IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL APPEAL NO.01 OF 2020

(Originating from the Judgement and Decree of the Resident Magistrate's Court of Dar es Salaam at Kinondoni (Hon. Hudi, RM) dated 2nd January 2020 in Civil Case No.176 of 2019)

DANGOTE INDUSTRIES LIMITED ..... APPEALLANT

VERSUS

WANERCOM TANZANIA LIMITED ..... RESPONDENT

Date of Last Order: 04/04/2022

Date of Judgement: 29/04/2022

JUDGEMENT IN APPEAL

MAGOIGA, J.

The appellant, DANGOTE INDUSTRIES LIMITED TANZANIA, aggrieved by the Judgement and Decree of the Resident Magistrate's Court of Dar es Salaam at Kinondoni (Hon. Hudi, RM) dated 2nd January 2020 has preferred this appeal against the above named respondent to this court against the whole judgement and decree armed with 11 grounds of appeal, namely:

1. The learned trial Magistrate erred in law and in fact in entertaining and determining a suit of which he did not have jurisdiction to entertain;
2. The learned Magistrate erred in law in admitting electronic evidence without satisfying himself that the respondent had followed the

requisite principles on production of electronic evidence as required by law;

3. The learned trial Magistrate erred in law by not affording the appellant an opportunity to cross examine the respondent's witness;
4. The learned Magistrate erred in law and in fact in holding that there was in existence contract for transportation of goods between the appellant and the respondent based on letters of intent;
5. The learned trial Magistrate erred in law and in fact in holding that there was in existence a contract for transportation of goods based in the reason that there was no evidence to the contrary;
6. The learned trial Magistrate erred in law and in fact for holding that the respondent had performed its obligations in the contract for transportation without first evaluating evidence and satisfying himself on whether the respondent had fulfilled its obligations under the contract of transportation of goods;
7. The learned trial Magistrate erred in law and in fact in holding that the appellant had breached the contract for transportation of goods on the basis that there was no evidence given by the appellant;

8. The learned trial Magistrate erred in law and in fact in holding the appellant liable for damages based on contractual arrangements between the respondent and third parties to which the appellant was neither a party nor privy to;
9. The learned trial Magistrate erred in law and in fact in awarding special damages to the respondent without any proof;
10. The learned trial Magistrate erred in law and in fact in applying wrong principles in the assessment of damages by awarding general damages to the respondent without any proof that the respondent had actually suffered damages;
11. The learned trial Magistrate erred in law in awarding excessive interest rate.

On the strength of the above grounds of appeal, the appellant asked this court to quash the decision of the trial court in its entirety with costs.

Facts of this appeal as gathered from the trial court record were that through letter of intent dated 23rd October, 2015, followed by quotation dated 6th October, 2015, discussions and work order dated 1st December, 2015, the appellant agreed with respondent to transport coal from TANCOAL to DIL plant site at the rate of Tshs.108,000.00 per tone. The business went on like

that until on 22nd February, 2016 when parties officially reduced their relationship into written Agreement on the terms and condition as contained therein.

Further facts were that on 4th May, 2016 onwards on diver dates as ordered and under the instructions of the appellant till 9th March, 2017, the respondent transported cement from Mtwara to Dar es Salaam, whose payment was partially made through the account of the respondent.

The facts went on that in order to perform the transportation orders to the requirement of the appellant, the respondent on 2nd August, 2016 entered into contract with TATA AFRICA HOLDINGS (TANZANIA) LIMITED for purchase of 5 trucks through a loan from FINCA MICROFINANCE BANK LIMITED.

More facts were that despite the respondent performing her obligations, the appellant despite several demands failed, denied and declined to pay the outstanding balance to the tune of Tshs.200,000,000.00, necessitating institution of the suit before the Resident Magistrate's Court of Kinondoni, whose determination, triggered this appeal, hence, this judgement in appeal.

Before this court, the appellant at all material time was enjoying the legal services of Mr. Luka Elingaya and Ms. Saudia Kabola, learned advocates. On the other hand, the respondent has been enjoying the legal services of Mr. Alex Mashamba Balomi, learned advocate.

Mr. Elingaya arguing the appeal told the court that they raised 11 grounds of appeal, but prayed to drop ground number 3 and that will argue grounds 4 and 5 jointly, 6 and 7 jointly and the rest will be argued separately in the order they appear in the memorandum of appeal.

Mr. Elingaya arguing ground number one told the court that the trial court had no jurisdiction to entertain this suit based on monetary claimed. The learned advocate stressed that, this being a point of law can be raised at any stage, even on appeal. In support of the above stance he cited the case of Commissioner General of TRA Vs. JSC ATOMREDMETCOLOGY (ARM2) CONSOLIDATED CIVIL APPEAL NO.78 & 79 of 2019 CAT (DDM) (unreported) in which it was held that jurisdiction is creature of the statute which can be raised at any stage of the proceedings, even on appeal.

