IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT BUKOBA

BUKOBA SUB- REGISTRY

CIVIL APPEAL NO. 16 OF 2023

(Originating from the decision of Biharamulo District Court in Civil case No. 01 of 2022, dated 10/07/2023)

FRESTER INVESTMENT CO. LTD..... APPELLANT

VERSUS

HAMUDI ABDI SULEIMAN.....1ST RESPONDENT

ZULEIYA ZUBAIRI..... 2ND RESPONDENT

JOSEPH SAMSON BINDALA.....3RD RESPONDENT

BUMACO INSURANCE COMPANY LIMITED.....3RD PARTY

JUDGMENT

22/04/2024 & 24/05/2024
E. L. NGIGWANA, J.

It is on the trial court record that on 13th day of June, 2020, the 3rd respondent Joseph Samson Bundala was driving a motor vehicle with registration Number T532 CXE make ZHONGTON BUS, the property of the appellant, Frester Investment Co. Ltd. The said motor vehicle was involved in a road accident whereas the same had knocked the 1st and 2nd Respondents (husband and wife) on board of the motorcycle with registration number MC916 AHR make Mkombozi and as a result, they were injured.

Both the 1st and 2nd respondents were attended at Biharamulo District Designated Hospital (D.D.H). Thereafter, the 3rd respondent , Joseph Samson Bundala was arraigned before the District Court of Biharamulo and charged with two counts of causing bodily injuries through careless driving contrary to sections of 41, 27 (1) (a) 63 (2) (b) of the Road Traffic Act, [Cap. 168 R.E 2019], and the third count of causing damage through careless driving contrary to sections 41, 27(1) (a) 63 (2) (b) of the Road Traffic Act, [Cap. 168 R.E 2019].

He was convicted upon his plea of guilty and sentenced to pay a fine of TZS. 25,000/= on each count, in default thereof to serve a custodial sentence of two (2) years on each count. Custodial sentences were ordered to run concurrently.

Subsequently, the 1st and 2nd respondents instituted a civil suit in the trial court against the appellant and the 3rd respondent claiming the following reliefs; (a) Payment of TZS. 7,000,000/= to the 1st respondent and TZS. 3,000,000/= to the 2nd respondent to make a total sum of TZS. 10,000,000/= being medical expenses incurred, (b) Payment of TZS. 64,500,000/= to the 1st respondent and TZS. 30,000,000/= to the 2nd respondent to make a total

sum of TZS. 94,500, 000/= being general damages for pains and sufferings, (c) Payment of TZS. 2, 800,000/= to the 1st respondent, being compensation for the damaged motorcycle, (d) Payment of TZS. 77,000,000/= to the 1st respondent being damages for loss of economic gains, (e) Payment of general damages as would be assessed by the trial court, (f) Payment of interest on the decratal sum at commercial rate from the date of the accident to the date of judgment, (g) Payment of interest on the decratal sum at the court's rate of 12% from the date of judgment to the date of actual payment, (h) Payment of costs of the suit and incidental thereof, and (i) Any other relief (s) the trial court would deem fit and equitable to grant.

In their Joint Written Statement of Defence, the appellant and the 3rd respondent vehemently disputed the claims by the 1st and 2nd respondents. Furthermore, the appellant alleged that the motor vehicle which was involved in the accident was insured to the 3rd party therefore; through Mr. Goodluck Herman, learned advocate, applied for leave before the trial court to present a third party notice, for the purpose of joining the BUMACO INSURANCE CO.LTD as a third party.

After obtaining the said notice, service was duly effected to the 4th respondent. After being joined as a third party, the 4th respondent filed a Written Statement of defence disputing the existence of insurance contract between her and the appellant.

The trial court record further revealed that before the commencement of the hearing, the following issues were framed and agreed upon for determination by the court; (i) Whether the first defendant (now 3rd respondent) drove the motor vehicle negligently, (ii) whether the plaintiffs (now 1st and 2nd respondents) suffered damages, (iii) whether the motor vehicle that was involved in in the accident was insured by the Third Party at the time of the accident, and (iv) what reliefs are the parties entitled.

