IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CONSOLIDATED CIVIL APPEAL NO. 12 AND 13, BOTH OF 2023

(C/f Civil Case No. 58 of 2020)

THE DON'S GROUP TANZANIA .....1ST APPELANT

JACQUELENE ALBERT MSANDO.....2ND APPELLANT

ALBERT GASPER MSANDO .....3RD APPELLANT

VERSUS

BAHATI MGONJA T/A Y&H MGONJA ENTERPRISES..... RESPONDENT

JUDGMENT

12/12/2023 & 24/01/2024

GWAE, J

Before Resident Magistrate Court of Arusha at Arusha (hereinafter trial court), the respondent, Bahati Mgonja T/A Y & H Mgonja Enterprises filed a suit against the appellants herein. She claimed for payment of an outstanding balance of Tshs. 181, 236, 300/=being the debt accumulated in the course of the parties' business namely; supply of various beverages to the appellants by the respondent, interest to the awarded amount, general damages, costs and any other reliefs.

On the other hands, the defendants now appellants before the trial court fervently disputed the respondent's claims by stating that, they used

to pay her through either cheque or by cash after supply of goods and to one Innocent Mgonja.

In its verdict, the trial court awarded the respondent the following reliefs; payment of Tshs. 155,032,000/= being specific damages and payment of Tshs. 20,000,000/= as general damages. The appellants were aggrieved by the trial court's decision. Thus, these consolidated appeals comprised of the following grounds of appeal;

1. That, the trial magistrate erred in law and fact by concluding that there was an agreement between the appellants and respondent
2. That, the trial magistrate erred in law and fact in holding that there was supply of goods from respondent to the appellants herein without any sufficient proof
3. That, the trial magistrate erred in law and fact by concluding that the appellants admitted the debt through their written statement of defence from paragraph 6 and 7 testified that the respondent owed them a total of Tshs. 155,032,000/=
4. That, the trial magistrate erred in law and fact by relying on documentary evidence, the letter written by 1st appellant (PE3) constituted an admission the debt claimed in the plaint by the appellants.
5. That, the trial court erred in law and fact by relying on the documentary evidence which was not admitted neither tendered in court as evidence

6. That, the trial magistrate erred in law and fact by ordering the appellants to pay Tshs. 155,032,000/= and Tshs 20, 000, 000/= being as specific and general damages without any justification and proof to the case
7. That, the trial magistrate erred in law by denying the appellants their right to amend their pleadings before hearing of the case without any justification
8. That, the trial magistrate erred in law and fact by concluding that there was cause of action against the 2nd and 3rd appellant personally.

On the 7th day of November 2023 when the appeal was called on for hearing, the learned advocates namely; Mr. Allen Godian assisted by Ms. Ikoda Kazzy and Mr. F. Muhalila for the appellants and respondent respectively sought and obtained leave to dispose of the appeal by way of written submission. The parties' rival submissions shall be taken in board while determining the grounds of appeal as presented and argued by their respective advocates.

In the 1st and 2nd ground of appeal which reads, that, the trial magistrate erred in law and fact by concluding that there was an agreement between the appellants and respondent while there is no sufficient evidence

It is the argument of the appellants' advocate that, there was no agreement between the parties that was proved by the respondent be it

by documentary evidence or oral evidence. According to him, since the amount claimed by the respondent exceeded Tshs. 200/= then the alleged agreement ought to be substantiated by written contract since the appellants denied to have entered into the said agreement neither they admitted to have received goods. He cited section 6 (1) of the Sale of the Goods Act, Cap 214 and case of **Ziad Mohamed Rasool General Trading Co. L.LC vs. Joachim Mushi** (executrix of the estate of Emmanuel Patrick Msoma), Civil Case No. 21 of 2020 (unreported) where this court **(Kakolaki, J)** stated;

> *"That the plaintiff ought to have proved that deceased either accepted goods sold to him or actually received the goods sold to him or provide any poof of payment by the deceased otherwise it is impossible to enforce this agreement as per requirement of section 6 (1) of the Sale of Goods Act"*

The appellants' advocate went on arguing that there was no scintilla of evidence establishing that, the 2nd and 3rd appellant entered into the said agreement with her taking into account they are not conducting their business in their own names.

