IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: WAMBALI, J.A., SEHEL, J.A., And GALEBA, J.A.)

CIVIL APPEAL NO. 237 OF 2020

KHAMIS MUHIDIN MUSA ..... APPELLANT

VERSUS

MOHAMMED THANI MATTAR..... RESPONDENT

(Appeal from the Decision of the High Court of Zanzibar at Vuga)

(Mohamed, J.)

dated the 15th day of July, 2019

in

Civil Case No. 37 of 2014

.....

JUDGMENT OF THE COURT

29th November & 3rd December 2021

GALEBA, J.A.:

The respondent, Mohammed Thani Mattar instituted Civil Case No. 37 of 2014 in the High Court of Zanzibar at Vuga moving it to make several declarations in his favour against the appellant, Khamis Muhidin Mussa. Along with the declaratory reliefs, in that case the respondent also claimed from the appellant punitive and general damages. Finally, he prayed that the appellant be condemned to foot his bill for the costs he would incur in the litigation. The brief details of the reliefs that were sought by the respondent in that law suit were, **one,** that he be declared to be privy to an agreement existing between the appellant and other third parties in respect of ownership and management of the Rock

Hotel situated at Pongwe area in the Central District within the Northern Region of Unguja Island in Zanzibar (the hotel). **Two,** that he be declared a 25% shareholder in the equity of the hotel and **three**, that the appellant be restrained from evicting and restricting him from participating in operations of the hotel. As indicated above, the respondent also prayed for punitive damages of TZS. 20,000,000.00 for dishonesty and general damages of TZS. 80,000,000.00 for breach of contract.

The basis upon which the above suit was premised were allegations by the respondent that in the year 2012 he advanced the appellant with an amount of TZS. 85,000,000.00 as his capital injection and contribution in the project for construction of the hotel, in consideration for an entitlement of 25% equity or ownership in the hotel project. Further understanding of the parties, according to the respondent, was that a detailed joint venture agreement would be drafted sometime after construction of the hotel. However, according to him, the appellant, took the money, constructed the hotel and registered a company called Zanzibar Rock Resort Company Limited with other third parties with whom he is owning the hotel. It turned out that the appellant was neither introducing nor recognizing him as a person with shares or interest in the hotel. He complained that the appellant was not

sharing with him any progress or business information concerning the hotel. Consequently, in 2013 when the respondent demanded a draft agreement that would be detailing and clarifying rights and obligations of parties in the project, the appellant started to avoid him and eventually he could not easily be traced. Finally, as the respondent's hopes in the project began to fade away but before he could give up, he decided to file the above law suit in the High Court in July 2014 to enforce his rights and interests in the hotel enterprise.

In his written statement of defence, the appellant denied to have received any money from the respondent for purposes of construction of the hotel as alleged. Nonetheless, he admitted a debt of TZS. 16,000,000.00 as reflected at page 23 of the record of appeal, but added that the money did not have any link to the hotel project. He pleaded that he borrowed the money from the respondent for his personal use, and it would be repaid gradually as and when it would be required by the respondent.

As the appellant denied the respondent's allegations in court, issues were duly framed and the case was set down for hearing whereupon the respondent called five witnesses and closed his case on 10th August 2017. Defence hearing started on 12th September 2017 on

which day the respondent adduced his evidence as DW1. Denge Muhidin Mussa (DW2) testified on 10th April 2018, on which day, defence hearing was adjourned for continuation to 10th May 2018. On the latter date, it is on record that the trial Judge was on leave, so the hearing was adjourned to 19th July 2018.

