IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 16 OF 2012

MS FISHCORP LIMITED .... PLAINTIFF

VERSUS

ILALA MUNICIPAL COUNCIL .... DEFENDANT

17th July, 2015 & 26th May, 2016

JUDGMENT

MWAMBEGELE, J.:

On 24.02.2012, the plaintiff MS Fishcorp Limited, filed this suit against the defendant Ilala Municipal Council for breach of contract. The plaintiff claims for Tshs. 400,000,000/= for loss of business, general damages, interests on the loss of business and general damages, costs and any other relief the honourable court may deem just and equitable to grant. The suit is rooted in a tenancy agreement executed by the parties to this suit on 14.05.2007.

As can be gleaned in the plaint, what happened is that on the said 14.05.2007 the plaintiff company and the defendant executed a tenancy agreement over four rooms and a corridor at Zone 8 of the Ferry International Fish Market in Dar es Salaam. It is the plaintiff's case that the defendant released only two rooms out of the agreed four rooms and a corridor throughout the tenancy period which did not make the plaintiff conduct any

business. That is the reason why he sought recourse in this court claiming for the above reliefs.

On the other hand the defendant states that the plaintiff was handed the rooms and corridor as per tenancy agreement but that the plaintiff did not pay rent as agreed in the Agreement.

The following issues were framed by the court on 29.11.2012, of course, with the assistance of counsel for the parties:

1. Whether the defendant is in breach of the Lease Agreement;
2. If the answer is in the affirmative, whether the plaintiff has suffered damages; and
3. To what relief are the parties entitled;

Before I go into the details of this case, let me explain at this juncture that the testimonies of witnesses in this case were taken electronically, save for Ismail Haji Hussein's (PW3's). At one point the server in which the testimonies were kept got broken and efforts were made to fix it and retrieve the oral evidence. However the retrieval process was not 100% successful as the testimony of Thabit Rajab Katunda PW2 could not be retrieved. Having proved futile to retrieve the testimony of PW2, I asked the parties as well as their advocates to peruse the case file with a view to seeing whether or not the Judge's notes on it depicted what transpired in court. Otherwise we could recall PW2 to re-testify. The learned counsel for the parties perused the case file and were both satisfied that what was scribbled by the trial judge on 07.10.2013 when PW2 testified depicted exactly what transpired in court on

that date. They both told the court that it may proceed writing the judgment without recalling PW2 to re-testify. And Sherally Hussein Sherally PW1, the plaintiff's director, also agreed that the court should proceed composing the judgment as he had been advised by his lawyer that the notes by the trial Judge depicted the gist of PW2's testimony. After all, PW1 added, PW2 is now sick having been attacked by a partial paralysis and thus cannot be re-procured to re-testify.

In the Commercial Division of the High Court, where evidence is taken electronically by the recording devices, an official record is the audio recording done by an electronic recording system. This is the tenor and import of rule 59 (1) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. For easy reference, let me reproduce it hereunder:

> "An official record shall be made of every hearing and such record shall consist of the following.-
>
> (a) in a hearing where an electronic recording system approved and managed by the Court or any other person appointed by the Court is used, the audio recording; ..."

But it is my considered view that where, as here, the electronically recorded evidence is, for any reason, missing, the court may, having consulted the parties to the suit as well as their counsel in cases where the parties are represented, and having satisfied itself that no injustice will be occasioned in relying on the Judge's notes in composing a judgment or ruling as the case

may be, rely on the said Judge's notes to compose judgment. Otherwise, if the parties do not agree, the recourse to take would be to recall the witness whose electronically recorded testimony is missing.

It is also worth noting that the case has changed hands considerably. It was my brother Nyangarika, J. who dealt with the initial stages of the case; the first pre-trial conference and mediation. Mediation having failed, the matter was assigned to my sister Bukuku, J. for trial. Bukuku, J. dealt with the case and only one witness; PW1 testified before Her Ladyship and she was transferred to another station after which the matter was assigned to my brother Nchimbi, J. before whom PW2, PW3, Athuman Hamis Mbelwa DW1 and Reverian Gabriel Kajuna DW2 testified. Nchimbi, J. was also transferred to another Division of High Court and consequently the case was assigned to His Lordship Songoro, J. who could not proceed with the trial as he thought it was prudent to withdraw because one of the litigants was known to him. The matter then landed onto my desk. Only one witness; Ramadhan Mwiga DW3 testified before me and the defendant closed its case.