Mr. Elingaya as such argued that according to section 40 (3) (b) of the Magistrate's Court Act, [Cap 11 R.E. 2019] (herein to be referred as the

'ACT') the jurisdiction of the District Courts and Resident Magistrate's Courts in relation to Commercial cases where the subject matter is capable of being estimated at monetary value is limited to 70 million only. The learned advocate for the appellant, pointed out that section 2 of the of the Act defined the phrase ***'Commercial case' to mean a civil case involving a matter considered to be of commercial significance including but not limited to-***

(i) ***NA***

(ii) ***NA***

(iii) ***The contractual relationship of a business or commercial organization with other bodies or persons outside it.***

(iv) ***The liability of a commercial or business organization or its officials arising out of its commercial or business activities.***

Guided by the above definition, the learned advocate for the appellant argued that looking at paragraphs 3, 4,5, 9, 10 and 11 of the plaint, no doubt that the parties herein entered into transportation contract with the respondent for transporting coal from Kitai Songea and cement from Mtwara to Dar es Salaam. Much as the respondent claims for declaratory orders and

damages for breach of contract, then, according to him, this falls within section 2 of the Act. Further arguments were that, therefore, the claim of Tshs.200,000,000/= as specific damages which is beyond Tshs.70 million allowed under the Act was entertained without jurisdiction. To buttress his point, Mr. Elingaya cited the case of ZANZIBAR INSURANCE CORPORATION LIMITED vs. RUDOLF TEMBA, COMMERCIAL CASE NO. 10 OF 2006 HC (DSM) (UNREPORTED) in which it insisted the amount to be still 70 million. And the in the case of AFRICAN WHEELS TYRES LIMITED vs. TRANSEE LIMITED , MISC CIVIL REVISION NO.11 OF 2020 which cited the provisions of section 2 of the Act, which defined what a commercial case is.

Mr. Elingaya probed by the court about the definitions of a 'commercial case' in the Rules of this Court and in the Act, told the court that the definition are almost the same but there are slight explanation in the Rules by adding the phrases ***'transaction of trade or commerce'*** which are not in the Act.

Further probed by the court as to what is the jurisdiction of the District Courts and Resident Magistrate's Courts in civil cases; Mr. Elingaya told the court that it is Tshs.300 million to immovable properties and Tshs.200 million where the subject matter in monetary value does not exceed Tshs.200 million according to the amendment done to the Act in 2016.

When the court directed the learned advocate for the appellant to the provision of Order VI rule 1(4) of the Civil Procedure Code [Cap 33 R.E.2019] (to be referred hereinafter as the **'Code'),** the learned advocate argued that sub rule 4 of Rule 1 of Order VI of the CPC do not make it mandatory for commercial cases to be instituted in this registry of the Commercial division of the High Court but parties are at liberty to go to other High Court Registries and not to District Court or Resident Magistrate's Court where the subject matter is above 70 Million.

On that note, the learned advocate for the appellant invited this court to find merits in this ground and allow the appeal as prayed in the memorandum of appeal.

On the second ground of appeal, Mr. Elingaya argued that admissions of electronic evidences tendered were admitted contrary to law. The learned advocate pointed out that, exhibits P4, P7 and P12 were all computer printer outs but were admitted without following the procedure as provided for under section 18(2) (3) and 4 of the Electronic Transaction Act, 2015. In the absence of affidavit or oral testimony of the respondent witness to authenticate their genuineness, Mr. Elingaya insisted that, same were not admitted according to the dictate of the law, and hence, prayed that they be

expunged from the court record. To back up his point cited the case of SERENGETI BREWERIES LIMITED vs. BREAKPOINT OUTDOORS CATERERS LIMITED, COMMERCIAL CASE NO.132 OF 2014 HC (DSM) (UNREPORTED) insisted on failure to follow procedure on its admission to be fatal.

On that note the learned advocate prayed that these exhibits be disregarded or be expunged from the court records.

On the 6th and 7th grounds which were argued jointly, Mr. Elingaya argued that the respondent claims were for breach of contract for transportation of coal and cement as alleged in paragraphs 13 to 30 of the plaint. According to Mr. Elingaya, the respondent was required under section 110 of the Tanzania Evidence Act, [Cap 6 R.E. 2019] to prove not only by tendering letter of intent and contract but proves that he actually delivered the goods by tendering delivery notes, and that a mere tendering of invoices was not enough. The learned advocate argued that the general sweeping statement of the trial Magistrate that in the absence of WSD then a suit was proved was wrong because the respondent was legally enjoined to prove her case to the standard required in civil cases. To bolt up her case cited the case of PAULINA SAMSON NDAWAVYA vs. THERESIA THOMAS MADAHA, CIVIL APPEAL NO. 45 OF 2017 CAT (MZA) (UNREPOTED) in which it was held that

the burden of prove never shifts to the adverse party until the party whose onus lies is discharged.