On the other hand, it is the respondent's argument that there was sufficient evidence relating to the existence of the agreement of supply of various beverages between the parties. He added that the appellants

herein admitted to have been in agreement of supply of liquor drinks. He referred to paragraph 6 in the 1st appellant's written statement of defence and paragraph 4 of the 2nd and 3rd respondent's written statement of defence as well as admission by the 3rd appellant during trial. He also argued that since the 2nd and 3rd appellants are shareholders and directors to the 1st appellant, they were thus properly sued. He finally submitted that, the appellants were bound by their own pleadings presented before the trial court. He embraced his argument by citing the case of **Yara Tanzania Limited vs. Ikuwo General Enterprises Limited,** Civil Appeal No. 309 of 2019 (unreported-CAT) where it was stated that parties are not allowed to depart from their own pleadings by raising new claim not founded in pleadings.

Court's determination of the 1st and 2nd ground of appeal herein.

I am alive that parties to the proceedings are bound by their own pleadings and they are not allowed to depart from their pleadings unless by way of an amendment. See Order VI Rule 7 of the Civil Procedure Code, Cap 33, Revised Edition, 2019 and **Yara Tanzania Limited** (supra). Hence, our courts are bound to rely on the parties' evidence founded on pleadings.

Now, I have to clearly examine the trial court's record to ascertain if the appellants in one or other had admitted existence of the agreement of supply of beverages by the respondent. According to the joint written statement of defence duly filed by the 2nd and 3rd appellant on 8th October 2020, it is clear that they disputed being in the supply agreement with the respondent in their personal capacities. However, they admitted such relation with the 1st appellant but refuted the indebtedness and previous payments made in favour of the respondent. For clarity, parts of the para 4, 6 and 7 of the joint written statement of defence are reproduced herein under;

> "*4. Paragraph 5 of the plaint is fervently disputed. The plaintiff has no agreement with the 2nd and 3rd defendants to supply beverages from her store.....*
> *6. That, 6 the contents of paragraph 6 of the plaint are partly admitted that the 1st defendant made payments to the plaintiff for goods supplied to its business. All other allegations* are disputed
> *7. That, the claim of Tanzania Shillings T**wenty Million**... as outstanding amount for month of August 2019 was paid to Mr. Innocent Mgonja by a cash.....a further amount of Tanzania Shillings ten Million....was paid back to the 2nd and 3rd defendants.... To offset*
> *11. ....2nd and 3rd defendant the goods supplied have been partly paid. To date of filing this defence, the 2nd and 3rd*

defendants has (sic) paid a total of Tanzania Shillings ***Four Million*****....."**

In the light of the above quoted parts of the 2nd and 3rd appellant's pleadings duly filed in the trial court, it goes without saying that there was existence of the agreement of supply of goods between the 1st appellant and respondent. Equally, when one carefully examines the 1st appellant's written statement of defence from paragraph No. 4, 6,7, 8, 9, 10 and 11, will inevitably note that, the same contain nothing but admission as to an existence of the beverages supply relationship between the respondent and the 1st appellant.

On the complaint that the, 2nd and 3rd appellant were not to be sued in their personal capacities. From outset, I find this complaint by the 2nd and 3rd appellant to have lacked merit since their status as shareholders and directors to the 1st appellant was not disputed through their WSD. (See paragraph 1 of the joint written statement of defence as well the 2nd and 3rd appellant's evidence). More so, the 2nd and 3rd appellant had averred to have made payments in respect of the said Mgonja being part payments for the goods supplied by the respondent and other payments being as setoff. To say the least, the 2nd and 3rd appellants' contention is nothing but an afterthought. Section 6 (1) of the Sales of Goods Act and case of **Ziad Mohamed Rasool** (supra) are

distinguishable since the 1st appellant accepted to have received the goods though contended to have discharged her obligations. Therefore, the appellants' assertion that, there was no evidence establishing that there was an agreement between the parties, in my considered view, is baseless.

> *As to the 3rd ground of appeal, that, the trial magistrate erred in law and fact by concluding that the appellants admitted the debt through their written statement of defence from paragraph 6 and 7 testified that the respondent owed them a total of Tshs. 155,032,000/=*

In this ground, the appellants' advocate was of the submission that, it was wrong for the learned trial magistrate to hold that the defendants admitted the respondent's claims to the tune of Tshs. 155,032,000/ since in both paragraphs No. 6 and 7 they disputed the entire claim in paragraph 5 of the 2nd and 3rd appellant's written statement of defence. He cited section 110 (1) & (2) of the Evidence Act, Cap 6, R. E, 2019 requiring a person who desires a court to give judgment in his or her favour has an obligation to prove to the required standards.

According to him, the respondent was supposed to prove that she supplied the appellants drinks and that he had never been paid. The appellants further argued that if her agent, Innocent Mgonja, did not pay the respondent, she ought to have sued him and not the appellants. He

then urged this court to refer to the case of **Berelia Karangirangi vs. Asteria Nyalambwa,** Civil Appeal No. 237 of 2017 (unreported) where the Court of Appeal of Tanzania held that the person with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities.

In his response to the 3rd ground of appeal, the learned counsel for the respondent was of the opinion that the appellants admitted via their WSD the claimed sum as rightly found by the trial court. He relied on Paragraph 6, 7, 8, 9, 10 and 11 of the appellants' written statement of defence making a total of Tshs. 155,032,000/=. He also argued that, the appellants' during trial admitted that the respondent did not have an agent, innocent Mgonja who was not called as their witness. In his own style, the advocate for the respondent argued that, the trial court ought to have awarded the respondent Tshs. 4, 437,500/= that was admitted by the appellants through paragraph 11 of their written statement of defence.

In his brief rejoinder relating to the 3rd ground, the counsel for the appellant stated that since it was the said Innocent Mgonja who supplied goods to the appellant, he was therefore the one who could sue the appellants.

Court's determination on the 3rd ground of the appellant's appeal.

Having examined the parties' written submissions, their pleadings and evidence, I am of the view that if one Innocent Mgonja was the agent of the respondent that fact ought to have sufficiently been established by tangible evidence. I am alive of the settled law that annexures are not evidence reliable by our courts. In **Sabry Hafidhi Khalfan vs. Zanzibar Telecom Ltd (Zantel) Zanzibar**, Civil Appeal No. 47 of 2009 (unreported), the Court of Appeal stated that;

> *'We wish to point out that annexures attached along with either the piaint or written statement of defence are not evidence. Probably, it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or the written statement of defence is to enable the other party to 13 the suit to know the case he is going to face. The idea behind is to do away with surprises. But annexures are not evidence."*

See also judicial decision in the case of **Patrick William Magubo vs. Peter Kitali,** Civil Appeal No. 41 of 2019 (unreported), the Court of Appeal sitting at Mwanza.

In the case at hand, the appellants purportedly showed that through the annexures in the WSD that, the payments made in favour of the respondent were through one Innocent Mgonja. If so, why the appellants

declined to join him as third party or calling him as their material witness? The answer is not in favour of the appellants. I am holding so, since paragraph 5, 6,7 and 8, of the respondent's reply to the 2nd and 3rd appellant's WSD is to the effect that, the respondent plainly eagerly disputed knowledge of the said Mgonja and receipts of the said payments allegedly made in his favour.

Considering paragraphs No. 6-11 of the appellant's written statement of defence, I do not see any serious dispute that, the respondent really supplied the goods to the appellants save that, the appellants' version that, they effected payments to the said Innocent Mgonja. The appellants generally denied the respondent's claim through their Paragraph 7 of their WSD but did not deny supply of the same save their contention through Paragraph 6-11 of their WSD that, they paid her through her agent, Mgonja as per PE2 as well as their evidence. I am therefore of the considered view that, if truly the appellants paid the respondent through one Innocent Mgonja there could be evidence to that effect instead of mere assertions.

