**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: MBAROUK, J.A., BWANA, J.A., And MUSSA, J.A.)**

**CIVIL APPEAL NO. 23 OF 2012**

**EUSTO K. NTAGALINDA.....APPELLANT**
**VERSUS**
**TANZANIA FISH PROCESSORS Ltd. .....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania Commercial Division at Mwanza)**

**(Mruma, J.)**

**dated the 13th day of September, 2011**
**in**
**Commercial Case No. 20 of 2009**

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# JUDGMENT OF THE COURT

19th & 22nd March 2013.

## BWANA, J.A:

The appellant, Eusto K. Ntagalinda, is a natural person engaged in fishing business around Lake Victoria. The respondent on its part, is a corporate entity registered under the company laws of Tanzania. It deals with fish processing in Mwanza.

The parties entered an ***oral agreement*** through which the appellant was to supply fish to the respondent's factory in Mwanza. After giving conflicting dates as to when the said oral agreement came into force, and when it was terminated, the trial court eventually held that the oral agreement was entered into by the parties in the year 2002 and was terminated on 30 June 2006, after the appellant is said to have stopped supplying fish to the factory.

It was also a term of the oral agreement that the respondent was to advance some money to the appellant as working capital in furtherance of his fishing activities. That included money for the purchase of fuel for his fishing boats. In return, the appellant was to supply/sale the catch to the respondent at an agreed price. The sum of Sh. 1500/= was given as being the price of one kilogramme of fish sold to the factory by the appellant.

Before the trial commercial court, the respondent, who was then the plaintiff, alleged that the defendant stopped supplying fish to the factory without giving notice and or reason to the other party to that oral agreement. That led the latter party to go to court claiming a total sum of sh. 209,012,396/12 being an outstanding amount advanced to the former. It also claimed for interest and costs of the suit.

The appellant, who was then the defendant, denied the claims in relation to cash that was said to have been advanced to him as capital and for fuel for his fishing boats. Further, he raised a counter-claim for fish allegedly supplied to the respondent's factory but of which no payment had been made in return. The total sum claimed in the counter-claim was given as Sh. 517,082,500/= the respondent herein denied those claims.

The trial judge entered judgment in favour of the then plaintiff. He ordered the appellant to pay the respondent the sum of Sh. 209,012,396/12 being an outstanding amount

received by him for supplying fish but which he did not supply. That sum was to carry a commercial interest of 21% per annum from the date of instituting the suit to the date of judgment. Further interest of 7% per annum was also to be charged from the date of judgment till full satisfaction. Costs of the suit were awarded to the plaintiff. The appellant's counter-claim was dismissed in its entirety.

Aggrieved by that decision, the appellant preferred this appeal. He raised the following grounds in his memorandum of appeal.

- That the trial judge erred in law and fact to overrule and dismiss the objection against the admission of 29 documents as exhibits which were never pleaded in the plaint.
- That the learned trial judge grossly erred in law and fact to admit the documents as exhibits which were not genuine and admissible in law.

- That the learned trial judge grossly erred in law and fact to allow the claim in the suit with interest while the respondent was not entitled to sue and there was no enforceable contract based on uncertain terms of oral contract and the evidence testified were at variance with the pleadings in the plaint which contradicted the matter.
- That the trial judge grossly erred in law and fact to enter judgment which suffers double standard, when he allowed the suit and dismissed a counter claim of which their pleadings were based on the same facts and testimony, a thing which was very bad in law.
- That the trial judge grossly erred in law and fact to dismiss the competent counter claim without any reasonable and rational reason.

Before us, the appellant was represented by both Mr. Mathias Rweyemamu and Didace Respicius, learned counsel, while the respondent was represented by Mr. Costantine

Mutalemwa, learned counsel. Both parties to the appeal filed written submissions in terms of Rule 106 of the Court of Appeal Rules, 2009 (the Rules) and they adopted the same in their respective addresses before us.

Before proceeding with the hearing, Mr. Mutalemwa raised a point ***in limine litis*** to the effect that the notice of appeal as lodged by the appellant does not show that it was served upon the respondent. There was no endorsement by the respondent on the face of the notice of appeal acknowledging service. As a consequence thereof the said appeal is incurably defective and should be struck out. He cited the case of ***Rowland Faini Sawaya t/a Sawaya Bus vs Cornel K. Tarimo and Another***, Civil Appeal No. 53 OF 2007(unreported), to support his averment. He further supported his averment by drawing our attention to the provisions of Rule 96(1)(b) of the Rules. On his part Mr. Respicius, learned counsel, replied by drawing our attention as well, to page 3A of the court record which shows

that service was effected within 14 days as prescribed by the Rules, and a copy thereof was returned to the Registry.