The 1st and 2nd issues were resolved in the affirmative. The third issue was resolved in the negative. On the 4th issue, the trial court found that special damages relating to medical expenses were not proved. The 1st and 2nd respondents also claimed TZS.64, 500,000/= and TZS. 30,000,000/= respectively, being damages for economic loss, psychological anguish, and pain suffered by them but the trial court was satisfied that the said claims were not proved.

As regards the claim for economic loss alleged to have been incurred by the 1st respondent in his vanilla farm, the trial court awarded the 1st respondent damages amounting to TZS 125,200,000/=. General damages amounting to TZS. 60,000,000/= were also awarded the 1st and 2nd respondents, together with interest of 12% per annum from the date of judgment until payment in full, and costs of the suit.

Dissatisfied with the decision of the trial Court, the appellant approached this court with thirteen grounds of appeal drawn and filed by Mr. Goodluck Herman, learned advocate, but later on, the appellant abandoned the 11th ground of appeal and hence remained with 12 grounds.

Before embarking on disposing the grounds of appeal, with due respect, I find it apposite to remind the learned advocates that grounds of appeal ought to be (a) as clear as possible (b) as brief as possible (c) as persuasive as possible without descending into narrative and argument. They should be clear and specific for determination by the court. They should not be too general, vague or repetitive.

In the matter at hand, the grounds for appeal were formulated in the following manner;

1. *That, the learned Magistrate grossly erred in law and fact upon deciding in favor of the 1st and 2nd Respondents by awarding general damages of TZS. 60,000,000/=to them while the 2nd Respondent did not at all testify her case before the court of law and there was no any Ex-parte order against 2nd Respondent.*

2. *That, the learned Magistrate grossly erred in law and fact upon deciding in favor of the 1st and 2nd Respondents by awarding general damages of TZS. 60,000,000/= while in her findings/reasons pointed that one cannot imagine the anguish and pain suffered, hence the plaintiffs fail to prove the same.*

3. *That, the learned Magistrate grossly erred in law and fact upon deciding in favor of the 1st Respondent by awarding him TZS. 125,200,000/= which was not part of the reliefs/prayers in the pleading, as it is the principle of the law that parties are bound by the pleadings they make as so required by the law.*

4. *That, the learned Magistrate grossly erred in law and fact by not stipulating reasons reached to award the 1st and 2nd Respondents*

general damages of TZS. 60,000,000/=, whereas there was no any proof of Injuries, pain, medical checkups/health status and medical expenses.

5. *That, the learned Magistrate grossly erred in law and fact, upon deciding on weaker evidence "the letter"- [Exhibit P6] tendered by the 1st Respondent standing as the valuation on a total sum of TZS. 125,200,000/=, whereas there was no any valuation report in it as so required by the law to be done as far as valuation, also there was no any Valuer who testified before the court of law.*

6. *That, the learned Magistrate grossly erred in law and fact by deciding in favor of the 1st and 2nd respondents whereas negligent was not proved in the court, and there were no any sketch map of the accident which was admitted to narrate/advocate the negligence done.*

7. *That, the learned Magistrate grossly erred in law and fact by crediting 1st respondent's evidence marked Exhibit P7 which lacked legitimacy as the Medical check-up information were stipulated to make part of it, the report which was admitted could be easily tempered.*

8. *That, the learned Magistrate grossly erred in law and fact by considering the PW2's evidence which was hearsay and at all did not show and prove at all any ownership of the Vanilla Farm situated at KITWE village by the 1st Respondent, also the correspondence/mode of information between the PW2 and the Agricultural officer was not proved, which resulted to a letter of valuation in the court of law.*

9. *That, the learned Magistrate grossly erred in law and fact by not considering the Loss Report tendered by the Appellant on the loss of the Cover note, which stipulated on the reason as to why the Appellant did not tender the cover note at the court, whereas the Appellant tendered before the court the Quotation which was issued by the 4th Respondent to the Appellant.*

10. *That, the learned Magistrate grossly erred in law and fact by considering the evidence provided by 3rd party's witness on the requirements of having a cover note, whereas they did not show any records to oppose any payment as may have been done by the Appellant on the Quotation, hence pointed that the Appellant had no cover note.*

11. Abandoned

12. That, the learned Magistrate grossly erred in law and fact by considering the different names so applied by the 1st Respondent without any Affidavit to confirm his names in the exhibits tendered.

