IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO:279 OF 2018

(Arising from the decision of the Resident Magistrate Court for Dar es Salaam at Kisutu in Civil Case No. 295 of 2015)

MANTRAC (T) LIMITED .....APPELLANT

VERSUS

SUMMER COMMUNICATIONS COMPANY LIMITED.....RESPONDENT

JUDGMENT

MASABO, J.L.:-

At the Resident's Magistrates Court for Dar es Salaam at Kisutu, the Respondent herein sued the Appellant demanding payment of Tshs 71,036,000/ as specific damages for breach of contract and general damages of Tshs 100,000,000/=. At the conclusion of the trial the court entered in favour of the Respondent and ordered the Appellant to pay are the payment claimed by the Respondent. Disgruntled the appellant appeals before this court against the whole judgment on the following grounds;

1. That, the trial magistrate erred in in law and fact for failure to consider that it lacked both pecuniary and territorial jurisdiction to entertain the suit;
2. That the trial magistrate erred in law and fact by changing the cause of action that was pleaded in the plaint;

3. That the trial magistrate erred in law and fact by failing to evaluate evidence on record that the respondent failed to pay for repair costs and, therefore, the alleged delay in repairing the machine was caused by the respondent's own cause;
4. That the trial magistrate erred in law and fact in deciding on extraneous facts which were not pleaded and proved by the Respondent and awarded damages contrary to well established principles on damages
5. That the trial magistrate erred in law and fact by admitting as evidence documents which were inadmissible as rightly objected by the appellant that the tendered document was different from the copy attached to the plaint
6. That the trial magistrate erred in law and fact by negatively interpreted the inspection fee for receipt to cover maintenance cost despite the admission of the parties and testimonies of the parties that the receipt was issued from inspection fees the task which was dully executed by the Appellant
7. That the trial magistrate erred in law and fact by awarding damages illegally which were not as a result of the cause of action and contrary to the principles of damages.

At the hearing, Mr. Roman Masumbuko, learned counsel represented the appellant and Mr. Dickson Mbilu, Advocate appeared for the Respondent.

In his address to the court Mr. Masumbuko consolidated the 2nd, 3rd, and 6th grounds of appeal. He also consolidated the 4th, 7th ground and the 5th ground.

Submitting on the 1st ground Mr. Masumbuko argued that the trial court lacked pecuniary and territorial jurisdiction and cited section 14 of the Civil Procedure Code which requires that the suit be instituted where the subject matter arose. He reasoned that, the cause of action arose in Njombe thus the suit was to be instituted in Njombe and not at Kisutu. Regards the pecuniary jurisdiction of the trial court he cited Section 18 (i)(ii) of the Magistrates Courts Act, Cap 11 RE 2002 and argued that at the time this matter was filed in court the minimum pecuniary jurisdiction of the District Courts and Courts of Resident Magistrates was 5 million. Suits with the lower pecuniary value were to be instituted in Primary Court. Hence, the value of the contract on which specific damages is confined was Tshs 3,950,000/=. The matter ought to have been instituted in the primary Court. He argued that it was wrong for the court to treat 71,360,000/=as specific damages as the same constitutes general damages which as a rule cannot be relied upon in determining the pecuniary jurisdiction of the court. To batress this point he cited the case of **China Friendship Textile V our lady of Usambara sisters** Civil Appeal No 84 of 2002 (CAT) and **Mikoani traders Ltd V Engineering and Distributors Ltd Crim.** Case No 2006.

On the consolidated 2nd, 3rd, 6th grounds Mr. Masumbuko submitted that the trial magistrate failed to analyze evidence. He argued that the claims are for

maintenance and hiring of the security guards but on page 17 of the proceedings PW1 testified that he paid the money for checking the machine but no maintenance. The trial magistrate held that money paid by the plaintiff was not supported by any information of the details of payment contrary to what PW1 said. Mr. Masumbuko cited the case of **Makori Wassaga v Joshua Mwaikambo** [1987] TLR 88 where it was held that the parties are bound by their pleadings and the court's assessment should be confined to that. On the consolidated 4th and 7th ground Mr. Masumbuko while relying on Exh. P2. Only 3,950,000/- challenged the award of Tshs 71,000,0000 million as specific damages, He argued that it was wrong for the court to award interest as interest is also awarded in special damages as opposed to general damages. He further submitted that, the grant of Tsh 30,000,000 general damages did not comply with the principles on award of general as it was awarded without assigning reasons contrary to the requirement of the law as stated in **Anthony Ngoo and Another V Kitinda Kimaro** Civil Appeal No 25 of 25 of 2014 (CAT). On the 5th ground Mr. Masumbuko submitted that tendering of Exh. P4 did not comply with the rules as to secondary evidence especially Section 67 and 68 of the Evidence Act. He argued that the court admitted D1 for identification but the same was relied upon on the judgment without any assigning any reason for the same. He supported his submission on this point with the Case of **Ismail Rashid v Mariam Msati** Civil Application 75 of 2015 (CAT)

Mr. Mbilu for the respondent refuted the submission that Tshs 71,036,000Tshs claimed was general damages. He argued that the same

was in respect of specific damages hence the court had the necessary pecuniary jurisdiction to try the matter as the pecuniary value exceeded the pecuniary jurisdiction of primary court. On the territorial jurisdiction Mr. Mbilu submitted that it was proper for the case to be instituted in Dar es salaam as the Mantrac headquarters is in Dar es salaam. Further, he reasoned that **Section 19 of the Civil Procedure Code** Cap 33 provides that objection as to the place of suing should not be raised on appeal unless it was raised at the trial court. Submitting on the 5th ground Mr. Mbilu argued that there was no problem in tendering Exh. P4 as the objection was raised and the same was overruled. He added further that, the trial court committed no era in awarding damages as all facts were pleaded and proved in court. Mr. Mbilu vehemently resisted the submission that the trial magistrate did not change the cause of action the respondent claimed payment of 3950,000/- as payment for maintenance not inspection.

On the first issue of jurisdiction, the court is called to determine whether or not the trial court was seized with the requisite territorial and pecuniary jurisdiction to try this matter. **Section** 18 of the Civil Procedure Code, [Cap 33 RE 2002] which deals with matters of territorial jurisdiction states that, every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant is domiciled; carries on business or personally works for gain, or where the cause of action arose.

A length interpretation of this provision was given by Manento JK (as he then was) in **Masha v Attorney General** (Civil Case No.136 of 2001) [2005]

TZHC 46 where having cited the decision of the Court of Appeal in **James Funke Gwagilo v. The Attorney General Civil Revision,** Civil Revision No.50/1998 stated that:

> "The Court of Appeal in dealing with this issue, it said that Section 18(c) of the Civil Procedure Code, 1966 is the one applicable in choosing the place/court where a suit like this one would be instituted. For ease of reference. I hereby reproduce section 18(c) of the civil procedure code, 1966.
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> > "S.18: Subject to the limitations aforesaid, every suit shall be instituted in a count within the local limits of whose jurisdictio: (c) the cause of action wholly or in part arises."
>
> Under the High Court Registry Rules, found in the Judicature and Application of Laws Act, cap 358, rule 5, there are District Registries in addition to the Registry at Dar es Salaam. Thus, there is a District Registry in Mwanza Region, where Sengerema is situated. Rule 7(1) of the High Court Registries states categorically the place of suing on original jurisdiction, that the proceedings may be instituted either in the Registry at Dar es Salaam or in the District Registry (if any) for the area in which the cause of action arose or where the Defendant resides. Therefore again, though the Defendant's head offices are situated at Dar es Salaam, yet the cause of action did not arise in the territorial High Court Registry of Dar es Salaam. It arose in the territorial jurisdiction of the District Registry of Mwanza."

The Plaintiff in the above case had instituted a civil suit against the Attorney General for special and general damages occasioned by tortuous acts committed against him police officers in Sengerema district in Mwanza

Region which is within the Mwanza High Court Registry. The plaintiff case was that since the Attorney General's head office is in Dar es Salaam this registry had jurisdiction to hear the case.

In the instant case, the appellant's case is that the cause of action arose in Njombe region and the contract forming basis of the suit (as evidenced by the receipt Exh P2) was executed at Mbeya, thus, impliedly, the suit ought to have been instituted in Njombe or Mbeya and not in Dar es Salaam. On the other hand, just as the case in Mr. Mbilu's argument in support of the Respondents case is that the Appellant has its head offices in Dar es Salaam hence the RMS Court for Dar es Salaam has jurisdiction. When these facts are paired with the facts and the finding of the case above, it is crystal clear that the matter was not within the territorial jurisdiction of the Resident Magistrate Court for Dar es Salaam.

I am however alive to the provision of section of section 19 of the Civil Procedure Code (Supra) which, as cited by the Respondent which provides that:

> "No objection as to the place of suing shall be allowed by any appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice" [emphasis added].

I have carefully perused the record of the instant case but did not find any record that the appellant raised this issue in the trial court. There is equally

no record that the same has accessioned failure of justice. Thus, under the circumstances, the proceedings of the trial court cannot be annulled based on this ground. Accordingly, this limb of the first ground of appeal collapses.

Regarding the second limb of the first ground of appeal as regards pecuniary jurisdiction, the position of the law, as rightly stated in the cases cited by the Appellant that, is that it the substantive claim and not general damages which determine the pecuniary jurisdiction of the court (**M/S Tanzania China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] TLR70; and **Mikoani traders Ltd V Engineering and Distributors Ltd** (Supra).

However, before I jump to the conclusion suggested by the Appellant, it is important to state albeit what constitutes specific damages. Black's Law Dictionary defines special damages as damages "... which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proxi-iunic consequence in the particular case, that is by reason of special circumstances or condition."

In our jurisdiction, special damages have been defined to consist of out of pocket expenses and loss of earnings incurred by the plaintiff and is generally capable of substantially exact calculation (**Frank Madege vs the A.G.** Civil Case No. 187/93 – HC at Dar (Bubeshi, J). When used in a suit it refers to damages that need to be specifically pleaded and proved/quantified contrary to general damages which need not to be proved (**Cooper Motors**

Corporation (T) Ltd Vs Arusha International Conference Centre (1991) TLR 165; **Jima Misanya And Another Vs Lista Nduruma** (1983) TLR 245; **Zuberi Augustino vs Anicet Mugabe** [1992] TLR 137 CAT.] Based on these authorities, I find the argument by the plaintiff that specific damages exclusively constitute the value of the contract to be a serious misdirection. The substantive claim in this case as stated in the paragraph 3 of the plaint was a total of Tshs 71, 036,000/- of the maintenance fee paid to the defendant and the specific damages suffered by the Respondent. Thus, the second limb is without merit.

In the consolidated 2nd, 3rd and 6th grounds of appeal, the appellant's case is that the trial court misdirected itself on the cause of action and entirely failed to analyse the evidence tendered by the parties and especially the nature of the payment made by the plaintiff. My task as first appeal court is to re-examine the evidence so as to ascertain whether the cause of action was twisted and whether the evidence rendered in court ably proved the plaintiff's case.

It is the requirement of law that a plaint must set out a cause of action (See Order VII Rule 1(e) of the Civil Procedure Code, Cap. 33 R.E 2002; **Motohov V Auto Garage** (1971) HCD 81). The phrase, "cause of action" although not defined under the Civil Procedure Code, it has been defined to simply mean essential facts which a plaintiff in a suit has to plead and later prove by evidence so as to succeed in his claim (**John M. Byombalirwa v. Agency Maritime Internationale (T) Ltd** [1983] TLR 1). The question as

to whether or not the plaintiff discloses a cause of action, is determined by looking at the content of the plaint and its accompanying documents/attachments if any. In the instant case, the plaint ably disclosed the cause of action in paragraphs 7 and 8 of the plaints and can be surprised as: breach of the contract of maintenance of the plaintiff's compactor machine. On this basis, in page 3 of the plaint the Appellant claimed for the following remedy against the Appellant:

> "..payment of specific damage of Tshs 71, 036,000/- (say Tanzania Shillings Seventy one million and Thirty Six Thousands only) being maintenance charges of the compactor machine; charges of hiring compactor machine and charges of hiring security guard to guard the compactor machine at the site" (emphasis added)

