IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CONSOLIDATED CIVIL APPEAL NO. 71 AND 91 OF 2023

(Arising from the Judgment and Decree of the Resident Magistrate Court of Dar es Salaam, at Kisutu, (Hon. H. A. Shaidi PRM), in Civil Case No. 46 of 2019 dated 10th March 2023)

OCTAVIAN BARNABAS KOMBA ..... APPELLANT.

VERSUS

ABSA BANK TANZANIA LIMITED (FORMERLY KNOWN AS BARCLAYS BANK TANZANIA LIMITED) .....1ST RESPONDENT.

CREDITINFO TANZANIA LIMITED.....2ND RESPONDENT.

JUDGMENT

MKWIZU,J:-

The two consolidate appeals ascend from the decision by the Kisutu Resident Magistrate court in Civil Case No 46 of 2019 dated 10th March 2023. In that case, the appellant had sued the respondents jointly and severally for among other things, permanent injunction restraining the appellant from publishing false credit information emanating from contract No.66-3005987, an order for payment of duties, demurrage and storage charges at the rate of Tshs. 94,231,130 or alternatively specific damages of US$ 41,187.85 and Tshs.100,000,000/= general damages.

The borne of contention in that case was a denial of the plaintiff to access loan facilities to fund his business by the banks after false and malicious entry in the credit info obtained from the 1st respondent that he is not a credit worth person. The averment in the amended plaint is to the effect that, appellant had obtained loan from the 1st respondent via contract No. 66-3005987 which he fully serviced as agreed. He sometimes in 2015 unsuccessfully approached several banks for loan facilities to fund his business because the information in credit information obtained from the 1st respondent had branded him **uncreditworth**y, the information he claims to be false, inattentively and maliciously given by the 1st respondent herein.

The defendants (now respondents) denied the claims stating that appellant had failed to service the loan as agreed prompting writing -off of the loan in accordance with the banking policies ranking appellant as a "high risk" hence uncreditworthy. The trial court heard the matter and at the end it found for the appellant. It awarded the appellant 45 million Tanzania shillings as specific damaged, 30 million general damages, interest, and costs of the suit.

Both the plaintiff, the winner and the 1st defendant are not happy. They each filed his appeal in this court. The appellant Octavian Barnabas Komba

filed Appeal No 71 of 2023 against the 1st respondent listing six grounds of appeal to wit:

1. *That upon the Trial Court making a finding that the Appellant (then the Plaintiff) was denied access to a loan facility for clearing two imported consignments pursuant to false credit report/information obtained from the Respondent, the Trial Court erred in law and in fact to grant special damages of TZS Forty-Five Million Only (TZS 45,000,000.00) instead of proved value of imported goods of USD 41,187.85 (then equivalent to TZS 97,648,871.00)*

2. *That upon the Trial Court making a finding that the Appellant (then Plaintiff) successfully proved that he imported goods and that he failed to clear the said goods from the Port, the Trial Court erred in law and in fact by awarding special damages of TZS forty-five million (TZS 45,000,000.00) instead of awarding the proved value of the imported goods of USD 41,187.85 (then equivalent to TZS 97,648,871.00).*

3. *That upon the Trial Court being satisfied that the Appellant (then Plaintiff) successfully proved the claimed value of*

imported goods/consignment to be USD 41,187.85 (then equivalent to TZS 97,648,871.00), the Trial Court erred in law and in fact by awarding special damages of TZS forty-five million (TZS 45,000,000.00) instead of awarding the proved value of the imported goods of USD 41,187.85 (then equivalent to TZS 97,648,871.00).

4. *That the Trial Court erred in law and in fact by relying on averment that the Court was not told whether the imported goods were damaged or were sold by TRA to recover whatever was due, an averment which was not in issue, therefore arrived at erroneous decision of awarding special damages of TZS forty-five million instead of proved value of the imported goods of USD 41,187.85 (then equivalent to TZS 97,648,871.00).*

5. *That upon being satisfied that the Respondent maliciously published false credit information of the Appellant, the Trial Court erred in law and in fact by awarding general damages of TZS thirty million (TZS 30,000,000/-), instead of awarding*

aggravated, exemplary and or punitive damages which should have been higher than awarded general damages.