13. That, the learned Magistrate grossly erred in law and fact by not issuing Ex-parte hearing against the 3rd Respondent, whereas proceeded with the case until making judgment with no order against the 3rd Respondent.

Therefore, the appellant is praying to this court to allow the appeal with costs by nullifying and quashing the trial court judgment and any other relief(s) the court deem fit and just to grant.

By leave of the court, this appeal was disposed by way written submissions. The appellant was represented by Mr. Goodluck Herman learned advocate. On the other hand, the 1st and 2nd respondents were represented by Mr. Lameck John Erasto and Mr. Victor Ntalula learned advocates, and 3rd party was represented by Andrew I. Luhigo learned advocate. The scheduling order was complied with by the learned advocates.

As for the 3rd respondent, he could not be served by ordinary means therefore, he was served by way of by publication through Mwananchi newspaper dated 08/03/2024, but yet, he entered no appearance, and as a result, it was ordered that the matter should proceed ex- parte against him.

The 1st, 2nd, and 4th grounds of appeal seem to challenge the trial court's decision to award general damages amounting to TZS. 60,000,000/=, therefore, I will address them collectively before embarking to other grounds.

On the 1st ground, Mr. Gooluck Herman argued that according to page 10 of the trial court judgment, the advocate for the 1st and 2nd respondents (Plaintiffs) informed the trial court that the 2nd respondent was unfit to testify, and a result, the plaintiffs closed their case without providing any evidence to support the 2nd respondent's claims.

Furthermore, Mr. Herman highlighted that on page 18 of the same judgment, the trial magistrate ordered the appellant to pay TZS. 60,000,000/= as general damages to the plaintiffs, even though the 2nd respondent did not present any testimony in her case before the court.

Additionally, he emphasized that page 47 of the proceedings in civil case no. 01/2022 indicated that the 2nd respondent had no involvement in her case, leading to the absence of any order made by the trial magistrate as per Order IX rule 7 of the Civil Procedure Code, [CAP 33 RE, 2019], either for or against the 2nd plaintiff now 2nd respondent. To support his argument, the learned counsel cited the case of **Anthony M. Masanga versus Penina (Mama Mgesi) And Another,** Civil Appeal No 118 of 2014 at Mwanza unreported, where Milla, J.A. (As he then was) on page 9, cited sections 110 and 111 of the Evidence Act, [Cap 6 RE 2019].

On the 2nd and 4th grounds, Mr. Herman argued that the fundamental legal principle is that the burden of proof lies with the plaintiff. He emphasized that pages 16 and 17 of the aforementioned trial court judgment did not contain any evidence supporting the medical expenses claimed by the plaintiffs or the damages to the motorcycle. He highlighted that on page 17 of the trial court judgment, it was mentioned that the 1st and 2nd respondents were seeking TZS. 64,500,000 and 30,000,000 respectively for pain and suffering after the accident, but these claims were not substantiated. He Further argued that, guided by the case of **Mrs. Huba Hashim Kassim versus M/S Tonda Express Ltd, Benson Lwendo and Nico Insurance,**

(Tanzania) Limited, Civil Case No.75 of 2010, the trial Magistrate found that the plaintiff's sufferings cannot be imagined and concluded that the claims were not proved.

He further argued that the trial magistrate's findings on page 18 of her judgment stating that the plaintiffs were injured and suffered losses, were inconsistent with her earlier finding that the claims were not proved. He concluded that the plaintiffs failed to meet the legal requirement of proving their suffering, pain, and injuries, and the general damages awarded were unjust and should be revoked.