On 19th July 2018, when the case was called on for continuation of defence hearing, Mr. Isaack Msengi learned counsel for the defendant (now the appellant) prayed for an adjournment on account of the fact that his client's third witness was not in attendance because, the witness was not advised of his being required in court ahead of time. Mr. Omar Said Shaaban learned advocate appearing for the plaintiff (now the respondent), objected to the prayer for adjournment and prayed that the court be pleased to close the defence case and set a date for judgement. Mr. Msengi pleaded with the court in the interest of justice not to make the orders that Mr. Shaaban prayed, but the court did not buy the idea, it turned down the prayer for adjourning the hearing. The session was adjourned for judgment which would be delivered on 23rd August 2018. It is not clear what transpired in between, but the judgment was delivered about a year later on 15th July 2019.

In that judgment, the appellant lost and was aggrieved. To challenge the decision of the High Court, he lodged the present appeal predicating it on 7 grounds of appeal, but because, determination of the first and third grounds of appeal might dispose of the whole appeal, we will not consider or determine the other grounds.

At the hearing of the appeal before us on 29th November 2021, Mr. Msengi appeared for the appellant whereas Mr. Rajab Abdalla Rajab learned advocate represented the respondent. After adopting the appellant's submission lodged earlier under Rule 106(1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), Mr. Msengi argued all the grounds of appeal, but as indicated above, we will focus our full attention on the first and third grounds of appeal, in which the appellant is complaining that:-

> *"1. The learned trial Judge erred in law for not satisfying herself that the High Court had no jurisdiction to entertain the suit.*
>
> *3. The learned trial Judge erred in law and in fact in determining the suit notwithstanding that she denied the appellant the right to be heard."*

In arguing the first ground of appeal, in his written submissions, Mr. Msengi submitted that as the amount claimed in the plaint in prayers

four and five was TZS. 100,000,000.00, the High Court had no pecuniary jurisdiction to try the case, because a suit to enforce recovery of such amount ought to have been filed in a court of a grade lower than the High Court, in terms of section 10 of the Civil Procedure Decree, Cap. 8 of the Laws of Zanzibar (the CPD). At the hearing, however, Mr. Msengi changed course and kept hovering and juggling over sections 4(1) and 11(1) of the CPD, as the provisions which were allegedly offended by the High Court. Nonetheless, he later zeroed down on section 11(1) of the CPD and confirmed to us that the latter was the actual section that was breached by the High Court. He relied on the case of the **Director of Public Prosecutions v. Farid Hadi Ahmed & 9 Others,** Criminal Appeal No. 96 of 2013 (unreported), to support the view that the issue of jurisdiction in any court is basic, and it goes to the very substratum of the authority of the court to adjudicate upon a given case. Another case he cited in his written submission is that of **Tanzania-China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] T.L.R. 70 to buttress his argument that it is specific damages and not general damages which determine pecuniary jurisdiction of courts. In the final analysis, counsel beseeched us to dismiss the appeal with costs for the case was tried without jurisdiction.

In reply to the above submission, Mr. Rajab was brief and focused. He advanced two points, **first** that, the suit before the High Court was not for recovery of any liquidated damages, such that jurisdiction would be determined by gauging it on an amount of money claimed, rather the respondent was claiming his interest and ownership in the equity of the hotel. **Two,** the money figures in prayers four and five in the plaint as reflected at page 18 of the record of appeal for punitive and general damages, cannot legally, be taken as a basis of determining pecuniary jurisdiction of the High Court. He finally, implored us to dismiss the first ground of appeal for want of merit.

The issue for determination in the first ground of appeal, is whether the High Court had no jurisdiction in determining Civil Case No. 37 of 2014. We will start with the law that Mr. Msengi challenged the High Court to have breached, which is section 11(1) of the CPD providing that:-

> *"11-(1) Subject to the pecuniary or other limitations prescribed by any law, suits-*
>
> *(a) for the recovery of immovable property, with or without rent or profits;*
>
> *(b) for the partition of immovable property;*

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;

(d) for the determination of any other right to or interest in immovable property;

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually under distraint or attachment;

Shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business or personally works for gain."

With respect to Mr. Msengi, we do not find any paragraph of the above section 11(1) nor did he specify one to us, which may be construed to have been offended by the High Court. Moreover, the section provides for territorial jurisdiction of courts in Zanzibar. In our view the section has no relevance to the issue of pecuniary jurisdiction, that Mr. Msengi raised.

The issue of jurisdiction in the instant matter can conveniently be resolved in the context of the two points raised by Mr. Rajab, where he had submitted that the respondent's claim in the High Court was not for recovery of any liquidated sum of money from the appellant and that monetary figures for general damages cannot be used to determine pecuniary jurisdiction of courts. The first point calls for a critical examination of the plaint and the nature of the prayers it carries whereas the latter involves elucidating the principles of law seeking to answer the question whether a monetary figure mentioned in a plaint as general damages can be taken as a judicial measure for purposes of ascertaining pecuniary jurisdiction of courts.

We now turn to examine the plaint which contains the following prayers at page 18 of the record of appeal: -

> *"REASONS WHEREFORE: That the plaintiff prays for judgment and decree against the defendant as follows:-*
> *1. A declaration that, the plaintiff is privity to contract between defendant and any other party regarding the disputed property;*
> *2. That, the plaintiff has furnished a valuable consideration in the suit property and hence he is a legal and equitable owner of 25 percent in the*

business commonly referred to as The Rock situate at Pongwe;

3. That, the defendant should be restrained from evicting the plaintiff from the ownership and operation of the disputed property;

4. That, the Defendant should be condemned to pay punitive damages to the tune of TZS. 20,000,000.00 for his dishonesty acts toward the Plaintiff;

5. That, the Defendant should be ordered to pay the Plaintiff general damages to the tune of TZS. 80,000,000.00;

6. Order for costs of and incidental to the suit to be provided for;

7. Any other Relief(s) as this Honorable Court may deem fit to grant."

Our keen scrutiny of the prayers above reveals that the first, second and third prayers are for two declarations and one restraint order. The fourth and fifth prayers are in respect of punitive damages and general damages, respectively. Both, punitive and general damages, legally are in one larger category of general damages. None of the two reliefs is specific damages. The two remaining reliefs, prayers six and seven, one is for costs and another for unspecified reliefs. We are therefore settled in our mind, that the suit before the High Court was for declarations and general damages. The suit was not for recovery of any

liquidated or specific damages for purposes of determination of pecuniary jurisdiction.

However, according to Mr. Msengi the monetary figures in the fourth and fifth prayers were the basis upon which the pecuniary jurisdiction of the court ought to be determined. Of course, Mr. Rajab's stand point was diametrically opposed to his counterpart's position. We will determine which view is the proper position of the law.

The position of this Court has quite a long time been that general damages cannot and do not form the basis of determining the court's pecuniary jurisdiction. Substantive, specific or liquidated damages do. Some of the cases in which this position has consistently been maintained include **Tanzania-China Friendship Textiles Co. Ltd case (supra), John Mome Morro v. Gratian Mbelwa and Three Others,** Civil Case No. 80 of 2011 and **Mwananchi Communications Limited and Two Others v. Joshua Kajula and Two Others,** Civil Appeal No. 126/01 of 2016 (both unreported). For instance, in **Mwananchi Communications Limited case (supra),** this Court observed: -

> *"It is obvious from the plaint that the claims were not for specific damages and thus fall under general damages. As expounded above, the position of the*

law as pronounced in various decisions is that it is the substantive claim which determines jurisdiction and not general damages as expounded hereinabove in our holding in ***Tanzania-China Friendship Textiles Co. Ltd case*** *(supra)."*

Thus, the first ground of appeal is baseless and we hereby dismiss it for want of merit because prayers four and five in the plaint refer to general damages upon which the High Court would not have taken as a benchmark to determine its pecuniary jurisdiction.