We have examined this matter in the light of the provisions of Rules 83(1), 84(1) and 96(1)(b) of the Rules read together and came to the considered view that the said notice of appeal was duly served. Proof of service to the respondent can be alleged to have been effected by ***either*** evidence of his signature or his stamp (or that of his advocate) on the face of the Notice of Appeal itself. (See: ***Wilfred Muganyizi Rwakatare vs Hamis Sued Kagasheki and Another,*** Civil Appeal No. 107 of 2008 (unreported) ***or*** by a letter acknowledging receipt of service. The latter procedure seems to have been adopted in the instant case, as page 3A of the record shows. It is however, important to distinguish between the procedure adopted and shown on page 3A and the inclusion of a copy of a notice of appeal in the record of appeal served on the respondent. The latter process is not a mode of service envisaged under the Rules (See: ***Sawaya case***, supra). The

procedure adopted in this case enabled the respondent to file the document on page 3A of the record which is in compliance with Rule 84(1) of the Rules. Had service not been effected, the respondent would have not complied in Rules 84 and 86 (1) of the Rules. Further, the record clearly shows that throughout, these proceedings, including when the appeal came up for hearing, the respondent had complied with all the requirements, including attending court proceedings. Therefore, there is no reason to hold that the record of appeal is incurably defective for want of proper service of notice of appeal. We differ with Mr. Mutalemwa and hold that there was proper service in compliance with the Rules.

We now consider the grounds of appeal. We start with the first issue (supra) which challenges the admissibility of exhibit P1. It was the submission by Mr. Recipicius, learned counsel, that exh. P1 was wrongly admitted in evidence because it was not annexed to the plaint. It had not been pleaded. Such admission of exh. P1 contravened Rule 18(1) of Order VII of the

Civil Procedure Code (the CPC), contended learned counsel. However, according to Mr. Mutalemwa, learned counsel, the impugned exhibit P1 was annexed to the plaint. What was objected to by Mr. Rweyemamu, learned counsel, were the payment vouchers showing payment for fuel and bank pay-in slip for money paid to the appellant through the National Bank of Commerce and marked from exhibit P2 to P8.

In arriving at his decision over the objection raised by Mr. Rweyemamu during the trial, the judge made an attempt to distinguish between documents received under Order VII R 14(1) and those under Order VII Rule 18(1) of the CPC. He then arrived at the following conclusion:-

> " These documents do not fall under the documents stated in the provisions of sub-rule(1) of rule 14 of Order VII but they ***are documents covered by the provisions of sub-ruie(1) of rule 1 of Order XII of the CPC which can be received at the***

***hearing of the suit***". (Emphasis provided).

He therefore proceeded to dismiss the objection and receive the documents as they were being tendered as exhibits. We hasten to make the following observations. **First**, exhibit P1 is a photocopy of the respondent's ledger in use from 1 July 2005 to 6 May 2006 in respect of the appellant's account. That is what was attached to the plaint. What is controverted and to which Mr. Mutalemwa enlightened us, are the copies of vouchers tendered as exhibits P2 to exh. P8. Those documents were not pleaded but the trial judge proceeded to admit them in evidence, invoking Order XII Rule 1 (1) of the CPC. With due respect order XII of the CPC does not have Rule 1(1). Further, it is irrelevant to the issue before us. It simply states:-

Order XII R.I:-

> " Any party to a suit may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

Therefore invoking that provision to admit those documents was improper on the part of the trial court.

**Second**, Order VII Rule 14 clearly lays down the procedure to be followed. Rule 14(1) makes it mandatory to attach the document to the plaint when the latter is being produced in court. The use of the word "shall" connotes the mandatory nature of the act that has to be compiled with (See. ***Ashura Abdulkadir vs /director of Tilapia Hotel,*** Civil Application No. 2 of 2005, (unreported)). Other documents that need not be attached at that stage, must be listed (Order VII R.4 (2)) and the list annexed to the plaint. That was not the case in the instant suit.

**Third,** another provision of the CPC which seems to be relevant at this stage is Order XIII R. 1 (1) which provides thus:-

> " The parties or their advocates ***shall produce at the first hearing of the suit, all documentary evidence of every description*** in their possession or power on which they intend to rely and which has not already been filed in court, and all the documents which the court has ordered to be produced." (Emphasis provided).

That procedure is the most commonly used and which we believe the plaintiff should have adopted if he were to rescue the admissibility of exhibits P2 to P8. Unfortunately that was not to be the case. Where the foregoing is not followed, there is yet a last chance which with leave of the court – reasons which must be recorded – yet documents may be produced. Order VII R 18 (1) provides:-

> " A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not

produced or entered accordingly, ***shall not without the leave of the court, be received in evidence on his behalf*** at the hearing of the suit." (Emphasis provided).