In reply, the learned advocates for the 1st and 2nd respondents submitted that in regards to the contention argued in the 1st ground against the award of the total sum of the TZS.60, 000,000/= by the trial Court on grounds that the 2nd Respondent had not appeared before the Court to testify on her claims is a total misconception.

They added that, looking at the Plaint and the evidence led by the 1st Respondent, it is open clear that the cause of action caused by the 3rd Respondent in the due course of employment by the Appellant had similarly and on the same spot occurred to them.

They further submitted that, this version was not contested by the Appellant during the abduction of the evidence as there was no cross-examination on such basic and crucial fact. They added that it is the cardinal principle of the law that unchallenged evidence is always be taken to be true. To support their argument they cited the case of **Kwiga Masa vs. Samwel Mtubatwa** [1989]T.L.R 103.

They added that the law is straight on the situation like this where the parties suing within the fours of Order 1 Rule 1 of The Civil Procedure Code, [Cap. 33 R.E. 2019].

They further submitted that, material part of the testimony over the fateful event was recorded at page 29 up to 30 where the bus owned by the Appellant had knocked the 1st and 2nd Respondents on board of the motorcycle at Darajani area with the results of falling at the pedestrian area with the results of losing consciousness, injuries including the bleeding and suffering from the untold pains.

They added that apart from this glaring cause of action, the Appellant had in the 2nd paragraph of her written statement of defense evasively shifted the burden of damages to her alleged insurer but did not specifically deny

the liability. To support their stance, they made reference to the well-established canon principle that parties are bound by their pleadings as it was emphatically underscored in the case of **Makori Wassaga v. Joshua Mwaikambo & Another** [1987] TLR 88. They further added that this means the Appellant cannot depart from her admission which she had made in her Written Statement of Defense.

They went on to submit that the Appellant had also pegged her argument basing on the provision of section 110 and 111 of the Evidence Act, [Cap. 6 R.E. 2019] together with the authority of **Anthony M. Masanga vs.Penina (Mama Mgesi) & Another (Supra)** but according to them, this case is distinguishable from the case at hand since the cause of action by the Plaintiffs was openly contained in the Plaint attached with the important Annexures. They added that at this juncture, it suffices to remind the court with what was repeated in the case of **Stambic Finance Tanzania Limited vs.Giuseppe Trupia & Chiara Malavasi** (2002)TLR 221 where the Court had this to say about the cause of action contained in the plaint;

"Facts which give a person a right to judicial redress or relief against another as found on the plaint at its annexure".

They added that, citing the case of **Abdul-Karim Haji vs. Raymond Nchimbi Alois** (Supra) on the duty of proof cannot avail any assistance to the Appellant as there was an uncontested cause of action to the victims al-together. It goes without saying that the plea of nullifying the proceedings finds barren merits.

They added that the arguments in support of the 2nd and 4th grounds of Appeal in challenging the findings reached by the trial Court is misplaced for the judgment was properly entered basing on the general damages arising from the acts caused by the 3rd Respondent of which the Appellant was vicarious liable.

They further argued that there was ample evidence that supported the claims of general damages cropping from the knock down, the bodily injuries leave alone the psychological torture and agonies after the shocking tragedy.

They briefly stated that the prosecution side tendered the PF3 which was admitted as Exhibit 3 which shown that both Plaintiffs sustained injuries after the accident caused by the negligent driving of the motor vehicle belonging to the Appellant leave alone the days spent at the Biharamulo Designated District Hospital which were produced in court as Exhibits P7 & P8. They

added that production of the documents follows the oral testimonies recorded on pages 29, 30, 31, 32, 36 and 38 of the proceedings.

According to them, the prosecution side had discharged the duty of proving the existence of the facts on the occurrence of the cause of action. They cited the case of **The Cooper motor Corporation Ltd. v. Moshi/Arusha Occupational Health Services** [1990] TLR 96 where it was held that the general damages need not be specifically pleaded, they may be asked for by a mere statement or prayer of claim.