Next for our consideration is the third ground of appeal, a complaint that at the trial the appellant was denied a right to be heard. That ground had two limbs. **One** was that at some point during the proceedings the trial court entertained two applications and determined them *ex parte.* The first was seeking for an injunctive relief and the second was praying for an order condemning the appellant for contempt of court. Limb **two** of this ground is that on 19th July 2018, the appellant was denied a right to call his third witness in the main trial, which denial, according to Mr. Msengi, the appellant's right to be heard was violated. Another blame to the trial court was that it erred when it adjourned the case for judgment under Order XX rule 2 of the CPD while that provision was not applicable in the circumstances, adding that in appropriate circumstances the proper provision ought to have been XX

rule 3 of the CPD. Based on those arguments Mr. Msengi submitted that, it was incumbent upon the Court to nullify the proceedings of the High Court from 19th July 2018 onwards and set aside the judgment and decree, with orders that the matter be remitted to the trial court for continuation of hearing immediately after the orders of 10th May 2018.

In reply to this ground, Mr. Rajab, was brief. As for the first two complaints on issuance of the injunction and an order for contempt of court, he submitted that determination of such grievances would be academic with no purposes to serve. He was however at one with Mr. Msengi on other arguments. Consequently, albeit quite adamantly and with a heavy heart, he, like his adversary, prayed that in the circumstances, the Court needs to quash all proceedings and set aside the judgment and the decree, with consequential orders as prayed by Mr. Msengi.

In resolving the instant ground of appeal, because of the nature of the order we are likely to eventually make, it would be early in the day to consider and determine the complaints raised regarding the *ex parte* injunction and the contempt of court orders. In the circumstances, our focus and full attention will therefore be oriented such that the only target issue will be whether the orders that were made on 19th July 2018

were lawful in the context of the law upon which they were passed and whether the orders were respectful and promotional of the fundament right to be heard.

To determine that issue we will start with what transpired on that day and to do it conveniently, we will let the record speak for itself. The record of that day is as follows:-

> *"Counsel Isaack:*
>
> *My Lady the case is coming for defendant's hearing but our witness has an emergency for not being informed earlier, we therefore pray for adjournment.*
>
> *Sgd: Rabia H. Mohamed*
> *Judge*
> *19/7/2018.*
>
> *Counsel Omar*
> *My Lady last time this case was on 10th May 2018 which is two months now. Witness neither was summoned by the court but a party to a case (sic). Defence hearing takes a long time with excuses now and then, as you have stated in Nasra vs PBZ, your court has the duty to control the proceedings. The case has now four years, we pray for your court to close the defence and proceed to announce judgment.*
> *Sgd: Rabia H. Mohamed*
> *Judge*
> *19/7/2018.*

Counsel Isaack:

It is not true that the case was last adjournment on 10th May 2018, it was also adjourned on 20th June 2018. I was not present to the court on 20th June, 2018, I was only informed about the hearing at the court clerk desk this morning. I believe the case was coming for mention today. We pray for adjournment so that justice can be maintained.

Sgd: Rabia H. Mohamed
Judge
19/7/2018.

Order:

1. *Reason for adjournment given by the counsel for the defendant does not make sense. This case was last adjournment on 10th May 2018, he does not seem to be sure on what he is doing, as such I deny the prayer for adjournment. This case is fixed for judgement under Order XX rule 2 of the Civil Procedure Decree Cap 8.*
2. *Judgment on 23/8/2018.*

Sgd: Rabia H. Mohamed
Judge
19/7/2018."

These are the proceedings that both counsel were at one that they were irregular. They challenged the court for having relied on Order XX rule 2 of the CPD, which provides as follows:-

"2. Where on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by order XI or make such other order as it thinks fit."

A careful observation of that rule reveals that the same is relevant and may be applied where parties to the suit do not appear on a day the case is called on for hearing. In the case at hand however, parties were present before the court, only that the next defence witness was not available to adduce his or her evidence. It is our considered view that the trial court stepped into an error of law by invoking a provision of law relevant for non-appearance of parties and applying it to terminate the unfinished evidence and set down the case for judgement.