On that reason, Mr. Elingaya urged this court to find that this ground is merited and allow it along with other grounds in this appeal because no evidence was tendered that goods were transported and failure to defend do not relieve the respondent to prove her case to the standard required in law.

On the 8th ground, Mr. Elingaya argued that the trial Magistrate erred to awards damages based on arrangements with third parties who were not in the original contract between parties herein namely the Bank and TATA HOLDINGS contracts. To support his arguments in this point cited the case of NATIONAL MICROFINANCE BANK vs. MARY RWABIZI TRADING t/a AMUGA ENTERPRISES, CIVIL APPEAL NO.296 OF 2017 in which it was held that general damages were to remote be granted against the appellant.

On the above guidance, Mr. Elingaya prayed this court to find that the general damages granted were privy to the appellant.

On the 9th ground of appeal it was briefly argued by Mr. Elingaya that, specific damages awarded were not proved in this appeal. In support of the point he cited the case of STANBIC BANK LIMITED vs. ABERCROMBIE &

KENT LIMITED, CIVIL APPEAL NO 21 OF 2021 CAT (DSM) (UNREPORTED) in which it was held that, general damages are to be specifically pleaded and strictly proved. On that note the learned advocate concluded that no such prove was advanced in this case.

On the 10th ground of appeal it was the argument of Mr. Elingaya that much as no direct wrong doing of the appellant and that the general damages was based on loan agreement, it was wrong to condemn the appellant to pay general damages to the tune of Tshs. 150,000,000.00. He cited the case of NMB (supra) to support his point.

On 11th ground of appeal it was the argument of Mr. Elingaya that, interest rate of 25 % was too high and prayed that it be reduced to 18% which is bank rate.

On ground 4th and 5th which were made last, it was the argument of Mr. Elingaya that, it was not enough with just a letter of intent and work order and failure to file defence to prove existence of contract which they dispute was not there. In this regard, he prayed that this court find merits in these two grounds argued jointly that no contract was ever proved between parties herein.

In the totality of the above grounds of appeal, Mr. Elingaya prayed and urged this court to find merits in this appeal and allow it with costs.

On the part of respondent, Mr. Balomi prayed to adopt the written skeleton arguments filed in opposing this appeal. On the first ground of appeal it was his strong argument that much as the Resident Magistrate's court had jurisdiction in trying civil cases and much as the substantive claim of the respondent was Tshs.200 million which is within its pecuniary jurisdiction of the court, then, the Resident Magistrate had jurisdiction to try the matter. To buttress the point, the learned advocate cited the case of TANZANIA CHINA FRIENDSHIP TEXTILE COMPANY LIMITED vs. OUR LADY USAMBARA SISTERS [2006] TLR 70 in which it was held it is on substantive claim and not on general damages which determines the pecuniary jurisdiction of the court.

According to Mr. Balomi, much as the Resident Magistrate's Court was the lowest grade on the substantive amount claimed, it was proper for the respondent who had option to choose where to go to Kinondoni or commercial court or district registry of any High Court.

Mr. Balomi further argued that the jurisdiction of the High Court (Commercial Division) in the circumstances cannot be ascertained through reading one law but a number laws, and, in particular, section 40(2)(b) of the Act , section 2 of JALA, Article 108 of the constitution and section 7 (1) of the CPC. Mr. Balomi charged that no specific law that bars the RM's court from entertaining a commercial case to the tune of Tshs.200 million much as is civil case.

According to Mr. Balomi, opening commercial case to High Court (Commercial Division) is not mandatory.

Orally submitting on this point, Mr. Balomi argued that the suit subject of this appeal was instituted in December, 2019 long after the RM's court jurisdiction on civil cases has been enhanced to 200 million as such the same was within the jurisdiction of the court. Referring to the definition of commercial case in the Rules, Mr. Balomi argued that the relationship between the parties did not qualify to business transaction or commerce because no trade was being done by the respondent on the services provided for.

Mr. Balomi strongly took a different view that, the option provided for under Order VI Rule 1(4) of the Code was to go to the High Court alone as wrong interpretation intended to mislead this court.

In the alternative, the learned advocate for the respondent argued that much as the relationship between the appellant and respondent did not qualify to be commercial case, no way one can argue the court has no jurisdiction. Mr. Balomi pointed out that the amendment of Rule 5 of the High Court (Commercial Division) Procedure Rules, 2012 done by G.N. 107 of 2019 was clear that what the High Court (Commercial Division) remained with is original and appellate jurisdiction on commercial cases. According to Mr. Balomi, section 2 of the Act has to be read together with the rule 3 of the Rules which define what is, a commercial case is. It was his further submissions that, much the circumstances of the case was not on business transaction of trade or commerce between parties, then, section 40 (3) (b) do not apply and was argued out of context in the circumstances.