They concluded that the developments of the laws regarding the awarding of general damages dictates that even if they are not even pleaded in the Plaints, that is the duty of the court to assess and grant. To support their stance, they cited the case of **Tanzania Breweries Limited vs. Nancy Morenje** (2015) LCCD1 No. 17

Having carefully gone through the 1st, 2nd and 4th grounds of appeal and submissions by both parties, the issue for determination is whether the said grounds are meritorious.

Undoubtedly, civil case No. 1 of 2022 was instituted by both the 1st and 2nd respondents. Despite the fact that the case one, the prayers sought were to

a great extent distinct. See reliefs sought in item (a), (b), (c), and (d) on page 2 & 3 of this judgment.

It is a cardinal principle of law as per sections 110 (1), (2) and 111 of the Evidence Act, [cap 6 R.E 2022] that, in civil cases, the burden of proof lies on the party who alleges anything in his favour. The said provisions of the law provide as follows;

"110-(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person,

111. The burden of proof in any suit lies on that person who would fail if no evidence were given on either side."

The herein above stance was emphasized by the Court of Appeal in the **case of Joao Oliveira & Another versus IT started in Africa Limited, & Another,** Civil Appeal No. 186 of 2020 CAT at Arusha, where the Court had this to say in relation to evidential burden in civil proceedings;

"Ordinarily; in civil proceedings a party who alleges anything in his favor also bears the evidential burden and the standard of proof is on the balance of probabilities which means that, the court will sustain and uphold and sustain such evidence which is more credible compared to the other on a particular fact to be proved"

In the matter at hand, as stated by the learned counsel for the appellant, the, the 2nd respondent did not enter appearance in the trial court to prove her claims.

On the hearing date to wit; 17/05/2023, the 2nd respondent's advocate Mr. Victor Ntalula entered an appearance and informed the trial Magistrate that his client was not in a good condition therefore; she could not enter appearance to testify. However, instead of praying for an adjournment, he prayed to close the defence case. For unknown reasons, the condition or reason which led to the said inability to enter appearance was never disclosed in the trial court.

However, at the end of the trial, the trial court awarded TZS 60,000,000/= to 1st and 2nd respondents, being general damages due to economic loss and injuries suffered by them, and if the amount was to be divided by two, each

would have been entitled to general damages amounting to TZS.30,000,000/=

It should be noted that civil suit No. 1 of 2022 was not a representative suit, and the 1st respondent was not the 2nd respondent's witness but also he had no power of attorney to act for the 2nd respondent.

Though, I shake hands with the learned advocates for the 1st and 2nd respondents that Order One Rule 1 of the CPC, requires that parties may join in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transaction, is alleged to exist, whether jointly, severally or in the alternative where, if such persons brought separate suits any common question of law or fact would arise, it is my considered view that the said provision was not aimed to exempt any of the plaintiffs from discharging his/her duty to prove his/her claims as per the law.

In the case of **Makori Wassaga versus Joshua Mwaikambo & Another** [1987] T.L.R 88, the Court stated that; a party is bound by his pleadings and can only succeed according to **what he has averred in his plaint and proved in evidence.**

Basically, a plaintiff cannot automatically succeed in his/her case; he/she must prove his/her case. In other words, it is well known in civil cases **that the plaintiff is the master of the suit and he/she has to win on his/her own legs. It follows that since the plaintiff comes up before the court, he/she owes the burden to proof the material particulars in his/her favour to get a decree passed.**

In the matter at hand, the 2nd respondent was expected to parade evidence in the trial court to support what she had earlier on pleaded.

It is also trite law that submission is not a substitute of evidence. See **The Registered Trustees of the Archdiocese of Dar es Salaam versus The Chairman, Bunju Village Government and 11 Others,** Civil Appeal No. 147 of 2006 (unreported), where it was stated that:

"... Submissions are not evidence. Submissions are generally meant to reflect the general features of the party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on applicable law. They are not intended to be substitute for evidence"

Though the written submissions by the learned advocate were impressive and persuasive, they cannot be substitute for evidence of the 2nd respondent.