6. *That upon being satisfied that the Respondent maliciously published false credit information of the Appellant, the Trial Court erred in law and in fact by not restraining the Respondent from publishing false credit information emanating from Contract No. 66-3005987.*

He in addition invited the court to substitute the trial courts order with the following orders:

1. *To set aside the award of the Trial Court of special damages of TZ Forty-five million and substitute the same with an order against the Respondent for payment of special damages of USD 41,187.85,*
2. *To order the Respondent pay any exchange loss in US$ should the Respondent pays the USD 41,187.85 in Tanzanian Shillings,*
3. *A permanent injunction restraining the Respondent from publishing false credit information emanating from Contract No. 66-3005987,*

4. *To order the Respondent pay aggravated, exemplary and or punitive damages in addition to the awarded general damages,*
5. *To order the Respondent pay interest on the special damages of USD 41,187.85 at the commercial rate of 25% per annum from the date of cause of action to the date of Judgment in Appeal,*
6. *To order the Respondent pay interest on the decretal sum at Court's rate of 7% per annum from the date of judgment in appeal to the date of full satisfaction of the Decree.*
7. *The costs in the Trial Court and in this Appellate Court be borne by the Respondent,*
8. Any other order and or reliefs this Court may find fit and just to grant.

On the other hand, the 1st respondent preferred an appeal No. 91 of 2023 against the appellant herein and one Credit info Tanzania Limited,(original 2nd defendant) with five grounds of appeal namely:

1. *The Trial Magistrate Erred in Law and Fact for Failure to Hold that GEOSA Enterprises had no Cause of Action Against Appellant; and subsequently the Court allowed the 1st Respondent to amend the Plaint thereof.*

2. *The Trial Magistrate erred in law and fact by failing to evaluate evidence of parties in the record.*
3. *The Trial Magistrate erred in law by admitting Exhibits contrary to the law and procedure and yet relied on those exhibits.*
4. *The Trial Magistrate erred in law and fact by holding that the 1st Respondent was entitled to specific damages of Tshs. 45,000,000/- whereas the Court ruled that there was no exact loss suffered by the 1st Respondent.*
5. *That the Trial Magistrate erred in law and fact by awarding interest at 25% and 7%, respectively, while there was no proof of loss.*

The two appeal were consolidated and for smooth resolution of the appeal, and heard together through written submissions.

The Appellant was represented by Modesta Stella Rweikiza and the 1st Respondent was represented by Mr Sabas Shayo, learned counsel, assisted by Ester Msangi also learned counsel. The 2nd respondent did not file any submissions hence this expert judgment against her.

Arguing his grounds of appeal, Octavian Baranabas Komba, appellant submitted that grounds 1, 2, 3, and 4 raises a common ground that: *The*

Trial Court erred in law and in fact to grant special damages of TZS Forty-Five Million Only (TZS 45,000,000.00) instead of proved value of imported goods of USD 41,187.85 (then equivalent to TZS 97,648,871.00). He said, the claimed value of imported goods of USD 41,187.85 (equivalent to TZS 97,648,871.00) is special damages which was in law required proof. Citing to the court the court decisions in **Finca Microfinance Bank ltd V. Mohamed Omary Magayu**, Civil Appeal No. 26 of 2020and **Strabag International (GMBH) V. Adinani Sabuni**, Civil Appeal No. 241 of 2018, (all unreported) he said, that amount (USD 41,187.85) was specifically pleaded and particularized in paragraphs 4, 10, 10.1, 10.2 and 10.3 of the plaint, and established by documentary evidence Exhibit P. 8 and P.9 demonstrating a total sum of USD 33,233.00 for the two consignments from China and Egypt Plus TZS 16,865,659 (then equivalent to USD 7,954.85) Total tax paid making a total of USD 41,187.85 proved loss.