Let me pose here and revisit the two fundamental principles of evidence law which guide the conduct of trials and findings thereto, to with the burden of proof and standard of proof. It is an elementary principle of law that the person who asserts the existence of certain facts had a duty to prove the existence of such facts (see section 110 and 111 of the Law of Evidence Act [Cap. 6 R.E. 2002 and **Godfrey Sayi v Anna Siame (as Legal Representative of the Late Mary Mndolwa**) Civil Appeal No. 114 of 2014). The trial appealing being of civil nature, the standards of proof is on the balance of probabilities which simply means that the court will accept evidence which is more credible and probable (see Al-**Karim Shamshudin Habib v Equity Bank Tanzania Limited & Viovena Company Limited** Commercial Case No. 60 Of 2016); **Wolfgango Dourado v. Toto Da Costa,** Civil Appeal No. 102 of 2002 CAT (unreported), and **Antony M.**

Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014, CAT (unreported).

Thus, in this case, I ask myself whether or not the Respondent discharged its legal burden to the standard required by the law. This lands me to another principle well cited by Mr. Masumbuko with regard to pleadings. It is a settled principle of law that the parties are bound by their pleadings and the court's assessment should be confined to that (**Makori Wassaga v Joshua Mwaikambo** [1987] TLR 88).Therefore, the Respondent was bound by its pleadings under paragraphs 7, and 8 of the plaint, that, after he had paid the Respondent the maintenance/repair charges the Appellant failed repair the Head Cylinder and kept it under its custody. For his claim to succeed, the Respondent had to prove two things (i) existence of a contract of maintenance between it and the Defendant company and (ii) that the defendant was in breach. The existence of a contract was to be proved by rendering the contract in court. As the existence of the contract was entirely based on the maintenance charges allegedly paid by the Respondent, it was important that the payment receipt be tendered in court.

The Appellant's case is that the receipt rendered in court was for inspection and not maintenance. He has referred the court to page 5 and of the judgment in which the trial court held that the payment of Tsh 3,950,000/- was backed with no explanation hence it was not clear as to what the payment was for. Upon perusal of the case file, I have found merit in Mr. Masumbuko's submission. When considered in its totality the records reveal

quite clearly the purpose of the payment. Although the receipt (Exhibit P2) does not indicate the purpose of the payment, in their testimony PW1 and DW1 converged on the fact the payment was for inspection of the compact machine. In page 16 of the proceedings, PW1 while tendering exhibit P2 PW1 told the court that he paid the sum so that the technicians 'can go to check' his machine which was at Makette. DW1 corroborates this in his testimony contained in page 38 of the proceedings. It was, therefore, certainly wrong for the trial court to exclusively base its finding on what was written on the receipt while totally ignoring the oral testimony by the parties which consistently proved that the receipt rendered in court (Exhbit P2) was for inspection of the compact not maintenance of the same. These two terms are semantically different.

Based on the principles above, I am of the considered view that the trial court erred in analysing the evidence rendered before it viz-a viz the cause of action stated in the plaint. Had the trial court properly analysed the evidence before it, it would have established the inconsistence between the evidence rendered in court and the cause of action stated in the plaint. Under the premise, I am of the settled view, by failing to produce the receipt in respect of the maintenance fee allegedly paid to the Appellant which was the basis of the contractual relationship between the Respondent and the appellant, the Respondent failed entirely to discharge its duty to prove the basis of his claim.

The next issue for determination concerns the correctness of damages awarded and interest thereto. Considering that I have found that the Respondent failed to prove its case, I will not proceed to examine this issue as it had been rendered nugatory by the finding above.

Accordingly, I allow the appeal, quash and set aside the decision of the trial court. Costs shall follow event.

DATED at DAR ES SALAAM this 21st day of February 2020.

J.L. MASABO

JUDGE

Judgment delivered this 21st day of February 2020 in the presence of Mr. Roman Masumbuko, counsel for the Appellant and in the absence of the Respondent

J.L. MASABO

JUDGE