I am alive that, TZS. 60,000,000/= was awarded to the 1st and 2nd respondents as general damages, and as per the law, general damages are awarded by the trial Judge or **Magistrate after consideration and deliberation on the evidence on record able to justify the award.** The Judge or Magistrate has to assign reasons in awarding it. Since there was no evidence paraded by the 2nd respondent for the trial court to consider and deliberate on to justify the award, it is my considered view that the trial court ought to have considered the evidence of the 1st respondent and award general damages to him without including the 2nd respondent who had abandoned her case for no apparent reasons.

It has been stated by the court of appeal in the case of **Peter Joseph Kibilika versus Patric Aloyce Mlingi,** Civil Appeal No. 39 of 2009(CAT-unreported) when quoting the case of **Admiralty Commissioners versus Susqehanna** [1950] 1 ALL ER 392, that:

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

In the matter at hand, the trial court's determination of the quantum of general damages was based on reasons founded on the evidence adduced by the 1st respondent. However, looking at exhibits P3, P7 and P8 to wit; PF3, the Medical report and Discharge Form all tendered by the 1st respondent, it goes without saying that they relate to the injuries suffered by the 1st respondent. They had nothing to do with the 2nd respondent.

I am not saying that the 1st respondent was not entitled to general damages, but we have to ask ourselves as to whether the trial Magistrate assigned clear, sound and convincing reasons to justify the same. The answer is definitely in the negative.

There is evidence on record that the 1st respondent was admitted to the hospital on 13/06/2020 and discharged on 17/06/2020. Exhibit P8 showed that the 1st respondent was discharged on the said date after **being better.** The same further revealed that the 1st respondent sustained soft tissue

injuries, meaning he sustained no fracture and has not lost any organ or part of his body.

It is common understanding that general Damages are normally damages at large and can be nominal or substantial depending on the circumstances of each case and the appellate court is not justified in substituting a figure of its own for that awarded by the trial court unless there are reasons to do so. On this stance the Court of Appeal in the case of **SANLAM General Insurance Tanzania Ltd versus Dennis Charles & Another, (Civil Appeal No.51 of** 2021) 2024 TZCA 105 (23 February 2024),had this to say;

"It is trite that the assessment of general damages is at the discretion of the trial court and the appellate court will not be justified in substituting a figure of its own for that awarded by the trial court ***unless it is satisfied that the court below applied a wrong principle or that it misapprehended the evidence and, consequently, arrived at a figure so excessive or so inconsiderable" (Emphasis supplied).***

General damages amounting to TZS 60,000,000/= were awarded to 1st and 2nd respondents, of which, if divided by two, each respondent would get TZS. 30,000,000/=.

However, basing on the evidence the trial court record as pointed out earlier, I am convinced that the court below misapprehended the evidence and, consequently, arrived at a figure which is excessive and disproportionate as per the circumstances of the case, thus interference by this court is necessary.

On the 3rd ground, the learned counsel for the appellant argued that according to The Civil Procedure Code, [Cap 33 RE 2019], parties are bound by their pleadings. He pointed out that in the plaint on page 4; the relief prayed for did not include a payment of TZS. 125, 200,000/= for economic loss, but rather TZS 77,000,000/=. However, the trial court on page 17 of the judgment awarded TZS 125,200,000/= as economic loss, failing to address the reliefs prayed for. To support his argument, he cited the the case of **Said Abdallah Doga versus Rose Fridoline Mwapinga and Ally Omary Funga**-Civil Revision No.1 of 2020 [Unreported] where it was held that "relief must be founded on the prayer made by the parties". Therefore, he concluded that the trial court's decision to award such an amount violated

legal requirements and principles, and requested for both the proceedings and judgment of the trial court to be set aside.