On the totality of the above reasons, Mr. Balomi invited this court to find and hold that the trial court was seized with jurisdiction to try the case that was before it.

As to the second ground, Mr. Balomi briefly argued that, it was not an issue before the trial court therefore it cannot be entertained now and urged this court to disregard it.

As to 4th and 5th grounds was equally his brief reply that the existence of contract was proved by several exhibits tendered such as exhibit P1 collectively, so it is out of context to argue that there was no proof on balance of probability.

On the 6th and 7th grounds, Mr. Balomi was brief to the point that, the trial Magistrate properly evaluated evidence and found out that the respondent performed its obligations and it was justified to hold so in the absence of other evidence to the contrary. In this, Mr. Balomi pointed out that, the trial Magistrate found that through exhibits such as exhibit P7 collectively which established existence of contract and discharge of obligations according to the contract.

As to 8th ground it was the reply by Mr. Balomi that general damages were established based on two limbs; one based on testimony of PW1 at pages 18-27 of the proceedings, hence, on breach of contract, and, second, on third parties contracts which were proximity to the transportation business

involving transportation of the goods without which the performance of the contract would be impossible.

In the circumstances, he urged this court to find and hold that the general damages were properly granted upon assessment of the damages caused by the appellant to the respondent's business.

As to 9th ground it was the brief reply of Mr. Balomi that, the respondent discharged his legal burden as demonstrated at pages 6-8 of the typed proceedings. Mr. Balomi was of the different view that the specific damages were specifically pleaded and strictly proved. In support of his pointed cited the case of ZUBERI AUGOSTINO vs. ANICET MUGABE [1992] TLR 137 in which it was held that specific damages must specifically be pleaded and strictly be proved before same are granted.

As to 10th ground, Mr. Balomi argued that the trial court correctly applied the principles in assessing damages. In support of his point cited the cases of ROYAL DUTCH AIRLINES & ANOTHER vs. FARMEX [1989-90] 2 GLR 623 @625 AND TANZANIA BREWERIES LIMITEC AND CHARLES MSUKU & ANOTHER, CAT DSM (UNREPORTED) in which it held that where plaintiff has suffered damages not too remote he must be entitled to compensation.

As to 11th on awarding excessive interest had a different view that interest granted were according to the prayers in the plaint. The learned advocate for respondent cited and asked this court to be guided by the case of REV. CHRISTOPHER MTIKILA vs. ATTORNEY GENERAL [2004] TLR 172 in which it was held that: (ix) since damages have to restore an injured party, as far as possible, to the position prior to injury, it is correct in law to include interest in the award of damages as an element calculated to offset the effect of inflation and devaluation.(x) It is apparent from the provisions of section 29 of the Civil Procedure Code read together with Rule 23 of Order XX of the same Code that interest is payable on a judgement debt from the date of delivery of the judgement until the same shall be satisfied, at the rate of 7% per annum or not exceeding 12%. (xi) the appellant was entitled to interest at commercial rate from the date of filing the suit to the date of delivery of judgement. (xii) Under the provisions of section 29 of the Civil Procedure Code, 1969, the appellant was entitled to the court's rate of 7% per annum from the date of judgement to the date of final settlement. The commercial rate of 31% interest per annum is to be paid on the decretal amount from the date of filing the suit to the date of judgement.

Lastly Mr. Balomi cited the case of NJORO FURNITURE MART LIMITED vs. TANZANIA ELECTRICT COMPANY LIMITED [1995] TLR 205 (CAT) in which interest and what was granted was held to be correct and there was nothing excessive on interest rate awarded.

Arguing orally on other grounds, Mr. Balomi generally submitted that the decisions cited in support of them were distinguishable from the circumstances we have in this appeal. According to Mr. Balomi, the case proceeded ex-parte and the respondent proved her case with series of exhibits without objection and much as no prejudicial is raised and proved, invited this court to reject all arguments on these grounds.

On that note, the learned advocate for the respondent on strong terms urged this court to dismiss this appeal with costs.

In rejoinder, Mr. Elingaya reiterated his earlier submissions on the first point and added that it is true under Order VI Rule 1(4) litigants are legally given options to institute a commercial case to other registries but was quick to pointed out that, that option is to go to the normal registry of the High Court and not District Court or Resident Magistrate's Court. According to Mr. Elingaya, the option has to be considered subject to section 40(3) (b) of the

Act. Mr. Elingaya went on to argue that the Orders in the Code and Rules of the Commercial Divisions of the High Court are subsidiary laws to Act and in case of conflict, the Act being substantive law has to prevail.

On the decisions cited, he rejoined that they are not distinguishable but relevant and should be considered. On electronic evidence, he rejoined that once it is established were admitted in contravention of the law, they should not be left to stand on record. On prejudicial, he argued that the appellant was prejudiced by being ordered to pay the money the respondent is not entitled to. Further, Mr. Elingaya submitted that, much as other grounds were based on merits, then, are allowed to challenge all matters done in abrogation of the law.

On that note, Mr. Elingaya reiterated his earlier prayers that this appeal be allowed with costs.

This marked the end of hearing of this hotly contested appeal.

The noble task of this court now is to determine the merits or otherwise of this appeal. I intend to determine the grounds of appeal in the order were argued by learned trained minds for parties. However, it should be noted that, the first ground, if sustained, suffices to dispose of this appeal. I will not

venture into academic but futile exercise to discuss the rest of the grounds but if it fails, will go to one after the other.

However, before going into the grounds of appeal, I find it imperative to state and know the development of the law and jurisprudence of the commercial court since its establishment as a specialized Division of the High Court to deal with commercial cases. The Commercial Division of the High Court was established by Government Notice No.141 of the High Court Registries (Amendment) Rules, 1999. Under the Rules, and, in particular, Rule 5A categorically provided as follows:-

> ***"Rule 5A- There shall be a Commercial Division of the High Court within the Registry at Dar es Salaam and at any other Registry or sub registry as may be determined by the Chief Justice, in which proceedings concerning commercial cases may be instituted."***
>
> (Emphasis mine)

Therefore, without much ado, since its establishment in 1999, the Commercial Division of the High Court, in my view, was not meant to enjoy exclusive jurisdiction of the commercial cases because the word used is **'may'** thus under section 53 (1) of the Interpretation of Laws Act

[Cap 1 R.E. 2019] connotes that it is not mandatory to institute a commercial case in Commercial Division of the High Court but an option to litigants. Not only that but also that, the above Rule is supported and is in harmony with the spirit of the provisions of Order VI Rule 1(4) of the Civil Procedure Code, [Cap 33 R.E. 2019] on institution of commercial case to be optional for parties to choose which registry to go. The said sub rule provides as follows:-

Rule 1(4)- It shall not be mandatory for commercial case to be instituted in Commercial Division of the High Court.

The above Rule was introduced in the Code vide G.N. 140 of 1999 and the spirit behind these two provisions above, in my view, since the inception of the Commercial Division of the High Court in 1999 to date, is that, doors on commercial cases were left open to litigants to choose where to go provided that courts have jurisdiction be it normal High Court or District Court or Resident Magistrate's Court. To hold otherwise, in my considered view, will amounts to close the vents in search of justice maintained by the drafters of the law since then. I will not go for that now.

Therefore, I am entitled to say and hold that the Commercial Division of the High Court is a specialized jurisdiction for commercial cases to litigants who opts that their matter or suit should, among others, be fast tracked in its determination to cater for development and economic changes and investor needs from the normal court that were clogged with back log cases. It is unfortunate, however, that for some reasons back logs are inevitable within this specialized division.

It is further to be noted that the same G.N. No.141 defined a Commercial Case to mean a **civil case** involving a matter considered to be of commercial significance, including but not limited to:-

(i) The formation of a business or commercial organization;

(ii) The governance of a business or commercial organization;

(iii) The contractual relationship of a business or commercial organization with other bodies or person outside it;

(iv) The liability of commercial or business organization or its officials arising out of its commercial or business activities;

(v) The liabilities of commercial or business person arising out of that person's commercial or business activities;

(vi) The restructuring or payment of commercial debts by or to business or commercial organization or person;

(vii) The winding up or bankruptcy of a commercial or business organization or person;

(viii) The enforcement of commercial arbitration award;

(ix) The enforcement of awards of a regional court or tribunal of competent jurisdiction made in accordance with a Treaty or Mutual Assistance arrangement to which the United Republic is a signatory and which forms part of the law of the United Republic;

(x) Admiralty proceedings; and

(xi) Arbitration proceedings.

The High Court (Commercial Division) Procedure Rules, 2012 G.N.250 of 2012 as amended from time to time, came with a definition of Commercial case to mean a ***civil case involving a matter considered by the court to be of commercial significance, including any claim or application***

arising out of transaction of trade or commerce but not limited to the same 11 items in the above quoted rule. (Emphasis mine).

The word Court is defined under the Act to mean the High Court, Court of Resident Magistrate's or District Court.

Therefore, as a general rule, all commercial cases are civil cases. The only exception, in my view, is for the subordinate courts when confronted with commercial matter to consider and differentiate a normal civil case to that of **commercial significance case by deciding or making a finding before trial takes off if it arose from transaction of trade or commerce or not.** (Emphasis mine).

In my further considered opinion, going by the definitions of commercial case both in the Act and the Rules, I find out that while under section 2 of the Act defines what a commercial case is; but the rules goes a step further to prescribe what the subordinate courts have to consider when deciding whether it is a case of commercial significance or not. However, both the Act and the Rules do not define what a transaction of trade or commerce is?. However, the Black's Law Dictionary 10th Edition defines **'trade'** to mean the business of buying and selling or bartering goods and services, and

'commerce' to mean the exchange of goods and services, especially on large scale involving transportation between cities, states and countries.

From the above definitions, two illustrations will suffice to explain and make it easy for subordinate courts to understand this point that has been of great concern not only to courts but also to practitioners.

Illustration A.

If 'A' buys goods/services from 'B' for selling with the aim of getting a profit, that is typically a transaction of trade/commerce and falls squarely into commercial significance case.

Illustration B.

If A after buying goods/services from 'B' and engage 'C' to transport them to his place of business, that is typically not transaction of trade/commerce but contract of carriage which falls within the normal civil case.

It is further to be noted that in 2016, by virtue of the Written Laws (Miscellaneous Amendments) Act, 2016, G.N.28 of 2016, the Act was amended. The amendment, among others, was on section 40 (2) (a) and (b) which enhanced the jurisdiction of the District Court and that of Resident

Magistrate's Court in civil cases to the tune of TZS. 300 Million for the recovery of immovable property and TZS. 200 Million to movable claim where the subject matter is capable of being estimated at a money value.

Further, the jurisdiction of the District Court/Resident Magistrate's Court in commercial cases was also amended in 2019 by The Written Laws (Miscellaneous Amendment) (No.4) Act, of 2019 which enhanced the pecuniary jurisdiction of the District Court and that of Resident Magistrate's Court on commercial cases from TZS.50 Million to the tune of TZS.100 Million for proceedings for recovery of immovable property; and, for proceedings where the subject matter is capable of being estimated at money value from TZS.30 Million to TZS.70 Million.

Now with the above amendment, and guided by the provisions of section 40(3) (b) of the Act, I agree with the arguments of Mr. Elingaya that, where it can be established that a case is a commercial significance case as defined above, then, the jurisdiction of the District Court and that of Resident Magistrate's Court is limited to Tshs.100 million for proceedings for recovery of immovable property and Tshs.70 million of claim where the subject matter can be estimated at money value.

So in this legal point, I reject to associate myself with the argument by Mr. Balomi that a party has an option to institute already considered commercial significance case to District court or court of Resident Magistrate beyond the amount stated under section 40(3) (b) of the Act.

Now back to the appeal and for determination of the first ground of appeal, which was couched that the Resident Magistrate's Court was without jurisdiction to entertain the suit for want of pecuniary jurisdiction, all argued and considered on this point, with due respect to Mr. Elingaya, learned advocate for the appellant, I am inclined to finds and hold that, the Resident Magistrate's Court of Kinondoni acted within its pecuniary jurisdiction to entertain the suit before it subject of this appeal. I will try to explain. **One,** In this appeal, I find the relationship between the appellant and respondent did not meet the threshold of being civil case with commercial significance involving buying and selling of goods and services. In both situations, it was a contract of carriage of coal from KITAI Songea to Mtwara and carriage of cement from Mtwara to Dar es Salaam. Yes, in both situations, there was a contractual relationship but was not for transaction of trade or commerce between the respondent and appellant but with some other people, hence,

not qualifying to be of commercial significance between the appellant and the respondent.

Had it been that the respondent sold and transported coal to the appellant, and/or bought cement for herself from the appellant for sale in Dar es Salaam, then, that could have been considered to be transaction of trade/ commerce to constitute a commercial case. It is not the case here.

The drafters of both the Act and the Rules in defining what is a commercial case, went further in the Rules to establish what a court has to consider in establishing that this is a case with commercial significance or not. It is my strong considered opinion that not very contractual relationship must be of commercial significance but facts have to considered to see if it amounts to trade/commerce or not. In this case, it is not.

Two, guided by the first reason and much as the substantial claim of respondent before the Resident Magistrate's Court was estimated to the tune Tshs.200,000,000/-, no way in a suit instituted in 2019 it can safely be argued that the court had no pecuniary jurisdiction. As seen above, the 2016 amendment in the Act enhanced the jurisdiction of the District Court and that

of Resident Magistrate's Court to Tshs. 200,000, 000/ - so making the argument by Mr. Elingaya misplaced and far from convincing me otherwise.

Three, I have read the cases cited and I have no problem with their holding but with due respect to Mr. Elingaya, the cases are distinguishable with the circumstances we have here, as correctly argued by Mr. Balomi.

In the foregoing, I find the first ground devoid of any useful merits and is hereby dismissed.

This takes me to the second ground of appeal couched and argued that the electronic evidence admitted did not follow the requisite principles on production of electronic evidence as required by law and this court was asked to expunge them from the court record. According to Mr Elingaya, the exhibits in dispute was exhibit P4 an email correspondence, exhibit P7 collectively admitted with Bank statement and exhibit P12 tendered without following the laid down procedures under section 18(2) (3) and (4) of the Electronic Transaction Act, 2015. Much as no affidavit of authentication of the electronic evidence was tendered, Mr. Elingaya strongly urged this court to disregard them or expunge them from the court record in determining this appeal.

