said Kibwana (supra), it was stated that the Court has a discretion to award interest for the period before the delivery of judgment only in special damages actually expended or incurred, but even this at such rate the Court thinks reasonable. This discretion does not

> extend to the period after the delivery of judgment."

What is disputed in this case, is whether the trial court rightly awarded 20% interest while the respondent prayed for 12% interest. It was well stated in **Zanzibar Telecom Ltd vs. Petrofuel T. Ltd.** (Civil Appeal 69 of 2014) [2019] TZCA 176 TANZLII that:

> "… as a matter of substantive law, the court cannot grant interest in a case where such interest was not pleaded and proved."

See also; **Ami Tanzania Limited vs. Prosper Joseph Msele** (Civil Appeal 159 of 2020) [2021] TZCA 668 TANZLII.

In the matter at hand, it is clear that the trial court granted a relief not prayed for by the respondents as the respondents prayed for 12% interest at court rate for specific damages. For interest of justice, noting that indeed the respondents did incur loss on their part, I set aside the 20% interest granted by the trial court and hereby award 12% interest at court rate for specific damages as initially requested by the respondents. This ground is thus found to have merit and succeeds to such extent.

In the foregoing, save for the adjustment of the interest rate in relation to the 3rd ground of appeal, the rest of the grounds are found to lack merit and hereby dismissed. Considering the outcome in this appeal, I make no orders as to costs.

Dated and delivered at Moshi on this 06th Day of December, 2023.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA