IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 14 OF 2021

(Originated from Civil Case No. 04 of 2014 of the Resident Magistrate Court of Mwanza at Mwanza)

ACCESS BANK (T) LIMITED ---------- APPELANT

VERSUS

SADIC JABIR MUNAWARA---------- RESPONDENT

JUDGMENT

Last Order: 31.08.2021

Ruling Date: 17.09.2021

M. MNYUKWA, J.

The appellant appealed against the Judgment of the Resident Magistrate Court of Mwanza in Misc. Civil Case No. 04 of 2014, which was decided in favor of the respondent.

The background to this appeal is briefly that, on 13th August 2013 the respondent obtained a loan worth Tshs. 15,000,000/= to be paid back on monthly basis up to 12th August 2014. According to the loan facility, the loan period was 12 months which attracts an interest of

4.5% per annum and secured by respondent assets to include, motor vehicle makes IST with reg. No. T129 BZM, assets at the respondent garage located at Buzuruga Nyakato area, and the household assets. The respondent defaulted payment of laon amount as agreed and that prompted the appellant who employed the service of the 2nd Appellant and alleged to attach the properties pleaded as security to the loan secured. Respondent claimed that justice was not done by the appellant according to the loan agreement as he sold the securities which were not pleaded in the loan agreement. As a result, he filed a suit in the Resident Magistrate Court of Mwanza at Mwanza. In the impugned decision four issues were determined by the court in which the decision was given in favour of the respondent. The said issues were;

1. *Whether the plaintiff was in breach of the loan contract between him and the defendant dated 13/08/2013;*
2. *If the above issue is answered in affirmative, whether the defendant lawfully confiscated the plaintiff's properties;*
3. *Whether the plaintiff suffered damages as a result of such confiscation; and*
4. *What reliefs are the parties entitled.*

Dissatisfied with the decision which was given in favour of the respondent, the appellant preferred this appeal by advancing four grounds of appeal as hereunder;

I. *That the learned trial magistrate erred in law by entertaining the suit without been clothed with jurisdiction.*

II. *That the learned magistrate erred in law and fact by not considering the weight of evidence adduced by the appellant/ and failure to make a critical analysis of evidence adduced by the appellant.*

III. *That the learned magistrate erred in law and fact by relying on the testimony of PW2 who did not witness the alleged confiscation.*

IV. *That the award of Tshs. 48,998,500/= as specific damages and Tshs. 5,000,000/= as general damages to the respondent is unreliable and unjustified contrary to the principle governing such award.*

Wherefore, the appellant prays that this Court to allow his appeal with costs and the judgement and decree of the Resident Magistrate's Court be quashed and set aside and any other relief(s) this Honourable Court may deem fit and just to grant.

By leave of the Court, the appeal was argued by way of written submissions, I thank the counsel of both parties for compliance with the order of the Court.

Submitting on the 1st ground of appeal, that the learned trial magistrate erred in law by entertaining the suit without been clothed with jurisdiction, the advocate of the appellant averred that, the suit that was instituted falls within the ambit of the commercial suit. He avers that the dispute emanates from the contractual relationship encompasses a loan facility granted to the respondent at a tune of Tshs. 15,000,000/=. Supporting his argument, he cited section 2 of the Magistrate Court's Act Cap. 11 [R.E 2019] and the case of **Mic. Tanzania Limited vs Hamis Mwinjuma & Another,** Civil Appeal No. 112 of 2019 quoting with authority the case of **Zanzibar Insurance Corporation Limited vs Adolf Temba** Commercial Appeal No. 01 of 2006 which defines a commercial case. Having claimed that the suit was a commercial nature, he went on pressing that the suit does not qualify a pecuniary jurisdiction as provided for under section 40 (3)(a)(b) of the Magistrate Court's Act, Cap 11 [R.E 2019]. Referring to para 7 of the plaint, he insisted that while the law gives the court pecuniary jurisdiction of 70,000,000/= for movable properties, the suit was of a

claim of 97,600,000/= which the trial court lacks jurisdiction. He prays this court to uphold the ground of appeal.