He faulted the trial court for affirming his loss on the imported goods from China and Egypt valued at USD 42,187.85 (Exhibit P.8 and P.9) agreeing to his evidence that he failed to clear the said goods from the Port on ground of being denied access to the loan by African Microfinance Bank (Exhibit P.10 and P.7) due to false credit information by the

Respondent but erroneously awarding him special damages of TZS 45,000,000.00 on averment that the Court was not told whether the imported goods were damaged or were sold by TRA to recover whatever was due, an averment which was neither in issue, nor supported by evidence on record. He urged the court to allow grounds 1, 2, 3, and 4, quash the TZS 45,000,000.00 (TZ Forty-five million) specific damages awarded by the trial court and substitute it with an order against the Respondent for payment of special damages of USD 41,187.85 and any exchange loss.

He on ground five, challenged the trial court for awarding him general damages of TZS thirty million (TZS 30,000,000/-), instead of aggravated, exemplary and or punitive damages which should have been higher than the awarded general damages after it had found on page 8 of its judgment that the report by the 1st respondent to the credit info was maliciously given. He supported his argument by the decision of this court in **Baco and Ayub Co. Limited V. Permanent Secretary Ministry of Defence and National Service and two others**, Commercial Case No. 40 of 2015 (unreported) and **The Cooper Motor Corporation Limited V. Moshi/Arusha Occupational Health Services,** [1990] TLR 96, contending that in awarding general damages of TZS 30,000,000/- the

trial court left out of account, relevant factors that is, the proved malice and respondent's harmful acts. He thus intreated the court to interfere with the awarded general damages and in addition award punitive/exemplary damages higher than the awarded general damages.

Pertaining to grounds 6, the appellant said, having found that the respondent had maliciously published wrong information in respect to contract No. 66-3005987, it was imperative for the Trial Court to issue restraining order against the Respondent from publishing false credit information emanating there from. He on this point urged the court to step into the trial court's position and issue a restraining order against the Respondent as prayed in the plaint.

In response to the first four grounds of appeal by the appellant,1st respondent said, the appellant had not proved anything known as imported goods. The admission of exhibits of the purported imported goods were objected to by the 1st Respondent and on pages 45 and 46 the trial magistrate was to dissect the said objections during composition of the judgment, the exercise that was never resorted to by the court which relied on the said exhibits without good reasons .

The counsel was of the view that naturally the proforma invoice and the invoice must tally but strangely in this case, the purported proforma invoice (Exhibit P9) reads a total sum of **US$ 19,900** while the invoice reads **US$ 17,763** and the purported parking list is not signed and not stamped by the maker . He argued that had the documents put to proper scrutiny the trial court would have not arrived at the conclusion that the value of goods purported to be imported was proved.

He, again posited that in this case there was no any iota of exhibiting the alleged purchase of goods by the appellant at the stipulated price as no single receipt of payment and proof of payment to the goods was tendered in court .Instead, in support of loss of goods, insurance, freight and taxes for the purported two consignments, exhibit P8 collectively dated 15th May, 2018 was tendered in court showing that the taxes were paid for the goods signalling that goods were ready for collection from customs (Tanzania Revenue Authority) and that they were actually collected by the appellant.

He challenged the contention that failure to clear the goods was due to refusal by the African Microfinance Ltd to grant loan for the sum of Tshs. 100,000,000/=, basing on the report from the 2nd Respondent, on the following grounds, ***firstly***, that at no material time had the African

Microfinance Limited sought information from the 2nd Respondent. There is no enquiry of any sort by the said bank to the 1st respondent and the details of exhibit P11 and D2 show that the outstanding balance is zero and therefore information given by African Microfinance Ltd was false and it did not originate from the 2nd Defendant. He maintained that the allegation of the Plaintiff that he failed to get loan due to misinformation from the 1st Respondent are baseless and without merits.

Secondly, at the time of applying for the purported loan the appellant had already paid all the taxes as amplified by Exhibit P8 collectively and no refusal by the TRA to release the goods upon payment of taxes was presented in court . ***Thirdly***, he said, apart from the documents which were not authenticated, there was no evidence from independent witnesses like TRA, the shipping company, the clearing agent collaborated the evidence of PW1. There was no evidence adduced to prove that the goods were damaged or were sold by the TRA to recover whatever was due.