All things being equal, the appropriate provision to be invoked, in the circumstances, ought to have been Order XX rule 3 of the CPD as per the submission of Mr. Rajab. That rule provides that: -

"3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to further the progress of the suit, for which time has been

allowed, the court may, notwithstanding such fault, proceed to decide the suit forthwith."

This provision is word to word or *in pari materia* with Order XVII rule 3 of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC) which is applicable in Tanzania Mainland.

These provisions of the CPC and the CPD are not to be invoked in every circumstance where a party does not come up with his witness to court for purposes of adducing evidence. This Court had occasion to interpret Order XVII rule 3 of the CPC to indicate in which circumstances it can safely be invoked at the detriment of a party to the suit who does not call his witness. In the case of **Zabron Pangamaleza v. Joachim Kiwaraka and Another** [1987] T.L.R. 140, the Court observed: -

"3. As was indicated earlier in this judgement, the learned judge stated that the trial magistrate rightly dismissed the suit because this section allowed him to do so after the plaintiff deliberately refused to lead evidence in proof of his case. But the wording of this rule is such that it cannot be applicable to the circumstances of the present case. ***This rule is meant to deal with a situation where a party for one reason or another has asked the court on a previous occasion to give him more time or order to do or complete something in the case and fails to do it within the time given. In the***

present case the appellant had not asked for more time to do anything and failed to do so and was thus asking for more time. *He was simply asking the court to transfer his case to another magistrate and the reasons he gave were not flimsy."*

[Emphasis added]

That means we have to go back and examine the record of the trial court previous to 19th July 2018 in order to establish whether the appellant had made a particular prayer and obtained an order which he was found not to have fulfilled when the case was called on for hearing on 19th July 2018. We have thoroughly and zealously scrutinized the record of the trial court, before 19th July 2019, but what we have found on record is that on 10th April 2018 after DW2 had adduced his evidence, Mr. Msengi prayed for adjournment and hearing was adjourned to 10th May 2018. On the latter date, the matter was called on for mention before the Registrar as the trial judge was on leave. No party made any prayer and hearing was adjourned to 19th July 2018. It is on 19th July 2018 that the trial court made the order refusing adjournment of the hearing to call the third defence witness, but adjourned the same for judgement. We are satisfied therefore that, before the defence case was closed by the trial court and the matter adjourned for judgment, the appellant had not applied for any orders

that he was found to have failed to fulfil on 19th July 2018. Therefore, even if the trial court would have invoked Order XX rule 3 of the CPD, to do what it did, the act would still be premature and uncalled for, in the context of the interpretation given in the case of **Zabron Pangamaleza** (supra).

We are also in agreement with both counsel that the appellant was erroneously denied a right to call another witness or witnesses to defend his case. That was a denial of the right to be heard, which is cherished and hailed in Zanzibar where the right to be heard is not only a fundamental right to all citizens and foreigners alike, but also a right constitutionally recognized, guaranteed and protected by Article 12(6)(a) of the Constitution of Zanzibar of 1984. In the circumstances, we uphold the third ground of appeal.

Before we pen off, we wish to observe that as we have allowed the third ground of appeal, determination of other grounds of appeal, in our view, would be a sheer waste, an exercise in futility.

Consequently, this appeal succeeds and the same is allowed. The proceedings of the High Court dated 19th July 2018 are hereby nullified and quashed. Equally the judgement is quashed and the resultant decree set aside. The original record in Civil Case No. 37 of 2014 is to be

remitted to the High Court for continuation of hearing according to law commencing immediately after the orders made on 10th May 2018. We make no orders as to costs because the matter is still pending in the High Court.

DATED at **ZANZIBAR**, this 3rd day of December, 2021

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

Judgment delivered this 3rd day of December, 2021, in the presence of Mr. Issack Msengi, learned counsel for the appellant also holding brief for Mr. Rajab Abdalla Rajab, learned counsel for the Respondent is hereby certified as the true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL