

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 90 OF 2022

JOEFF GROUP TANZANIA LIMITED APPELLANT

VERSUS

SOZMY INTERNATIONAL TANZANIA LIMITED RESPONDENT

(Appeal from the Judgment and Decree of the Resident Magistrate's Court of Dar-es-Salaam at Kisutu)

(H. A. Shaidi, PRM)

Dated 16th day of June 2022

In

(Civil Case No. 138 of 2019)

JUDGMENT

Date: 21/2 & 13/03/2023

NKWABI, J.:

It is common ground that the appellant stored the respondent's two heads of trucks make Scania in his bonded warehouse at Makumbusho in the year 2016. The defendant had to pay storage fees. It would appear that the defendant did not pay all the storage fee. Thus, the appellant did not hand over to motor vehicles to the respondent. In 2019 the appellant sued the respondent in the trial Court. In its decree, the trial court ordered as follows:

1. The defendant to pay the balance of the agreed charges i.e. 4,300 USD.

2. The defendant in the counter-claim to pay the plaintiff amount of Tshs 150,000/= per vehicle/head of truck (one hundred and fifty thousand shillings) per day. The payment should commence in March 2017 to this date of judgment.
3. Immediate release of those two heads of truck while at a good condition as they were when driven at bonded warehouse and kept for care or under care of the defendant.
4. Each to carry its costs.

Both the appellant and the respondent were dissatisfied with the decree of the trial court. The appellant filed this appeal while the respondent filed a memorandum of cross-objection.

The appellant has the following grounds of appeal namely:

1. That the honourable Trial Magistrate erred in law and fact for completely neglecting to determine the issues in dispute and they were never reflected in the judgment as required by law and erroneously reached wrong findings and conclusions in respect of the appellant's claim.
2. That the honourable trial magistrate erred in law and fact for failing to properly record, analyze and accord weight to the evidence of the

appellant and erroneously introduced new facts and events and misdirected himself in making erroneous conclusions and findings in respect of the claims of the appellant and wrongly ordered the appellant to be paid USD 4,300 instead of USD 39,200.

3. That the honourable trial magistrate erred in law and fact for ignoring the weight of the appellant's evidence in respect of the counter claim and erroneously determined the counter claim through assumptions and inferences on the basis of the respondent's evidence and unjustifiably ordered payment of T.shs 150,000/= by the appellant per day from 1st March 2017 to the date of judgment.
4. That the honourable trial magistrate erred in law and fact for wrongly introducing new facts and evidences while they were not testimonies of either party to the case.

It is for the above grounds the appellant is praying for the following reliefs:

1. The appeal be allowed.
2. That the judgment, decree and orders made by the Resident Magistrates' Court of Dar-es-Salaam at Kisutu, in Civil Case No. 138 of 2019 be quashed.

3. Any other relief be granted by this honourable Court as it deems fit and just to grant.

However, the memorandum of cross-objection filed under the provisions of Order XXXIX Rule 22(1) of the Civil Procedure Code Cap. 33 R.E. 2022 had the following grounds:

- i. That the honourable trial court erred in fact and law by its failure to award payment of T.shs 150,000/= (one hundred and fifty thousand shillings) per vehicle/head of truck, per day being loss of business earnings for 1st March, 2017, until the date the trucks will be released and handed over to the respondent.
- ii. That the honourable trial court also grossly erred in fact and in law in declining to award interest on the claimed amount, which was pleaded and proved, without assigning any grounds and/or reasons for its abduction to grant the same.
- iii. That the honourable trial Court further erred in fact and in law by declining to award commensurate loss of business as pleaded in the counter-claim, despite express admission by the appellant that her bonded warehouse had in its storage, the respondent's to heads of trucks.

The respondent prayed this Court to allow the cross-objection.

The appeal was disposed of by way of written submissions. For the appellant (who sometimes I would refer her by the name "Somzy" for convenience), Mr. Ahmed Abdallah Mwita, learned counsel, drew and file submissions in support of the appeal and against the cross-objection. The respondent (who sometimes I would refer her by the name "Joeff" for convenience) had the services of Mr. Edward Lisso, learned advocate who drew and filed the submissions against the appeal and submissions on the memorandum of cross-objection.

In respect of the 1st ground of appeal which is that the honourable Trial Magistrate erred in law and fact for completely neglecting to determine the issues in dispute and they were never reflected in the judgment as required by law and erroneously reached wrong findings and conclusions in respect of the appellant's claim.

It was submitted by Mr. Mwita that the trial magistrate neglected to determine the issues in dispute and were left in the judgment in the light of the evidence hence miscarriage of justice. He made reference to various

cases including **Blay v Polland and Morris**, [1930] 1 KB 311 where it was observed that:

"We are of the considered view that generally a judge is duty bound to decide a case on the issues on record and that if there are other questions to be considered they should be placed on record and the parties be given opportunity to address the court on those questions."

In reply submission the respondent asserted that the trial court properly considered the evidence presented and found in favour of the respondent. It correctly reached at its reasoned decision based on parties' testimonies and exhibit P1 and P2 and analyzed the issues. It is said, the cited case of **Said Mohamed Said** (supra) is irrelevant because no issue was raised without affording parties to a hearing, but determined issues which were framed by the court. Thus, no miscarriage of justice was occasioned.

The first ground of complaint, to me, lacks any merit because the counsel for the appellant did not mention which issue actually was not considered. The main issue was the first one, followed by two issues which depended on the 1st one. The trial magistrate analyzed the issue and come to his

conclusion, whether he reached at a wrongful conclusion, that is a different matter. I would also add that the complaint that the trial court completely neglecting to determine the issues in dispute is, in my view, baseless and uncalled for. This is because, the main issue was "*whether the defendant refusal to pay storage charges amount to breach of contract*". The following issues thereafter depended on the 1st issue which are:

If the 1st issue is in the affirmative whether the plaintiff suffered any loss and the 3^d issues was which reliefs are parties entitled to. In essence, on the first issue, the trial court was supposed to deal with the evidence to see if it would be answered in the affirmative. One of the matters to be proved was whether there was refusal to pay. In the presence of exhibit P1 it is difficult to decided that the respondent refused to pay, while there was a demand by the respondent for reconciliation therein. The faults on the part of the trial magistrate were non-direction and misdirection on the evidence on record which caused the wrongful decision which I will show herein below and redress it. Therefore, I accept Mr. Lisso's argument that this ground of appeal is unmerited and the case of **Said Mohamed Said** is irrelevant in the circumstances of this case where no new issue was raised suo motu.

On the second ground of appeal that the honourable trial magistrate erred in law and fact for failing to properly record, analyze and accord weight to the evidence of the appellant and erroneously introduced new facts and events and misdirected himself in making erroneous conclusions and findings in respect of the claims of the appellant and wrongly ordered the appellant to be paid USD 4,300 instead of USD 39,200.

It was argued that on the 1st and 2nd page of the judgment the trial magistrate completely ignored the evidence and testimonies of the appellant and ended up only considering the plaintiff's 2nd last relief of USD 4,300 ignoring the other claims by being not being determined resulted from failing to properly record, analyze and record weight to the evidence of the appellant and erroneously introduced new facts and events and the claims of the respondent in the counter claim were never proved. It was added that he who alleges must prove as per section 110 and 111 of the Evidence Act. It was further contended that the trial magistrate ignored the evidence of the appellant in light of the claim for specific damages to the tune of USD 10,000 and general damages to the tune of 30,000 and there was no proof of the relief that the appellant pays the respondent T.shs 150,000/= per day.

He referred to **Rufus Kangethe Kamau v. Grace Njeri Kamau**, Civil Appeal No. 25 of 2020 HC where it was stated:

"... by raising and determining the suit on an issue which was neither pleaded nor evidence adduced on thereby introduced a new cause of action against the appellant. He clearly went astray and his judgment cannot be left to stand on that account."

In reply submission it was maintained for the respondent that the trial court correctly reached at its decision based on the testimonies of PW1 and PW2, and rightly concluded that the plaintiff did not prove its case in terms of the dictates of the law. As to the order of payment of the appellant to the respondent T.shs 150,000/= in the amended counter-claim per day was proved by the testimony of DW1 and exhibit D1, D2 and D3. He said the case of **Rufus Kamau** (supra) is distinguishable.

On this 2nd ground of appeal, I should hastily make it clear that court record is presumed to represent accurately what actually transpired in court and cannot be lightly impeached see **Halfan Sudi v. Abeiza Chichili** [1998] T.L.R. 527 and **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018 (CAT) (unreported).

On the complaint that the trial magistrate erroneously introduced new facts and events and misdirected himself in making erroneous conclusions and findings in respect of the claims of the appellant and wrongly ordered the appellant to be paid USD 4,300 instead of USD 39,200. I agree that the trial magistrate misdirected himself on the evidence when he failed to find that the breach of the contract was caused by each party. Each party contributed to the injury of the other party. If one looks at the evidence one would see that the appellant did not prove that she was demanding to be paid. The record is silent as to any written demand to pay only to feature in the year 2019 through the exhibit P1 where the respondent admitted to have not paid part of the amount claimed, but even where the respondent demanded for reconciliation, there is no proof that the appellant replied and directed how the money would be paid, be it by cheque, cash or deposit into bank account.