In reply, the learned advocates for the 1st and 2nd respondents submitted that the contention against the award of the total sum of TZS 125,200,000/- by the trial court on reasons that the same was not sought in the Reliefs is far to be reached and baseless. They added that the trial court was fully satisfied by the tendered Exhibit P6 which was the Valuation Report of the damages of the vanilla plants after the 1st Respondent had failed to maintain due to the injuries suffered from the negligent driving of the motor vehicle.

They further argued that PW2 testified in Court for the accident and damages to the Vanilla farm as also reproduced at page 9 of the Judgment. They added that there was no way the lower court could deviate from the report that prepared by the qualified and competent Government Valuer. Their argument is cemented by the case of **Japan International Cooperation Agency (JILA) vs. Khaki Complex Limited** (2006) TLR 342.

Having gone through the 3rd ground of appeal and submissions of the parties on the ground, I am now in a position to determine whether the same is meritorious or otherwise.

It is a well-established legal principle that parties are legally obligated to adhere to their pleadings, and any evidence that contradicts the pleadings should be disregarded. Pleadings serve as the foundation for all legal proceedings, and therefore, any evidence presented must align with the content of the pleadings. Regardless of the strength of the evidence, if it conflicts with the pleadings, it should be disregarded.

The Court of Appeal in the case of **Barclays Bank (T) Ltd versus Jacob Muro,** Civil Appeal No. 357 of 2019 (unreported), cited with approval a passage in an article by Sir Jack I. H. Jacob Titled "The Present Importance of Pleadings" published in Current Legal problems

(1960) at page 174 that: -

"As the parties are adversaries, ***it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... For the sake of certainty and finality, each party is bound by his own pleadings*** *...Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties" (Emphasis supplied).*

The Court further held that;

"We feel compelled, at this point, to restate the time- honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored".

It is again a cardinal principle of the law that the court will only grant reliefs sought by a party. Indeed where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs.

The Court of Appeal of Tanzania at Mwanza in the case of **Dr. Abraham Israel Shuma Muro versus National Institute for Medical Research and another,** Civil Appeal No 68 of 2020 cited with approval the case of **Melchiades John Mwenda vs. Gizelle Mbaga (Administratrix of the Estate of John Japhet Mbaga- deceased & 2 others,** Civil Appeal No 57 of 2018 where the court held that,

"It is elementary law which is settled in our jurisdiction that the court will grant only relief which has been prayed for"

In the plaint filed in the trial court, the 1st and 2nd respondents, among others, sought "Any other relief (s) the trial court would deem fit and equitable to grant." What this implies is that the trial court may grant reliefs not endorsed on the plaint if it deemed it proper to do so in the interest of justice and provided such reliefs are justified by the evidence led at the trial. Through, it is safer to pray for specific reliefs instead of relying on the discretion of the court.

In the matter at hand, the amount of TZS 125, 200,000/= was not awarded basing on the trial court discretion therefore it does not fall within the category of "Any other relief (s) the trial court would deem fit and equitable to grant."

There is no paragraph of the plaint filed in the trial court that bears such amount. Again, reliefs items contained in the plaint duly filed in the trial court were eight (8), but none of them had such amount. Undoubtedly, without an amendment of the plaint, the court is not entitled to grant the relief not asked for. In the matter at hand, there was not amendment effected in the trial court. In that premise, I shake hands with the learned counsel for the appellant the trial court erred in awarding the plaintiffs TZS 125,200,000/= since there was no prayer for such relief/amount.

I am alive that it is trite law that the Court is enjoined to consider the ground of appeal presented to it either generally or one after another, and failure to consider the grounds is fatal to the decision. This position was stressed in the case of in the case of **Mwajuma Bakari versus Julita Semgeni & Another,** (Civil Appeal 71 of 2022) where the Court of Appeal at page 8 held had this to say;

"... appellate court is bound to consider the grounds of appeal presented before it and in so doing, need not discuss all of them where only a few will be sufficient to dispose of the appeal but it is bound to address and resolve the complaints of the appellant either separately or jointly depending on the circumstance of each appeal"

In the matter at hand, after agreeing with the Appellant's learned counsel on the 3rd ground of appeal, which is closely related to grounds 5 and 8 of this appeal concerning the valuation report and ownership of the vanilla farm, resulting in the TZS 125, 200,000/= awarded to the 1st respondent, I see no reason to delve into grounds 5 and 8.

Upon reviewing grounds 6 and 12 of the appeal, which are interconnected as they both pertain to the varying names used by the 1st plaintiff (now 1st

respondent) during the trial and in the court documents, I conclude that this argument lacks validity. I concur with the arguments presented by the counsel for the 1st and 2nd respondents, stating that the 1st respondent (previously the 1st plaintiff) clarified under oath during the trial that the names were used interchangeably to refer to him.

Appellant's counsel on the 7th ground of appeal faulted the admissibility of Exhibit p7 at the trial court. He argued that since it lacked a hospital title or reference number, it should not be considered as valid evidence. I meticulously reviewed the trial court proceedings on pages 37 and 38. The document in question was admitted by the trial court, as the objections raised by the defendant's advocate and the advocate representing the third party (now advocates for the appellant and 4th respondent respectively) were found to have no legal grounds. This is because the document was an original copy, duly signed and stamped by the hospital and the document was produced for inspection of the court. Hence the contents of exhibit p7 were proved by primary evidence. Thus, I shake hands with the advocates for the 1st and 2nd respondents that the 7th ground of appeal is devoid of merit.

Grounds 9 and 10, collectively presented by the appellant, criticize the trial court for its failure to take into account exhibit D1 (Quotation and Loss Report) as proof of the existence of a cover note. Additionally, the appellant faults the trial magistrate for not demanding the 3rd party to demonstrate that no payments were made for the cover note, thus concluding that there is no cover note.

I agree with the learned counsel representing the 3rd party who argues that a mere quotation does not establish the existence of an insurance contract between the appellant and the 3rd party. If the appellant had provided payment receipts to substantiate the quotation, it would have been more convincing.

Furthermore, the loss report only indicates that someone reported the loss of something, but it does not serve as proof that the cover note actually exists and mentions the 3rd party as the insurer of the appellant's motor vehicle. Therefore, the trial court was justified in disregarding these documents when making its decision.

In regard to ground 13 of this appeal, the appellant's counsel argue that the trial court failure to give ex-parte order against the 1st defendant (now 3rd respondent) indicate that the procedure was not followed.

Order IX rule 8 of The Civil Code, [Cap. 33 R.E. 2019] provides that;

"Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed and the court shall, at the time or pronouncing judgment, make such Order as it think fit with respect to the defendant who do not appear"

The provision of law is clear that the court upon defendant's absence shall proceed, and the order can be made at the time the court proceeds without the defendant or when pronouncing Judgement. Having going through the trial court proceedings, see pages 58-59, the court indeed gave such order before announcing judgment date. The trial court had this to say;

"Since none of the advocates is present. I find that is wise to adjourn this case to another date and if the defendant's advocate will not adhere to what he promised that he will bring the 1st defendant, then the case will be set for judgment"

In that respect, the 13th ground of appeal is also devoid of merit hence dismissed.

In the upshot, this appeal partly succeeds. Therefore, I hereby set aside part of the decision of the trial court and substitute it with the following orders;

(a) The 1st respondent is awarded **TZS 10,000,000/= (**Ten Million) as general damages with interest at court rate from the date of judgment till payment in full.

(b) Since none of the parties has emerged fully successful, I make no order as to costs of this appeal.

(c) The 1st respondent however, shall get his costs in the court below.

It is so ordered.

Dated at Bukoba this 24 day of May, 2024.

E. L. NGIGWANA

JUDGE

24/05/2024

Judgment delivered this 24th day of May 2024 in the presence of Mr. Goodluck Herman Learned Counsel for the appellant but also holding brief for Mr. Andrew Luhigo, advocate for the 3rd party, 1st respondent in person, Hon. A.A. Madulu, JLA and Ms. Queen Koba B/C.

E. L. NGIGWANA

JUDGE

24/05/2024