On the other hand of the respondent, Mr. Balomi argued that the issue of electronic evidence was not an issue before the trial court and as such this court cannot entertain it at this point.

Having seriously considered the rivaling arguments on this point, the law and revisited the proceedings, I find merits on this ground that exhibits complained of, were admitted in clear abrogation of the law. The law here for bank statements is sections 78(1) and (2), 79 (1) and (2) of Tanzania Evidence Act, [Cap 6 R.E.2019] and section 18 of Electronic Transaction Act, 2015 for other forms of electronic evidence. The fact that the case was heard ex-parte did not absolve or exonerate the respondent from following the laid down procedure for admission and prove of the cases. The arguments by Mr. Balomi are far from convincing this court to hold otherwise.

On that note, I associate myself with the arguments by Mr. Elingaya that exhibit P4, part of exhibit P7 on bank statements alone and part of exhibit P12 on bank statement alone are hereby expunged from the court record or will not be regarded in this appeal.

Next is the 6th and 7th grounds argued together that no breach of contract for want of contract and prove of transportation done. On this point, Mr.

Elingaya argued that exhibits tendered were not enough without delivery notes and that a mere presentation of invoices was not enough and did not prove that the goods were transported. The learned advocate for the appellant urged this court to find and hold that in the light of the case of PAULINA SAMSON NDAWAVYA vs. THERESIA THOMAS MADAHA(supra) the burden of prove never shifted to the appellant for failure to prove the respondent transported any goods from Songea and Dar es Salaam. Mr. Elinagya invited this court to find merits on these grounds together.

On the adversary part of the respondent, Mr. Balomi argued that the trial court correctly analyzed evidence on record and correctly arrived at just conclusion that the appellant proved her case in the standard required in civil cases.

Having dispassionately considered the rivaling arguments of this point, revisited the proceedings and exhibits tendered, I find these grounds are akin to fail. I will explain. **One,** Exhibit P1 admitted collectively exhibited that by virtue of letter of intent dated 23/10/2015 and the work order dated 01/12/2015 constitutes a contract unless the contrary is shown once was accepted by the respondent so to speak. **Two,** the argument that no delivery note hence no prove of transportation was negated by the extension done

through **exhibit P3** which refers to the same and if no performance was done why then extend the contract. This argument, in my opinion, I find it purely a technical argument employed by the learned advocate for the appellant to avoid liability. It is thus rejected in its face value.

On the foregoing, I find the 6th and 7th grounds have to fail and are hereby dismissed for want of merits.

On the 8th ground which was couched that the trial Magistrate erred in law and fact for holding appellant liable for damages based on contractual arrangements between the respondent and third parties to which the appellant was not a party. Mr. Elingaya on this point forcefully argued that much as the appellant was not a party to other contracts tendered relating to the performance of the contract, then, it was wrong for trial Magistrate to base on those contracts to grant damages. The learned advocate for appellant in support of this point cited the case of NMB vs. MARY RWABIZI TRADING (supra), in which it held that general damages were privy to the appellant.

On the other adversary part of the respondent Mr. Balomi argued to the contrary that the liability of the appellant was found based on contract as

testified by PW1 between the parties herein. According to Mr. Balomi, other contracts with other parties were directly connected with the performance of the contract with the appellant, hence, probable to the contract with the appellant. Mr. Balomi argued further that the loan sought and granted and the motor vehicles bought were for the same purposes and it was not wrong for the trial magistrate to hold as he did.

I have carefully considered the rivaling arguments of the learned advocates, the cases cited on grant of general damages, read the judgement of the trial court and the proximity of the basis upon which were granted and I found out that this point, has as well to fail. I will explain. **One,** the issue of damages was handled on two limbs; first is the special damages and second is the general damages. The first limb of damages was granted because the trial court believed there were contracts as well as breach of contract of the same and not because there were other contracts. **Two,** the general damages were not granted based on other contracts alone but based on breach of payment of the goods transported but not paid for. Further, even, if other contracts were not considered but still in the circumstances, the plaintiff/respondent was entitled general damages by virtue of section 73 of the Law of Contract. The said section provides as follows:

Section 73. Compensation for loss or damage caused by breach of contract, etc.

(1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) The compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

(4) In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience

caused by the non-performance of the contract must be taken into account.

Notwithstanding what I have found above, the question that I have to ask in this appeal is whether the borrowing of the motor vehicles was remote to the transportation business between parties? I have carefully considered this point and I found out that the grant of the general damages was not granted because there was breach of those contracts. The contracts were not proving the unpaid amount remained unpaid by the appellant following breach of the contract. The breach of contract was proved by other exhibits on record. The fact that there is evidence for breach of contract, then, general damages need not strictly be proved as Mr. Elingaya want this court to believe.