Submitting on the 2nd and 3rd ground of appeal, he claimed that the trial magistrate erred in law and fact for failure to consider the weight of evidence and analysis of the evidence. He averred that the appellant did not make any confiscation to the respondent shop as per the evidence of DW1 one Florian Asenga and the trial magistrate relied on hearsay from the evidence of PW1, PW2, PW3 and PW4 whose evidence-based on information obtained from different people c/s 62 (1) (a) of the Law of Evidence Act, Cap. 6 [R.E 2019]. He insisted that the evidence of PW4 and PW5 who claimed to be on the scene failed to know the numbers and value of items confiscated and failed to identify persons who confiscated the respondent's shop and do not know if they were the officers or agents of the appellant. He, therefore, claims that the trial court failed to make analysis of the evidence on record and awarded the respondent Tshs. 48,998,500/= as specific damages.

On the 4th ground, he claimed that the amount of Tshs. 48,998,500/= as specific damages and Tshs. 5,000,000/= as general damages awarded to the respondent was unreasonable and contrary to the principle of law. He insisted that claims under specific and special damages must be specifically pleaded and proved. Maintaining his

position, he cited the cases of **Anthony Ngoo & Another vs Kitinda Kimaro,** Civil Appeal No. 25 of 2014 CAT (unreported), pg 16 and 17, and the case of **Zuberi Agustino vs Anicent Mugabe** [1992] TLR137 at pg 39 and **Tanzania- China Friendship** (Supra).

He insisted that the specific and special damages were neither pleaded nor strictly proved by the respondent. Citing paragraph 7 of the plaint, the he insisted that, the respondent pleaded the claim of Tshs. 97,600.000/= as special damages but his evidence failed to prove the entitlement. Referring to exhibit P1 at page 7, he avers that the amount of pleaded securities stood at a total of Tshs 15,400,000/= as market value and Tshs. 9,690,000/= as the value of the properties accepted by both parties, then the respondent claim that he holds a capital of Tshs. 97,600,000/= without exhibiting to the court for the added Tshs. 86,910,000/= was not proper. He, therefore, insisted that the award of specific damages at a tune of Tshs. 48,998.500/= was unjustified.

On the general damages, he claims that the court needs to give reasons for such an award but in the matter at hand, the trial court awarded general damages without giving reasons for the award. Insisting, he cited the case of **Anthony Ngoo** (supra) and the case of **Access Bank Tanzania Limited vs Adeltus Rwegasira Anthony & Another,** Civil Appeal No. 49 of 2018 (unreported) at pg 08 and 09.

Finally, he prays this court to allow the appeal with costs.

Responding, on the first ground of appeal, he avers that the submissions by the learned counsel were misplaced and misconceived for the reason that the same issue was raised and determined by the trial court on 08.06.2014 when the preliminary objection was overruled and the case proceeded on merit. He went on that, the court ruled that the matter was never a commercial case and no appeal was preferred after the decision. Insisting his point, he cited the case of **Gerald Chuchuba vs Rector, Itaga Seminary** [2002] TLR 213 that, failure to appeal to the decision on the same subject matter, raising it as the ground of appeal become res judicata.

On the second ground of appeal, he submitted that the law is clear that who alleges must prove. He went on that the decision of the trial court did not base on the piece of evidence of PW1 but rather a totality of various pieces of evidence. He went on that the respondent discharged his burden as required under section 110(1) of the Evidence Act, Cap. 6 [R.E 2019]. Referring to page 3 of the appellant's written submissions, he avers that, the appellant disputed to have confiscated the respondent's goods but the same was under paragraph 5.5.6 of the WSD, the appellant admitted to having confiscated the items as an

alternative to recover her loaned money. He insisted that parties are bound by their pleadings.

He went on referring to page 18 of the proceedings that, the appellant had closed the respondent's shop and when the respondent went to his office, the appellant acknowledged to close the shop and confiscated the goods. He went on that PW1 testimony was supported by the evidence of PW4 and PW5.