On the part of the respondent Joeff, did not also indicate or prove her serious intention to pay by any documentary evidence such as demanding for how the money she was admitting to be owed to the appellant should be paid. Further he has not proved that amount he claimed should be deducted, proof by evidence such as pay-in-slips, copies of cheques and receipts if any. Either

party, in my view ought to have even gone as far as instituting a suit at the earliest opportunity.

However, I agree that the trial court acted on no any evidence when it ordered the appellant be paid USD 4,300 instead of USD 14,700 which was admitted in exhibit P1 without proof of any deduction by way of payment by the respondent. That establishes the misdirection complained about by the appellant. Nevertheless, since the appellant contributed to the delay of being paid, I hold that she is not entitled to be paid general damages she is complaining against being denied by the trial court.

I turn next to consider the 3rd ground of appeal which is the honourable trial magistrate erred in law and fact for ignoring the weight of the appellant's evidence in respect of the counter claim and erroneously determined the counter claim through assumptions and inferences on the basis of the respondent's evidence and unjustifiably ordered payment of T.shs 150,000/= by the appellant per day from 1st March 2017 to the date of judgment. The counsel for the appellant reiterated the submission in the 2nd ground of appeal.

In reply submission it was contended that the trial court handed down a judgment that was justified.

I have considered the 3rd ground of appeal, I think it is merited in that since I have found that both the parties to this suit have to share the blame, in the circumstances, the appellant ought not to have been ordered to pay T.shs 150,000/= per day per head of truck from 1st March 2017 to the date of judgment.

Turning to consider and determine the 4th ground of appeal which is that the honourable trial magistrate erred in law and fact for wrongly introducing new facts and evidences while they were not testimonies of either party to the case, Mr. Mwita was of the view that the trial magistrate incorporated new facts on page 3 last paragraph and top first line on page 4 of the judgment, that neither the appellant nor the respondent testified to that effect. And on the last page in the last paragraph occasioned injustice which are unjustified findings and orders made by the trial magistrate. It was thus prayed that the appeal be allowed. The judgment, decree and orders made by the trial court be quashed.

For the respondent it was argued that the judgment of the trial court was based on what was on record in the evidence. It was prayed that court to dismiss the ground of appeal and ultimately dismiss the appeal with costs.

I have already decided that the trial court misdirected itself on the evidence and I think I have addressed the situation adequately when dealing with the complaint as above, I need not add anything thereto.

Parties too argued the memorandum of cross-objection made under Order XXXIX Rule 22(1) of the Civil Procedure Code, by Mr. Edward M. Lisso for Joeff Group Tanzania Limited.

On the first ground which is that the honourable trial court erred in fact and law by its failure to award payment of T.shs 150,000/= (one hundred and fifty thousand shillings) per vehicle/head of truck, per day being loss of business earnings for 1st March, 2017, until the date the trucks will be released and handed over to the respondent, it was contended that the two heads of Scania trucks belonging to Joeff were kept at Somzy's bonded warehouse as relevant duty was not paid by Joeff to Tanzania Revenue Authority. The Scania trucks were obliged to be released from the bonded

warehouse to Joeff hence the claim for loss of business earnings as from March, 2017 until when they were released to the appellant (Joeff). The duty was paid by Joeff on 20/02/2017 evidenced by Exhibit D1 but immediate release was denied to date. It was further argued that the delay in releasing caused loss of T.shs 500,000/= per day which was proved by Exhibit D3. It was added that it was erroneous for the trial court to award T.shs 150,000/= per vehicle. He cited **Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre** [1991] TLR 165:

" a party is awarded damages which he pleaded and proved."

The learned counsel for Joeff prayed this Court to allow the ground of appeal.

In reply it was stated that the cross- objection is devoid of merit because the evidence shows that Joeff defaulted warehouse duty, thus, no loss of business earnings on part of her, she contributed to the loss the alleged earnings. Exhibit D.1 does not suggest Joeff had paid all due warehouse duty. She failed to prove the alleged earnings. Neither the claim of T.shs 500,000 nor 150,000/= was proved. The ground be dismissed.

While pressing his stance in rejoinder Mr. Lisso argued that Joeff pleaded payment of T.shs 500,000/= per day per each head of trucks being loss of business **Reni International Co. Ltd v. Geita Gold Mining Ltd**, Civil Appeal No. 453 of 2019 CAT:

"... though pleaded as specific damages, the claim as to loss of expectation earnings was nothing but a claim for general damages which was within the discretion of the trial court. As the law requires therefore, we would be reluctant to disturb the exercise of civil discretion by the trial court ... Having found the claim falls in under general damages, the extent of award was entirely in the discretion of the court."

He prayed the cross-objection be allowed on the 1st ground.

I have already stated both parties to this case contributed to the awful situation between them under consideration by this Court, Joeff did not do all ought to have done by him in order to pay the storage fee until she wrote exhibit P1 in the year 2019. Prior to that there is nothing to show her effort to clear the storage fee. Thus, I am of the view that Joeff is not entitled to the relief of T.shs 500,000/= per head of truck for month or lesser amount. I quash the order of the trial court for Somzy to pay Joeff T.shs 150,000/=

per head of truck per month. Thus, the 1st ground in the memorandum of cross-objection crumbles to the ground.

On the second ground it was contented that the honourable trial court also grossly erred in fact and in law in declining to award interest on the claimed amount, which was pleaded and proved, without assigning any grounds and/or reasons for its abduction to grant the same.

It is said that it was wrong for the trial court to have decided in the following terms:

"The court opt to remain silent on the interest and costs of this suit."

The cited case for that proposition of the law is the case of **Robert Scheltens v. Sudesh Kumari Varma** (as an administrator of the estate of **Baldev Norataram Varma** the deceased **and 2 Others**, Civil Appeal No. 203 of 2019, CAT (unreported) where it was held:

"Generally, interests that may be adjudged and decreed by courts one of three categories which can be conveniently described in three phrases in the dispute's life span.

The first phase of interest corresponds to the period between when the cause of action arises to the date of filing the suit.

The second phase spans between the date of filing the suit to the date of delivery of judgment. Interest on the category is also called interest at commercial rate or interest at bank rate.

The third category of interest corresponds to the period between the date of judgment to the date of final settlement of the judgment debt. This is also referred to as interest at court rate.

... interest, particularly interests in the 2nd and 3rd phases (after filing the suit) above are covered under s. 29 and Order XX rule 21 both of the Civil Procedure Code (Cap. 33 R.E. 2019)."

In reply submission Mr. Mwita argued that the court assessed the parties' evidence and determined the parties' interests Court's pronouncement of

interest is within its discretion. It is added the award of costs is in the discretion of the court. He cited **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT.

Reinforcing the submission in chief in rejoinder it was stated that the trial court ought to have awarded interest as pleaded and proved in the testimony of DW1. The case of **Mollel Electrical Contractors Ltd v. Mantrac Tanzania Ltd**, Civil Appeal No. 394 of 2019:

"Indeed, in terms of section 29 of the Civil Procedure Code Cap. 33 R.E. 2019, the trial court had power to order interest not just on the judgment debt but also on the pre-existing debt retrospectively up to the date of the judgment."

He further elaborated that the complaint against non-award of interest. He prayed the 2nd ground of cross-objection be allowed as it is unopposed.

However, this Court is of the view that since I have already decided that Joeff was not entitled to the relief of T.shs 150,000/= that the trial court ordered, then she was not entitled to be paid interest. Thus, this ground of appeal dies a natural death. It is dismissed.

On the 3rd ground of objection that the honourable trial Court further erred in fact and in law by declining to award commensurate loss of business as pleaded in the counter-claim, despite express admission by the appellant that her bonded ware house had in its storage, the respondent's to heads of trucks.

It was argued that the continued detention of the two trucks caused loss to Joeff as per amended counter-claim and proved by exhibit D2 and D3. Joeff therefore was entitled to redress. It is prayed the cross-objection be allowed with costs.

In reply, Mr. Mwita maintained that this ground of appeal relates to the 1st ground of appeal, he reiterated the submission on the 1st ground of appeal.


Pressing hard for his position in rejoinder submission, Mr. Lisso contended that Somzy admitted to have in her bonded warehouse the two heads of trucks which were supposed to be released after payment of the demanded duty by Tanzania Revenue Authority. Failure of which accessioned loss of use thereof. The fault of the trial court it is contended was its failure to award the pleaded and proved loss (exhibit D2 and exhibit D3. It is thus prayed that the cross-objection be allowed on this ground as well with costs.

I have already decided that both parties to this suit contributed to the awkward situation they are in. That blame for each party makes them to make good the party of their blame. Therefore, Joeff cannot be heard to complain for commensurate loss of business. The 3rd ground in the memorandum of cross-objection is unmerited and dismissed.

To conclude, the appeal is partly allowed but the cross-objection fails as hereinabove explained. I order that the respondent to the appeal to pay the appellant USD 14,700/=, immediately. Upon being paid the above-mentioned amount, the appellant to immediately hand over the two heads of trucks (Scania) to the respondent subject to natural wear and tear of being kept. Because each party is responsible for the state of affairs, I order each party to bear their costs.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 13th day of March, 2023.



J. F. NKWABI
JUDGE