I ordered counsel for the parties to file written closing submissions which they did, timeously.

To prove the issues the plaintiff and defendants brought three witnesses each in support and defence of the case respectively. I find it appropriate to go through their testimonies, albeit briefly.

PW1 who introduced himself as one of the directors of the plaintiff company testified that on 14.05.2007 the plaintiff company and the defendant

executed a tenancy agreement over four rooms and a corridor at Zone 8 of the Ferry International Fish Market. The agreed rent rate was Tshs. 1,000,000/= per month. The duration of agreement was five years commencing from 18.05.2007. He testified that the defendant released only two rooms and a corridor out of the agreed four rooms and a corridor. That despite the fact that the plaintiff was not handed over two rooms, she (the plaintiff company) proceeded to pay rent in full; that is Tshs. 1,000,000/= per month. Efforts to ask the defendant hand over the plaintiff the remaining two rooms by two letters of 12.09.2008 and 28.12.2009 proved futile. Instead, the defendant wrote the plaintiff two letters claiming for rent.

Cross-examined, PW1 states that he came to court even before the termination of the contract and that the company paid rent from other sources of income. On Umoja wa Wavuvi Wadogowadogo Dar es Salaam (UWAWADA), PW1 testified on cross-examination that they helped the plaintiff company organize fishermen.

The plaintiff tendered three exhibits. The letter of 28.02.2007 by the plaintiff to the defendant was tendered in evidence, admitted and marked Exh. P1. Two letters by the defendant to the plaintiff dated 13.08.2008 and 04.12.2009 were also tendered in evidence, admitted and marked Exh. P2 collectively and the Lease Agreement was tendered, admitted and marked Exh. P3.

PW2's testimony is, in essence, like that of PW1. When cross-examined, he was not sure up to when was the rent paid. He approximated to have been paid up to 2009 but was not sure. He thought a total of Tshs. 60,000,000/=

had been paid but, again, he was not sure. PW2 tendered a letter by the plaintiff to the defendant dated 15.09.2008 which was admitted and marked Exh. P4.

PW3 described himself as a businessman in fishing devices with one of the rooms at Zone 8 of Ferry international Fish Marked. His room neighboured that to the plaintiff. He testified that he was told by UWAWADA to hand over his store to them. That other neighbhours were supposed to do the same. He also testified that the plaintiff was helping the fishermen. He did not state what kind of help the plaintiff was offering to the fishermen.

The defence case was supported by the evidence of three witnesses; namely, Athumani Hamis Mbelwa DW1, Reverian Gabriel Kajuna DW2 and Ramadhan Mwiga DW3 as well as the exhibits referred to hereinabove.

DW1; an employee of the defendant, testified that the plaintiff was their tenant at Zone 8 of Ferry Fish Market by an agreement entered into between them in 2007. That the plaintiff and UWAWADA entered into partnership or Joint Venture which later did not work. That after the tenancy agreement only the cold room operated; the rest of the planned investment by the plaintiff did not materialize because, he was told, the plaintiff was in financial difficulties. DW1 went on to testify that the plaintiff was handed over all the four rooms and a corridor as agreed in the agreement. That the plaintiff paid rent at the agreed rate of Tshs. 1,000,000/= for only six months. The witness went on to testify that the rooms are still vacant to date but in the hands of the plaintiff.

Reverian Gabriel Kajuna DW2 is an employee of the defendant. He agrees that there was a tenancy agreement executed between the parties but that all the agreed space was handed to the plaintiff but that the plaintiff stopped paying rent which was agreed to be paid every 5th day of the month. He thinks this case was opened by the plaintiff in order to evade rent.

Ramadhan Mwiga DW3 is a Secretary General of UWAWADA. He testified that the rooms were handed to the plaintiff but that he never started operations to the extent that members of UWAWADA suspected that the management of UWAWADA was participating to deceive them in collaboration with the plaintiff. This witness testified that the machines intended for the project are still there and that they were under lock and key initiated by the plaintiff.

The first issue for determination is whether the defendant is in breach of the Lease Agreement. The plaintiff's contention is that the defendant is in breach of the Lease Agreement as he has failed to hand over to her two rooms. On the other hand, it is the defendant's case that the plaintiff is the one in breach as she has not paid rent as agreed by them in the Agreement.

All the three witnesses who testified for the plaintiff, except for PW3 who was honest that he did not know the nature of relationship between the plaintiff and defendant, are emphatic that the defendant never handed over the remaining two rooms to the plaintiff. On the other hand, all the three witnesses for the defendant are of the position that the plaintiff was handed all the rooms and the corridor as agreed in the Lease Agreement. My task is to decide in whose favour the balance of probabilities tilts. The plaintiff is

on record to have been complaining over the two rooms not handed over to her. In support of this, Exh. P1 was tendered, admitted and marked accordingly. I have scanned Exh. P1 and have read it between the lines. Exh. P1 is a letter headed "Request for Allocation of Extra Space at Zone No. 8, Ferry Fish Market, Dar es Salaam". It requests for extra space to enable the plaintiff carry on the business as planned. It does not speak of the two rooms allegedly not handed to the plaintiff. Let some of the parts of Exh. P1 speak for themselves:

> "We as Directors of Fishcorp Limited, are members of UWAWADA and our company is operating under UWAWADA. Presently our company has installed partial machinery for fish preservation process but cannot continue with full operations because the space which has been allocated to us is inadequate for that purpose."

And the third para reads:

> "We are therefore, forwarding to you our request for allocation of further space as the ferry fish market so that we implement our desired project for the benefit of all stakeholders utilising this facility"

It is not provided anywhere in the exhibit that what was required was the two rooms as per agreement. Apparently, the letter is dated 28.02,2007 and not

28.02,2008 as led in evidence. The Lease Agreement (Exh. P3) was executed on 14.05.2007 thereby connoting that Exh. P1 was written prior to the Lease Agreement. But because the letter refers to "the space already allocated" I have no hesitation to hold that the 2007 appearing in Exh. P1 is but a keyboard mistake.

The defendant's witnesses are testifying that the rooms which the plaintiff claims not to have been handed over, are there, empty. With the totality of evidence before me, I am not persuaded by the defendant on this take. I am satisfied that the defendant did not hand over the two rooms as agreed. The defendant is therefore in breach of the Agreement. The first issue is therefore answered in the affirmative.

The second issue is whether the plaintiff suffered damages. The plaintiff has pleaded general damages at the rate to be assessed by the court. This is quite apposite because general damages are never quantified; they are paid at the discretion of the court and, on that score, it is the court which decides which amount to award – see ***Tanzania - China Friendship Textile Co. Ltd.* Vs *Our Lady of the Usambara Sisters*** [2006] TLR 70 and ***Admiralty Commissioners Vs Susqueh-Hanna*** [1926] AC 655. In ***Admiralty*** case (supra) it was stated:

> "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 our jurisdiction the court]".

> [As quoted in ***Kibwana and Another Vs Jumbe*** [1990-1994] 1 EA 223].

According to **Black's Law Dictionary** (Abridged 7th Edition) by Bryan A. Garner; Editor in Chief, the term "damages" is defined at page 320 as:

> "Money claimed by, or ordered to be paid to. A person as compensation for loss or injury".

And the term "general damages" is defined by the same legal work at page 321 as:

> "Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained".

This position is reiterated by the court in the case of ***Kibwana & another Vs Jumbe*** [1990-1994] 1 EA 223 where it was held:

> "The court, in granting damages will determine an amount which will give the injured party reparation for the wrongful act and for all the direct and unnatural consequences of the wrongful".

In the case at hand, it is not disputed between the parties that the plaintiff is a business legal person. She, certainly, must have suffered damages to entitle her the prayer sought under this head. I will conclude this issue shortly when dealing with the third issue.

The third issue is about reliefs to which the parties are entitled. The plaintiff, as stated at the beginning of this judgment, the relief sought are: Tshs. 400,000,000/= for loss of business, general damages, interests on the loss of business and general damages, costs and any other relief the honourable court may deem just and equitable to grant.

I propose to start with the claim of Tshs. 400,000,000/= for loss of business. The plaintiff has claimed Tshs. 400,000,000/= for loss of business. This claim has been particularized at para 8 of the plaint. It is couched in the following terms:

> "THAT the plaintiff had intended to install machines at the demised premises including but not limited to provision of quick freezing facility, storage facility and ice making plant which would have yielded to the plaintiff an income of Eighty Million (80,000,000/=) per year on provision of storage and freezing facilities to the fishermen."

In his testimony, the plaintiff has not provided any proof as to how the loss was suffered. What the plaintiff states is that he expected to earn Tshs. 80,000,000/= per year. No proof has been brought in evidence how the

80,000,000/= would be earned. It is the law that loss of business falls with the realm of special damages which must be specifically pleaded and proved.

Loss of business certainly refers to the disappearance or diminutions of value of such enterprise/business as a whole disappearance/reduction of profit. Logically and legally therefore, to establish loss of business, or profit, evidence as to its existence and extent/nature of its existence is necessary. This is vividly manifested by the observations in ***Masolele General Agencies Vs Africa Inland Church Tanzania*** [1994] TLR 192, at 193-194) that:

> "In the present case, the appellant company claimed loss of business profits in the sum of Shs. 1,660,000/= it would have realized from the cement business. All that was said in evidence by the Director of that company apparently in proof of this claim was as follows:
> '*I had taken Shs 2 million as loan from the bank. The bank took interest of 31% per month. The overdraft facility was to end on 20/6/91. I tender (Exist P2). I had bank money to buy the iron bars. I dealt with cement. One wagon gave me Shs 280,000/= (for 800 bags) I could take one wagon per month. That was since January 1991.*'
> This was all the evidence led on behalf of the appellant company on its cement operations. **No documents were produced to back up these**

> **figures** which therefore appear to have been plucked from the air ... For instance apart from the appellant's word, there was no evidence that it deals in cement (need for proof of existence of the business). What was the purchase price of one bag of cement, from which point, what was the transportation costs of one bag and at what price was it finally sold".
>
> [Bolding supplied for emphasis].

Thus, in line with the above observations, whether loss of business is pleaded as such or as loss of profit directly, evidence as to existence of such business prior to the loss and to what extent or in what quantity it existed is necessary. Likewise as for profit which is part of business, there must be clear indication of how much profit was being gained from such business, or how much that business was useful/profitable.

Accordingly, loss of business must be so specified in pleading (nature and extent whether as establishment or profit) and strictly proved in evidence. Apart from the above and in line with the ***Masolele*** case, this view is supported by his Lordship Massati, J. (as he then was – now Justice of the Court of Appeal) in the case of ***Gift Eric Mbowe Vs Reuben Pazia & Another***, Commercial Case No. 67 of 2005 (unreported). In that case, His Lordship, referring to the ***Masolele*** case summarized the outcome as follows:

> "In that case [the ***Masolele*** case], the Court of Appeal refused to accept the Appellant's mere

> statement of loss of business, without any documentary evidence".

In my considered view, that conclusion is obviated by the fact that, naturally, any business is capable of being quantified and recorded. This is why, courts have innumerably endeavoured to demonstrate that indeed loss of business must be specifically pleaded and strictly proved and as such damages arising therefrom are awardable under the "specific damages" head of claim.

In the recent past; February, 2015, the Court of Appeal has reiterated in strong terms what it had long held in the above cases in the case of ***Anthony Ngoo & another Vs Kitinda Kimaro***, Civil Appeal No. 25 of 2014 (unreported) on the need to plead and prove strictly specific damages.

In this court, his Lordship Mruma J.'s observations support the same conclusion that damages arising from loss of business is awardable as a specific claim. This is what His Lordship had to say in ***Efficient Freighters Ltd Vs Lilian Kanema***, Commercial Case No. 33 of 2009 (Unreported):

> "... the second prayer is for payment of USD 5000.00 being replacement costs for the 2 x 20 containers. There is evidence on record that the two containers have not returned as required. There is also evidence to the effect that the shipping agent Diamond Shipping services Limited sent an invoice No.260109 of 26th January, 2009

> (Part of exhibit P6) ... I find that this claim has been proved and I allow it".

That is synonymous in intent and purpose of the observations of His Lordship Massati J. (as he then was) in ***Tangamano Transport Services Ltd Vs Elias Raymond & Another***, Commercial Case No. 50 of 2004 (unreported) thus:

> "I have shown above that as a special damage, the claim of loss of profit should not only have been pleaded but also specifically proved ..."

The totality of the foregoing discussion is that loss of business once pleaded, damages must be strictly proved and as such, it is compensable specifically under the head of specific damages. In the instant case, the plaintiff pleaded loss of business at para 8 of the plaint but did not even attempt to prove it in evidence. In the circumstances, I find and hold that the plaintiff specifically pleaded loss of business profit but miserably failed to prove the same in evidence. In the premises, I would, as I hereby do, reject this prayer.

Another prayer is for general damages. I have already discussed this head above and promised to revert to it when discussing the third issue. As already stated, the plaintiff, indisputably, is a legal business person and must be entitled to general damages. I therefore grant her Tshs. 100,000,000/= as general damages.

The plaintiff has also claimed for interests on the loss of business and general damages. Starting with interest of loss of business, I have already stated that the plaintiff in not entitled to loss of business as, despite specifically pleading it, she has not specifically proved it in evidence. She cannot therefore be entitled to be awarded interest thereon.

As for interest on general damages which I have assessed it at Tshs. 100,000,000/=, the plaintiff has prayed for interest on the same (she has pegged the rate to be at the commercial or bank rate) from the date of judgment to payment in full. I think the plaintiff is right to pray for interest on general damages in this manner; from the date of judgment, it is the law in this jurisdiction that interest on general damages is not allowed prior to the date of judgment. The reason why damages are not allowed before judgment was stated with sufficient lucidity by the Court of Appeal of Tanzania in ***Saidi Kibwana and General Tyre E.A. Ltd Vs Rose Jumbe*** [1993] TLR 175, at 190, that:

> "Interest on general damages is only due after the delivery of judgment because then the principal amount due is known. The Court has a discretion to award interest for the period before the delivery of judgment only on special damages actually expended or incurred, but even this at such rate as the Court thinks reasonable. This discretion does not extend to the period after the delivery of judgment. The rate of interest to be awarded during the period after the judgment is

delivered is governed by the provisions of O 20 r 21 of the Civil Procedure Code which is limited between the minimum of seven per centum per annum and the maximum of twelve per centum per annum."

(See also: ***Tanzania Air Services Vs the Registered Trustees of the Precious Blood Fathers***, Civil Appeal No. 21 of 2009 (CAT unreported) and ***Prem Lata Vs Peter Musa Mbuju*** [1965J EA 592.)

On the basis of the above discussion, I grant the plaintiff interest on general damages at the rate of 10% per annum from the date of this judgment to the date of payment in full.

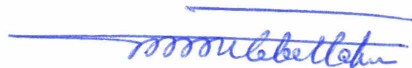
The plaintiff has also prayed for costs and any other relief the honourable court may deem just and equitable to grant. The plaintiff is indeed, in terms of section 30 of the CPC, entitled to costs. I do not, however, find any other aspect on which to peg the "any other relief the honourable court may deem just and equitable to grant" part of the prayer.

In sum, therefore, in terms of the provisions of rule 67 (3) of the High Court (Commercial Division) Procedure Rules, 2012 GN No. 250 of 2012 which dictate that every judgment shall embody at the end a summary of the reliefs granted by the Court, I hereby decree as follows:

1. The defendant shall pay the plaintiff Tshs. 100,000,000/= as general damages;
2. The defendant shall pay the plaintiff interest at the rate of 10% per annum on 1 above from the date of judgment until the amount is satisfied in full; and
3. The defendant shall pay the plaintiff costs of the suit.

Order accordingly.

DATED at DAR ES SALAAM this 26th day of May, 2016.



J. C. M. MWAMBEGELE

JUDGE