On the 4th ground of appeal, he insisted that the award of Tshs. 48,998,500/= was properly awarded as was proved to the required standard upon consideration of 22 purchase receipts of items which were confiscated from PW1 shop tendered and admitted as exhibit P2 as reflected on page 18. He insisted that, though the claim was at a tune of Tshs. 97,600,000/= after the evidence was adduced, the sum of Tshs. 48,998,500/= was proved as seen on page 12 of the trial court judgment. He insisted that the case of **Anthony Ngoo** (supra) cited by the appellant is distinguishable. He insisted that the award of general damages is the court's discretion depending on the circumstances of the case. Citing the case of **Tanzania Sayi Corporation vs African Marble Company Limited** [2004] TLR 155, he insisted that there are circumstances when the award may be altered on appeal, and he finally

holds that the amount was properly awarded. He prays this appeal to be dismissed with costs.

Rejoining, on the first ground of appeal, the appellant learned counsel insisted that the law is settled that the issue of jurisdiction can be raised at any stage**.** Insisting he cited the case of **M/S Tanzania - China Friendship Textile Co. Limited vs Our Lady of Usambara Sisters** (2006) TLR 70. He went on refuting that the Preliminary Objection as to jurisdiction raised in the trial court amounted to interlocutory order which is not appealable. He insisted that the cited case of **Gerald Chuchura (supra),** is distinguishable for the reason that the interlocutory order was not discussed.

Adding on the 2nd and 3rd ground, he maintains that the issue of confiscation requires proof and evidence of PW1-PW4 was hearsay, and PW5 who claims to witness the confiscation failed to identify items confiscated. Referring to section 110 (1) and (2) of the Law of Evidence Act, Cap. 6 [R.E 2019] he insisted that the respondent failed to discharge his duty conferred by the law.

On the 4th ground of appeal, he added that, the trial magistrate must assign reasons for the award of the general damages. Insisting, he cited the case of **Access Bank Tanzania Limited vs Michael Daud**

Msufu, HC Civil Appeal No. 02 of 2019 (unreported) that the reasons must be assigned to justify the award of general damages. Reiterating his submissions in chief, he insisted that the award of Tshs. 48,998,500/= as special damages were not proved strictly and therefore ought to be disregarded. He finally prays this appeal to be allowed with costs.

After the contending submissions by the learned counsels by the way of written submissions, I now stand the position of determining the matter before me as to whether the matter before the trial court was well presented and proved on the balance of probability as against the appellant and in favor of the respondent.

On the first ground of appeal, the appellant claims that the learned trial magistrate erred in law by entertaining the suit without being clothed with jurisdiction. Jurisdiction is a very vital component in adjudication for it gives or takes courts power to deal with a matter. The court on various occasions has made remarks on jurisdiction. In the case of **Fanuel Mantiri Ng'unda v. Herman M Ngunda**, Civil Appeal No. 8 of 1995, CAT (unreported) it was held that: -

> *"The jurisdiction of any court is basic; it goes to the very root of the authority of the court to adjudicate upon cases of different nature.... the question of jurisdiction is so*

fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case."

What is claimed by the appellant is that the trial court tried the matter without jurisdiction for it was a commercial matter and therefore wanting pecuniary jurisdiction. The claim was denied by the respondent learned counsel that the matter was raised as a preliminary objection and determined to its finality and the appellant did not appeal against the decision. The appellant contends that the issue of jurisdiction can be raised at any stage and what was decided by the trial court was an interlocutory matter which is not appealable.

First, as to whether the issue was a commercial matter, I do not subscribe to the appellant's counsel that the nature of the agreement between the appellant and the respondent ought to be necessarily filed in the commercial court. It is my view that so long as the dispute was filed as a normal civil suit, I find that the trial court had the jurisdiction to entertain the suit. The situation would have been different if the same was registered as a commercial suit. Plaints concerning commercial cases are required to reveal in the pleadings that it is a commercial case. This is the holding of this Court, Commercial Division

in the case of **China Pesticide (T) Ltd vs. Safari Radio Ltd,** Commercial Case No. 170 of 2014 where it stated as follows: -

> *"For a suit to be commercial, , the plaint must, inter alia, specify the nature of the claim, the subject matter and the territorial jurisdiction as well as facts showing that the suit is of commercial significance."*

I, therefore, find that the matter was properly before the trial court.

Second, as to the pecuniary jurisdiction for the court to try the matter, I have had time to go to the records, and as stated in the case of **M/S Tanzania China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] TLR70 which held that: -

> *"The issue of jurisdiction of the Court can be raised at any stage even before an appellate court. It is the substantive claim and not general damages which determine the pecuniary jurisdiction of the court."*

Revisiting section 40 of the Magistrate Court's Act, Cap. 11 [R.E 2019] It is my considered opinion that the trial court was clothed with jurisdiction to determine the matter as against the submissions by the appellant learned counsel because the case was a normal civil case. I am fortified by a decision of this Court (Hon. Dr. Twaib, J. as he then was) in the case of **Bestcom Company Ltd vs. Jacob Mtalinya T/A It**

Farm, Civil Case No. 160 of 2012 (unreported) where he held that the commercial court did not oust the jurisdiction of this Court in trying cases emanating from commercial disputes filed in its registry, stated as follows: -

> *"It is incorrect to say that the Commercial Court deals with all commercial cases at the High Court level, the High Court Registry Rules do not provide for such exclusive jurisdiction. The civil registry of this court, as a court of record, still retains its general jurisdiction to hear and determine commercial cases, as part of its full original jurisdiction in civil matters, as provided for by section 2 (1) of the JALA. In any case, a subordinate legislation such as the Registry Rules cannot take away the constitutional and statutory jurisdiction of this Court.*
>
> *The cure to the mischief that the amendments intended to bring about was not intended to completely remove the power of District Courts to entertain commercial cases whose value was beyond Tshs. 30 million. It was to rescue the Commercial Division of this Court from the threat of redundancy and severely reduced revenue that was encroaching upon it, and give it a new lease of life."*

Thirdly, as a matter of fact, that the issue of jurisdiction was raised and determined, I proceed to determine as to whether it was proper for the appellant to raise the same issue before this court and whether the

same was an interlocutory order. Going to the records, on 08.06.2014 the preliminary objection was overruled for the reason that the case was not a commercial case. After court decision the Preliminary Objection, the trial court ordered hearing to proceed. This means the Preliminary Objection did not dispose of the suit. The order of the trial court which overruled the Preliminary Objection was interlocutory, which is unappealable.

The test as to what amounts to interlocutory order was stated in the Case of **Junaco (T) Ltd and Justin Lambert versus Harel Mallac Tanzania Limited,** Civil Application No. 473/16 of 2016 C.A Dar es Salaam (unreported) at pages 12 to 13, where the Court has this to say;

> *"In order to know whether the order is interlocutory or not 'the nature of the order test must be conducted that is, did the order or the judgment complained of finally dispose of the rights of the parties"*

Also, the test was put, in the case of **Bozson versus Artincham Urban District Council** [1903] I KB 547 wherein Lord Alveston stated as follows: -

> *"It seems to me that the real test of determining this question ought to be this. Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it*

ought to be treated as final order but if it does not, it is then in my opinion, an interlocutory order".

I don't subscribe to the respondent learned counsel submissions who cited the case of **Gerald Chuchuba vs Rector, Itaga Seminary** [2002] TLR 213 that what was required of the appellant was to appeal against the decision of the trial court.

I find this ground has no merit and therefore fails.

On the 2nd and 3rd grounds of appeal, as submitted and, before I venture to determine these grounds, I would like to point out that, assets pledged as security for loan are realized in the event the borrower default. As a matter of due deligence, there is a need for the lendor to scrutinize and ascertain the existence of the securities pleaded as collateral for loan and its value before a loan is advanced to the borrower, Failure to do so, the borrower cannot go contrary to what the parties have agreed upon.

In the case at hand, I agree that a party who entered into an agreement and secured a loan must strictly adhere to the terms of the agreement. When the borrower fails to honor the terms, the realization of securities has been the solution to recover the money by a lander in order not to be a victim of bankruptcy. Therefore, it is correct for the

appellant to realize securities after breach of terms of the agreement by a borrower, it is legally justifiable.