Considering the appellants' pleadings and their reply letter (PE2) dated 17th August 2020 to the respondent's demand letter (PE1), the appellants are found to have received goods from the respondent of such value (155, 032,000/=). However, their contentions that, the amount of

money for the respondent's supply of goods to the 1st appellant was paid to her through one Innocent Mgonja remains unsubstantiated.

Similarly, I do not buy the argument advanced by the learned counsel for the respondent that, the trial court omitted to award his client a sum of Tshs. 4,437,500/=. I am of the settled mind that view since the respondent has not filed an appeal challenging the trial court's decision in that aspect. He ought to have appealed and not featuring his grievances in the submission since submission constitutes neither evidence to be relied or grounds of appeal for court's determination. (See the decision of the Court of Appeal in **SalimLakhani and Two Others vs. Ishfaque Shabir Yusufali** (As an administrator of the Estate of the Late Shabir Yusufali), Civil Application No 23/17 of 2019 (unreported). Consequently, the 3rd ground is bound to fail, it is here by dismissed.

> *In the 4th ground, that, the trial magistrate erred in law and fact by relying on documentary evidence, the letter written by 1st appellant (PE3) allegedly constituted an admission of the debt claimed in the plaint by the appellants.*

According to the appellants' advocate, it was wrong for the trial court to rely on the PE3, which shows that, the 1st appellant indebted to the respondent as it only aimed at settling the outstanding debt. He

further arguing that the said letter ought to have been corroborated by other pieces of evidence.

The respondent's counsel on the other hand argued that, the trial court did not rely only on the PE3 as only evidence. He further attacked the appellants' submission by stating that, it was his own opinion, not led by the impugned judgment.

Court's determination in respect of the 4th ground.

It is as alleged by the appellant that, the letter dated 22nd July 2020 (PE3) did not specify the amount of money to which the 1st appellant was indebted to the respondent as the same was merely aimed at paying one million shillings per week until the debt is fully paid. However, my diligent examination of the impugned judgment reveals that, the learned trial Resident Magistrate did not rely wholly on the PE3 except the appellants' admission of indebtedness. The outstanding amount at the rate of Tshs. 155, 032, 000/= was patently arrived at after analysis of other pieces of evidence and the parties' pleadings. Therefore, the 4th ground of appeal also lacks merit and proceed dismissing it.

Coming to the 5th ground which reads; that, the trial court erred in law and fact by relying on the documentary evidence which was not admitted neither tendered in court as evidence

Having carefully examined the parties' written submissions and the impugned judgment, I have noted that at page 5 of the typed judgment, the learned trial magistrate stated that the appellants and their counsel were silent on the attached copies of dishonored cheques. I however find that she did not rely on attachments in her judgment, she reasoned that if truly the appellants paid the respondent via the said Innocent Mgonja through cheques yet the appellants or their counsel were silent on that particular issue. Hence, the copies of the cheques attached did not form the basis of the trial court decision as correctly argued by the respondent's counsel.

As earlier alluded, the annexures or attachment to the plaint or application are not part of the evidence to be relied except they save purpose of not taking other party into surprise. See the decision of the Court of Appeal of Tanzania in **Godbless J. Lema vs. Mussa Mussa Hamis Mkhanga and two others**, Civil Appeal No. 47 of 2012 (unreported). However, in our instant case, the trial court did not rely on the attachments in the appellants' WSD. I equally dismiss the 5th ground of appeal for being non-meritorious.

In the 6th ground of appeal; that, the trial magistrate erred in law and fact by ordering the appellants to pay Tshs. 155,032,000/=

and Tshs 20, 000, 000/= being as specific and general damages without any justification and proof to the case.

The appellants' counsel was of the submission that there was no proof that justified the trial court to arrive at Tshs. 155,032,000/= being specific damages sustained by the respondent. Embracing his submission relating to the awarded specific damages, the counsel referred to the case of Z**uberi Augustiono vs. Anicent Mugabe** 91992) TLR 137. He went on arguing that, the trial magistrate did not show how she arrived at Tshs. 20, 000, 000/- as general damages.