The attention of the court was drawn to the letter(application for the purported loan) by the applicant which partly read ***Nina makontena yangu mawili ambayo yamekwama bandarini kwa mda mrefu sana kwa kukosa fedha ya ushuru*** implying that failure by the

applellant to clear the goods are a direct consequences of his poor financial plans and not the claimed report by the 1st respondent.

He maintained that appellant's request for financial assistance on 08/10/2018 came almost one year after the goods were shipped. According to the Bill of Lading (Exhibit P9 collectively) the goods were shipped on 27th October 2017 and containers were discharged on 12/12/2017. And in Exhibit P9, the invoice and proforma invoice are dated 02/05/2018 and 23/03/2018 respectively meaning that the invoice was issued before the proforma invoice. Both the purported Exhibit P8 and P9 are not signed and do not even bear the stamp of the company issuing them beckoning invoice a sign of a counterfeit. He urged the court to disregard the said documents.

Still on the exhibit P9, the 1st respondent counsel said, in international trade the goods are paid for before being loaded on ship and proforma invoice issued before the goods are purchased but in this case deposit slips or bank statements proving that appellant did incur the claimed costs.

Pertaining to, general damages, the 1st respondent's counsel submitted that they are awarded at the discretion of the court and since there was no misrepresentation as alleged the appellant is not entitled to general

damages. He also urged the court to find the 6-ground baseless for failure to prove misrepresentation by the 1st respondent.

The appellant rejoinder submissions are essentially a reiteration of this submissions in chief with few clarifications of which I will refer to them where necessary during the analysis of the grounds.

In support of his grounds of appeal, the counsel for the 1st respondent faulted the trial court for ordering amendment of the plaint to remove Geosa Enterprises in the plaint after it had sustained their preliminary objection that the plaintiffs had no cause of action against the defendants. According to the learned counsel, this was wrong because having held that Geosa Enterprises had no relationship with the loan agreement between the appellant and 1st Respondent, the trial court had no power to make any finding about the claim by Geosa Enterprises. And mores so in this case where all exhibits including the exhibits P7, P8 and P9 are in the name of Geosa Enterprises, which initially the court held that it has no connection with the loan agreement between the Appellant and 1st Respondent. He was of the view that the trial court's judgement was in a way trying to overrule its own Ruling date 23/01/2020.He on that background prayed for the dismissal of any claim related to GEOSA.

On evaluation of evidence, the learned counsel was of the view that there was failure by the trial court to evaluate evidence that was tendered during the trial, especially PW1 and DW1 stating that the trial court was biased in assessing the evidence tendered resulted into an unjust decision. He went further to argues that to determine the 1st issue the court should have taken into account and understood the purpose of established Credit Info and the nature of information to be kept by the 2nd Defendant under Regulation 17(1) of the Bank of Tanzania (Credit Reference Bureau) Regulations, 2012, GN No. 416 of 2012 as explained by DW1 and Dw2 that once the loan is categorised written off, the said status is to remain alive in the credit info for 6 years purposely set to showing the other creditor the borrowing history of the defaulting client . It is from this evidence that they believe that there was no negligent or misstatement as alleged by the appellant.

He constantly shouted that had the court properly analysed the evidence on record it could have realised that appellant's claim was baseless for being based on a business name known as Geosa Enterprises registered in 2015 without any linkage with the Bank loan issued in 2013 and without proof..

In his 3rd ground of appeal, the 1st respondent's counsel is faulting the trial court for admitting Exhibits contrary to section 63 of the Evidence Act and yet relied on them. He said, the exhibits P8 and P9 were admitted and formed the basis of the decision despite the fact the fact that they lacked signature and the stamp of the company that issued the same.

And on grounds 4 and 5, he said, the centre of the plaintiffs (appellant) claims was a denial of the loan facility by African Microfinance Limited through Exhibit P6, which culminated to the claimed loss but the African Microfinance Limited neither featured in Exhibit D1 nor P11 for making inquiry to the bureau. Relying on **Salvand K.A Rwegasira v. China Henan International Cooperation Group Ltd**, Civil Appeal No. 57 of 2011 on the principles of general damages he said, the trial court was not justified to award general damaged after it had concluded that no loss was specifically shown to have been incurred. He lastly prayed for the court to allow his appeal with costs.