In the case of **Agency Cargo International vs Eura African Bank Civil Case No. 44 of 1998,** it was stated that: -

> *"in order for the bank to continue doing banking business, it must have the fund to lend and which must be repaid by its borrowers. If the bank does not recover loans, it will surely be an obvious candidate for bankruptcy"*

The situation at hand was a result of the respondent failure to honor the terms of the agreement after he secured a loan from the appellant and defaulted. When litigating the matter before the trial court, the appellant claimed that, the trial court erred in law and fact by not considering the weight of evidence adduced by the appellant and making a proper analysis of evidence relying on the evidence of PW2.

Going by the records, DW1 testified that the respondent defaulted to pay the loan and they went to his garage where they discovered that the securities pleaded did not belong to the respondent, they attached one car Make Toyota IST and sold it at an auction for a price of Tshs. 6 million. He went on that; they never went to the respondent shop for it was not among of the security pleaded. PW1 testified that at the time of confiscation he was not present and the evidence of PW2 and PW3 were

to the extent that they were guarantors. The evidence of PW4 was to the extent that he was at the scene and witnessed the confiscation by Accses Bank staff for they had identity cards and wore uniforms. Though PW4 did not identify who did what and did not know exactly the items confiscated and their value.

The question here is whether the trial court made a proper analysis of evidence to establish whether it was the appellant who confiscated the items of the respondent and whether the confiscated items valued 48,998,500 as awarded to the respondent.

First, DW1 denied having confiscated the items from the respondent shop as claimed for they were not among of security for the loan. He testified before the trial court that, they attached a car make Toyota IST and not the items in the shop of the respondent. The court decided in favor of the respondent that, the respondent proved the case on the balance of probabilities and awarded Tshs 48,998,500/= as specific damages.

The same was opposed by the respondent for reason that, the appellant was wrong to deny what he had already admitted at the trial, but this fact was not considered by the trial magistrate. He referred to

paragraph 5:5-6 of the WSD, that the appellant admitted to having confiscated the items as an alternative to recover her loaned money.

Going to the records, it's clear that the appellant in his WSD filed at the trial court dated 30.04.2014, agreed to have confiscated the respondent's properties in the repayment of the loan defaulted by the respondent. For better reference, I find wanting to reproduce what was averred by the appellant in para 5:5-6 of their WSD at the trial court: -

> *Para 5.5 the defendants' actions of seizing the plaintiff stocks was in accordance with the terms and conditions of the loan agreement and the security document created to secure the repayment of a loan.*
>
> *5.6 in view of the matter stated above, it is wrong for the plaintiff to aver under paragraph 5 of the plaint that the defendant trespassed to the plaintiff's shop and took the plaintiff's items. The act of seizure of the plaintiff properties was justifiable and the same cannot be construed to mean trespass as alleged or at all.*

I agree with the respondent's learned counsel that a party is bound by its pleadings. The appellant stood no chance at a trial court to deny that she did not involve in the confiscation of the respondent's property while in her pleadings, admitted to hav entered and confiscated the

properties of the respondent in his shop having found that the properties belong to the respondent.

Going to the loan agreement, exhibit P1, the confiscated items were not among of the securities pleaded, and though the agreement gives a right to the appellant to go for other properties, the procedures were to be followed. What happened that has tasked this court is the action of the appellant denying to have confiscated the properties of the respondent when testifying at the trial court.

This leaves me with no doubt on the ill will of the appellant against the respondent. I, therefore, find that the evidence of the respondent PW1 and that of PW4 and PW5 reflects what was submitted under para 5.5-6 of the WSD at the trial court and it was proved on the balance of probability that it was the appellant who confiscated the properties in the shop of the respondent illegally and unprocedurally.

Again, what is left to be determined on this ground is the extent of the properties confiscated and their value. It is a requirement of the law that specific damages must be strictly proved, I went through the records and found that on page 11 of the trial court's judgment, it first found that, though the specific damage claimed was Tshs.

97,000,000/=, the receipts tended to prove the claim of Tshs. 114,023,800.

The trial court used its wisdom to have the exhibits admitted and reasoned that since the respondent secured a loan in order to purchase spare parts, it was wise to expunge all receipts issued before the signing of the loan agreement. I do not subscribe to this wisdom. I find that the trial court went on deciding contrary to the said wisdom. Going to pages 11 and para 2 of page 12 of the trial court's judgment, and having in mind that the loan agreement was entered on 14. 08.2013, when computing the specific damages, the trial court proceed to refer to receipts issued in 2012.