Therefore, from the foregoing, this court finds this ground is devoid of any useful merits in this appeal and same is hereby dismissed.

Next is the 9th ground couched and argued that the specific damages granted were granted without any proof. According to Mr. Elingaya, no proof was tendered to strictly prove the specific damages but the trial Magistrate used general statement to conclude that the same were proved which is wrong for

failure to prove delivery of the goods. In support of this he cited the case of STANBIC BANK Vs. ABERCROMBIE & KENT (T) LIMITED (supra)

On the other adversary part, Mr. Balomi was brief to the point that special damages were proved to the require standard. In support of this point he cited the case of ZUBERI AUGOSTINO vs. ANICET MUGABE (supra).

Having considered this point critically and traversed the pleadings and its annexure, the exhibits tendered, I am entitled to find and hold that the claim of special damages was specifically pleaded and in the circumstances of this case was strictly proved. The strict prove do not necessary means to have the receipts but will depend on the circumstances of each case. Exhibits P8, P6, P10, P18 which the appellant has no complaint against altogether considered it cannot be said that there was no proof from the part of the respondent. Strict proof in my opinion, does not go above the balance of probability as required in civil cases.

So, on that note, this ground too has to fail and is hereby dismissed as well.

Next is the 10th ground couched and argued that the trial Magistrate erred in law and fact in applying wrong principles in the assessment of damages by awarding general damages to the respondent without any proof that the

respondent has suffered damages. Mr. Eingaya strongly argued that, the general damages were granted based on contracts with third parties and as such remote to be granted against the appellant. He cited the case of NMB vs. MARY RWABIZI TRADING (supra) at page 29 at which the Court of Appeal of Tanzania quoted the case of TANZANIA SARUJI CORPORATION vs. AFRICAN MARBLE COMPANY LIMITED [2004] TLR 155 in which it was held that:

> ***"general damages are such as to the law will presume to be the direct, natural or probable consequences of the act complained of; the defendant's wrongdoing must, therefore, have been a cause, if not sole, or a particularly significant, cause of damage."***

On the strength of the above reason, Mr. Elingaya urged this court to find merits on this ground and allow the appeal.

On the other part of the respondent, Mr. Balomi argued that the trial court was right in reaching the grant of general damages flowing from the breach of contract and cited the cases of ROYAL DUTCH AIRLINES vs. FARMES LTD (Supra) in which it was held that the cause of damage must be related to the cause of damage.

I have carefully considered this point along with my findings in the 9th ground above, with respect to Mr. Elingaya, I find nothing wrong on the awarding of the general damages much as there was breach of contract even without those contracts.

Therefore, this ground too has to fail as well.

Next was 11th ground couched and argued that the trial court erred in law in awarding excessive interest rate. In this Mr. Elingaya argued that interest claimed was 25% but, according to him, the proper interest to award was 18% which is bank's rate. The learned advocate without assigned any reason(s) prayed that same be reduced to 18%.

On the other hand of the respondent, Mr. Balomi argued to the contrary that interest rate of 25% is not that much and urged this court not to disturb it.

Having considered this point and having gone through exhibits, in particular, exhibit P1, parties never agreed on any rate of interest in case of breach. The plaintiff claimed 25% from the date of breach to the date of judgement. I have seriously exercised my mind on this point but I find no reason to fault the rate of interest claimed in the plaint. Also, much as no reason was given

for request to disturb it, I find this ground devoid of any useful merits and as such same is hereby dismissed as well.

The last grounds argued jointly were the 4th and 5th grounds couched and argued was that the trial Magistrate erred in law and fact in holding that there was existence of contract of transportation of goods between the appellant and respondent based on letter of intents and on reason that there was no evidence to the contrary. Mr. Elingaya argued that a mere letter of intent and work orders were not enough to substantiate there was a contract.

Mr. Balomi brief to the point argued that there was contract for transportation of coal from Songea to Mtwara and cement from Mtwara to Dar es Salaam.

Having heard and considered exhibits tendered during trial and the rivaling arguments of the legal trained minds for the parties, I hasten to find and hold that this point too is devoid of any useful merits. Exhibit P1 collectively admitted and exhibit P2 all proves that there were written contracts dated 01/12/2015 and 22/02/2016 respectively between parties and it was the latter contract that was renewed by exhibit P3. Not only that but also that the

trial Magistrate was justified to hold as he did that in the absence of other evidence to the contrary, in this appeal there was ample evidence to prove contract between parties herein.

That said and done, for reasons I have assigned; except for the 2nd ground in respect of which I found merits and allowed, the rest of them lack merit and are accordingly dismissed. In the end, the appeal fails. I uphold the trial court's judgement and decree in favour of the respondent. The respondent shall have costs of this appeal.

It is so ordered.

Dated at Dar es Salaam this 29th day of April, 2022.

S. M. MAGOIGA

JUDGE

29/04/2022