Responding to this appeal, Mr Octavian attacks the 1st respondent for introducing through his submissions new objection not embodied in ground one of the appeals without leave of the court. The Submissions raised on this point, he said, has failed to faulty the trial courts findings that GEOSA has no cause of action against the respondent and the

subsequent order for the amendment of the plaint. He was generally in support of the trial courts findings on the objection raised.

Responding to the respondents grounds no 2 and 3 , he said, the defence evidence was properly considered in the judgment and to him, it was in support of the plaintiff's claim of negligence by the defendant. While acknowledging that admissibility of exhibit P8 was objected to for lacking the stamp and signature of the author, he was quick to add the trial court had rightly admitted the said exhibit for it contain the name of the author and that there is no law demanding a document to be signed and stamped before admission.

On the issue of damages, he said, the trial court's conclusion that it could not find the exactly specific loss incurred was a result of an erroneous averment that the court was not told whether the imported goods were damaged or were sold by the TRA the averment that was never at issue. He beseeched the court to quash and set aside the trial courts order for 45,000,000/= Specific damages and substitute thereof with an order for payment of USD 41,187.85 as specific damages.

I have considered the grounds of appeal by both parties and the rival submissions and I find prudent to first dispose of grounds 1 and 3 of the 1st respondent's appeal challenging the competence of trial court's proceedings. In the first ground the trial court is faulted for the failure to hold that Geosa Enterprises had no Cause of Action Against 1st respondent. I have dissected the records. It is true that initially the suit was filed by one Octavian Barnabas Komba t/a Geosa Enterprises against the two defendants (now respondents). A preliminary objection was raised challenging the suitability of the suit on the ground that the plaintiff had no cause of action against the defendants. The point was determined, and the objection was sustained. But since the plaint had sufficient evidence that Octavian Baranabas Komba was privy to the contract subject to the complained transaction, he was allowed to amend the plaint to remove the added description of the plaintiff that is, t/a Geosa Enterprises. I do not think if this was odd. The trial courts finding on this point is allowed under Order IX rule 10 (1) which is couched thus:

> *10.-(1)* ***Where a suit has been instituted in the name of the wrong person as plaintiff*** *or where it is doubtful whether it has been instituted in the name of the right plaintiff* ***the court may at any stage of the suit, if satisfied that***

> ***the suit has been so instituted through a bona fide mistake**, and that it is necessary for the determination of the real matter in dispute so to do, **order any other person to be substituted** or added as plaintiff upon such terms as the court thinks just.*

A substitution of the parties including plaintiff in a suit is possible under the above provision where the court is satisfied that institution of the suit in the name of the wrong person was a bona fide mistake and that such a substitution or addition of person as plaintiff is necessary for the determination of the controversy between the parties. Undoubtedly Geosa enterprises in this case was used as a trade name which in law doesn't have any legal implication and since as stated above by the trial court , the plaintiff was privy to the contract subject of the dispute I think it was judicious under the circumstances to allow the amendment. I find no faulty on the party of the trial court. The 1st respondents' 1st ground is unwarranted.

In the third ground of appeal by the 1st respondent the trial court is censured for erroneous admission of exhibits contrary to the law. The 1st respondent's bone of contention lies on the admission of exhibits P8 and P9 which he said bore no signature nor stamp of the author wondering

whether they were authentic to be admitted and relied upon by the court even after an objection against its admissibility and without reasons.

I have thoroughly inspected the trial court's records. Exhibit P9 was admitted in court without any objection from the respondents. The settled rule is, an objection to admissibility of evidence should ordinarily be made, when it's tendered, not subsequently. Thus, the complaint in respect of this document is an afterthought.

Nonetheless, it is correct that the authenticity of exhibit P8 was challenged during trial and the decision to its admissibility was deferred to the judgment stage. In its order dated 3/3/2022 at pages 45 and 46 of the trial court's proceedings, the trial Magistrate acknowledged the defects pointed out by the 1st respondent's counsel with a specific remark that the issue would be discussed at a later stage during the composition of the judgment. The trial courts order was as follows:

> *"COURT: The invoice is really not signed nor stamped however the issue whether it is safe to really on it or not, is not a matter to bother us at this moment, the advocate will have time to challenge it in XXD and even talk about it at the final submissions if they find good.* ***Also, the court will talk about it at the end of the day when composing its***

judgement. Meanwhile let the document be received as exhibit P8 collectively.*"(emphasis added)*

Unfortunately, there is no discussion on the authenticity or otherwise of the objected exhibit in the judgment. Instead, the trial court did rely on the said exhibits on page 8 of its judgment and went ahead to base its finding on it without a decision on its admissibility.

The question is whether the adopted procedure is fatal. Usually where there is an objection to admissibility of evidence, the trial court is required to hear the parties on the respective objection and give a ruling to accept or reject the evidence tendered before relying on the said evidence. The accepted practice has been to resolve the objection regarding admissibility of a document/ any other material evidence there and then when it is brought to the attention of the court during the tendering of the evidence at issue **or** in some instances the trial court may make a note of such objection and mark the objected document tentatively as an exhibit in the case subject to such objections to be decided at the last stage in the final judgment . In all the situations, the court is mandated to resolve the raised legal points regarding admissibility of the objected evidence before the document or evidence is relied upon by the court.

The trial court in this case did went amiss by basing its decision on the evidence whose authenticity was at issue without reasons. I think this is fatal. It renders the entire judgment arrived at a nullity. Fortunately, this is not a virgin area in our jurisdiction. Faced with a similar situation, Court of Appeal in **Geita Gold Mining Limited V. Sweetbert Hurber**, Civil Appeal No. 269 of 2019(unreported) at page 10 held:

> *"Failure to deliver the ruling, as the learned counsel of the parties concurred, denied them and the parties the right to know the reasoning of the CMA in admitting the flash disc as exhibit. The reasoning would also enable the Court, in the event of an appeal, to inquire on the propriety of its admission and hence its evidential value..."*

On the consequences of the said error, at page 11 of the said decision the Court held:

> *"With a serious note we wish to express our discontent with the habit of certain trial magistrates or judges proceeding with trial without determining objections by delivering the ruling as and when the objections are raised so as to let the parties know the fate of the objection and thereby arrange their case*

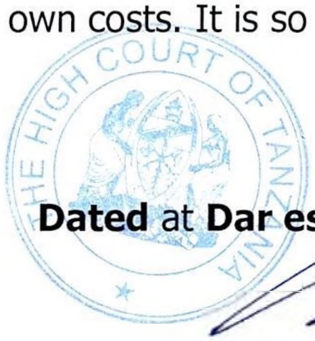
properly in line or in accordance with the contents of the ruling. By doing what he did, the Arbitrator denied the parties the right to know the reasons for admitting exhibit D1 hence arrange on how further to proceed with the hearing of the dispute. That was unfair. As such, it was improper for the CMA to proceed with the determination of dispute. The subsequent proceedings and award by the CMA as well as the proceedings and ruling of the High Court in the revision application were therefore invalid"

I am bound by the above decision. Since the error in this case was committed during the composition of the judgment, I think the best course to take is to nullify the judgment and remit the records back to the trial court to compose a fresh judgment containing a decision on the objection raised on the admissibility of exhibit P8 as promised by the trial court during trial.

Accordingly, the trial court's judgment is quashed and the decree emanating therefrom is set aside. The trial courts records are remitted back to the trial court for composition of a fresh judgment giving reasons for either accepting or rejecting exhibit P8. This ground alone suffices to

dispose of the appeal, I will thus, refrain from discussing other grounds in both appeals.

And since the error was committed by the court, I order each party to bear own costs. It is so ordered.



Dated at **Dar es salaam,** this **9th Day** of **February** 2024

E. Y MKWIZU

JUDGE