Secondly, it is my findings that on the balance of probability, the respondent managed to prove that the appellant confiscated his properties, and as averred by the appellant in their WSD at the trial court. It was the duty of the appellant to exhibit the properties confiscated as claimed failure of which raises a doubt, the benefit of the doubt can be given to the respondent who managed to prove what was taken from his shop.

But, be it as it may, there is a lot left to be desired in respect of the pleaded securities. To the bank, it stood at a total of Tshs 15,400,000/=

as market value and 9,690,000/= as the value of the properties. This fact is accepted by both parties, but the respondent claimed to hold a capital of Tshs. 97,600,000/= without exhibiting to the court the whereabouts of the added Tshs. 86,910,000/= at the same time he failed to repay the amount of loan due.

It is my findings that, though the benefit of doubt is given to the respondent, there is no strong evidence to prove that the confiscated items from the respondents' shop and the exhibits tendered did justify the award of Tshs. 48,998,500/= awarded by the trial court. I, therefore, agree with the appellant's learned counsel that the trial court failed to analyse the evidence on record to the extent that, though the case was proved on the balance of probabilities, in principle failed to prove the quantification of the specific damages according to the exhibits tendered. This court failed to believe if all the spare parts purchased as exhibited by receipts were not sold at all, I find the 2nd and 3rd grounds of appeal partly has merit to the extent explained herein.

Determining the 4th ground, the claim by the appellant was that the amount of Tshs. 48,998,500/= as specific damages and 5,000,000/= as general damages awarded to the respondent was unreasonable and contrary to the principle of law for failure to be specifically pleaded and proved. Insisting, he cited the cases **Anthon Ngoo & Another vs**

Kitinda Kimaro, Civil Appeal No. 25 of 2014 CAT (unreported), at pg 16 and 17, and the case of **Zuberi Agustino vs Anicent Mugabe** [1992] TLR137 and **Tanzania- China Friendship** (Supra). On the part of the respondent, he insisted that the trial court was right and the award was a result of the evidence adduced at the trial court.

I had time to go through the records, and having in mind that the issue boils from the unhonoured agreement between the parties in that the respondent defaulted from payment of the loan, and in the cause to secure the payments, the appellant decided to attach the properties of the respondent. As it stood, the default was on the side of the respondent. The default harboured by the respondent justified the appellant's right to take action. The award for the specific damages has in detail already determined above on the 2nd and 3rd ground.

What tasked my mind are the questions that, what justified the respondent to be awarded general damages? Is it not that by doing so, gives the respondent benefit from his own wrong doings?

In the cited case of **Anthony Ngoo & Another vs Kitinda Kimaro**, CAT- Civil Appeal No. 25 of 2014 (unreported), it was held that: -

"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on recordable to justify the award. The judge has discretion in the award of general damages. However, the judge must assign a reason...."

The law is clear that the award of general damages is the court discretion but that has to be exercised cautiously and before doing so, the trial magistrate must assign reasons.

It is my founded opinion, that, where a customer defaults under the term and conditions of the loan agreement, the bank is given various remedies including the right to attach and sell. Even if the purported attachment was legally not properly exercised, that cannot be a justification to award general damages to the respondent who is duty-bound to honor the loan agreement. In this aspect, I think the bank should be protected to avoid the proportional rate of losing money through defaulters.

It is trite law that the award is court's discretional, which must be exercised cautiously. In the matter at hand, the trial court did not give reasons for awarding 5,000,000/= as general damages to the respondent who defaulted to pay the loan as agreed in the loan agreement.

In the final analysis, I find this ground has merit and I proceed to allow it.

In the upshot, this appeal has been partly allowed to the extent explained in this Judgement. No order as to costs.

Order accordingly.

It is so ordered.

M.MNYUKWA
JUDGE
17/09/2021

Right of appeal is fully explained to the parties.

M.MNYUKWA
JUDGE
17/09/2021

Judgment delivered via audio teleconference whereby all parties were remotely present.

M.MNYUKWA
JUDGE
17/09/2021