It was the reply submission that the appellants at Paragraph 6-11 of their WSD proved the awarded amount relating to specific damages through admission. He equally argued that the respondent was able to prove that, he suffered general damages since the claimed amount was for business and that she had various loans

Now to the court's determination, I am sound of the principle that the specific damage must be specifically pleaded and the same be strictly proved in civil proceedings. This position of law was judicially stressed in the case of **Bolag vs. Hutchson** (1950) A. C. 515, at page 525 that:

> "*What we accept special damages are such as the law will not infer from the nature of the act, they do not follow in the ordinary course. They are exceptional in their*

character and therefore, they must be claimed specifically and proved strictly".

In our case, as earlier explained and correctly observed by the trial court, the respondent's claims was admitted by the appellants save that, the payments of the supplied goods were made to the said Innocent. It is my view that even if a claim is based on the specific damage, if the same is admitted through parties' pleadings, there would be no further proof that is required in law.

Nonetheless, I do not see any evidence adduced in respect of the claim of the general damages especially that, she obtained loans from various money lending institutions. Hence, the respondent's assertion that the respondent ably sustained general damages since she obtained loans is not backed by any evidence on record. Despite that finding, I am of the that view, since the respondent was undisputedly doing business, hence, she must have consequentially suffered general damages following the appellants' act of failure to pay her dues to date. I subscribe to **Tanzania Saruji Corporation vs. African Marble Co Ltd** [2002] 2 EA 613 where the Court of Appeal stated;

"General damages are such as the law will presume to direct, natural or probable consequence of the act complained of.....".

In our instant matter, I do not see any justification to interfere with the finding of the trial court in respect of the awarded general damages as no evidence establishing that it acted upon a wrong principle of law or amount awarded is so large. The 6th ground is also bound to fail for lack of merit.

As to the 7th ground of appeal; that, the trial magistrate erred in law by denying the appellants their right to amend their pleadings before hearing of the case without any justification

Submitting on the 7th ground, the appellants' advocate stated that on 17th August 2022 when they advanced a prayer of an amendment of their pleadings they were denied such vital right. He invited the court to VI Rule 17 of CPC.

On the other hand, the counsel for the respondent replied that, the appellants' advocate failed to state the reasons for the sought amendment and specific amendment to the written statement of defence whereas the case was filed on 17th August 2020.

It is vividly clear that the respondent's case was instituted in 2020 and the same initially suffered technicality on limitation of time. The respondent appealed to the court vide Civil Appeal No. 9 of 2021 whose decision was delivered on 21st April 2022. It is also clear as complained

by the appellants that, the trial court denied them right to amend their WSD as there were facts known by them after the appeal before this court. According to their advocates, the basis for the complained denial to amend-WSD was reference to the said appeal. Order VI Rule 17 of the CPC cited by the appellants' counsel reads;

> *"17. The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."*

In our instant case, the mere assertions that, there were facts that were known to the appellants after the appeal were not sufficient to justify the trial court to grant leave. The appellants ought to have expounded their prayer for the sought amendment particularly scope of an amendment, mentioning facts that, were not known. In my considered view, the words "in such manner and on such terms as may be just" were inserted with purpose that, an application for an amendment of pleadings and leave thereof must be in a defined scope and not insecurely. The appellants' counsel ought to have specifically stated what facts were unknown to them. In the above reasons and circumstances, the trial court

was therefore justified to refuse the prayer. The 7th ground of appeal is thus dismissed.

> *In the last ground that, the trial magistrate erred in law and fact by concluding that there was cause of action against the 2nd and 3rd appellant personally.*

As I have determined this ground through my determination of the 1st ground of appeal. I do not see any need to be curtailed dealing with this ground. Suffice to hold that, there was cause of action against the 2nd and 3rd appellant taking into account that, there are payments that, were effected by them directly to another person as per their own pleadings and direct evidence adduced by the respondent as well as the alleged set off of the debt by the 2nd and 3rd respondent. Therefore, the 8th ground is dismissed for want of merit.

In the final result, the appeal fails; the decision of the trial court is hereby confirmed. The appellants shall severally and jointly bear the costs of this appeal.

It is so ordered.

M. R. GWAE
JUDGE
24/01/2024