We believe there was an oversight on the part of the trial judge in not invoking the foregoing provisions of the CPC when admitting exhibits P2 to P8.

What are the consequences of all the above noted shortcomings? We are of the settled mind that since those exhibits were not pleaded, the only plausible conclusion is to expunge them from the record as we hereby do.

Having expunged exhibits P2 to P8 from the record, Exh P1 remains with no feet to stand on, save the evidence of PW1 which we now consider in respect of the first ground of appeal. We do note that PW1 tendered those exhibits P2 to P8 with leave of the court but with continued objection from the adverse

party that they were wrongly being admitted as they contravened the provisions of the CPC already cited above. In the absence of the contents of those exhibits, PW1 did not, in our view, give any other independent and relevant evidence which would support his case. Exhibit P1 therefore, standing alone, merely shows a breakdown of transactions from 1 July 2005 to 6 May 2006. It does not give a true picture as to what transpired from the start of the oral contract in 2002. Further, there is no other evidence to support the respondent's claims for payment of Shs. 209,012,396.12. Therefore for reasons stated above, this ground of appeal is allowed. The award of the said sum is therefore set aside.

Having expunged exhibits P2 to P8, there is no need to discuss the second ground of appeal which in essence, is challenging the authenticity of those documents.

Ground three of the appeal challenges the various interests that follow the sums of money awarded to the respondent by the

trial court. Essentially it is the appellant's averment that since the issue of interest chargeable was not part of the oral agreement, it should have not been considered by the trial court. We do agree with the appellant on this point. It is settled law that terms of a contract must be clear and certain (See: ***Mukisa Biscuit Manufacturing Co. Ltd vs Westend Distributors Ltd*** (1970) EA 489). Further, it was held in ***The British Bank for Foreign Trade Ltd vs Novinex LTD*** (1949) 1KB 623 that:-

> "... if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract ...."

It is evident therefore that since the issue of interest was not part of the oral agreement between the parties, it was improper for the trial court to interpolate that term and give interest to the amounts awarded to the respondent. The court may not imply a term for payment of interest from a given

business practice between parties if by doing so would go contrary to the express words of the said agreement. This is particularly important when it comes to oral agreements where their terms are uncertain or there is visible variance. We further hold that having set aside the sum of Sh. 209,012,396.12, there is no ground and support for awarding those interests.

Ground four of the memorandum of appeal raises the issue of double standards, namely, that the same documents were used in evidence in favour of the respondent but denied of similar treatment when it came to interprete the appellant's part of the case. It suffices to state herein that the impugned documents, we believe, are exhibits P2 to P8, which have already been expunged from the record. We therefore do not see the need to detain ourselves over this issue.

The fifth and last ground of appeal concerns the counter claim. The appellant presented a counter claim of Shs. 549,082,500/= being money value for fish supplied to the

plaintiff from 2002 up to the time of termination of the oral agreement. He claimed as well, costs for confiscated boat, fishing machine and water pump all valued at Sh. 32,600,000/=. The said items were said to have been confiscated by the respondent on 30 June 2006. As a consequence of that confiscation, the appellant alleges that he lost business valued at Sh. 2,000,000/= each day. He also claimed for general damages for breach of business contract estimated at Shs. 200,000,000/=.

The respondent denied those claims and put the appellant to strict proof thereof. In his reply, Mr. Mutalemwa claimed that there was no sufficient proof in support of those claims in the counter claim. An earlier attempt by the appellant to have annexture EQ1 admitted as an exhibit was not successful. The annexture, which attempted to prove the alleged supply of 366055 kilogrammes of fish worth Sh. 517,082,500/= to the respondent was rejected allegedly because it did not resemble the copy annexed to the written statement of defence. Its contents had been doctored. Mr. Rweyemamu, learned counsel,

admitted those irregularities and therefore annexture EQI was not admitted.

After analyzing the contents of the counter claim, following the non admission of EQI, the trial judge dismissed the counter claim in its totality.

A counter claim is similar to a cross – suit. It has to be proved to the required standard in civil cases. In the instant case, we get it from the record the following salient points.

- The amount of fish claimed to have been sold to the respondent was valued at Sh. 517,082,500/=. However, there is no independent proof of that sum, EQI having been rejected. The evidence of DW1 and DW2 seem to conflict on this issue.
- It is apparent that the counter claim did not cover "reject fish". The appellant was unsuccessful in his attempt to bring in the issue of reject fish in the

counter claim. We are in agreement with the trial judge on this point.

- We are however in agreement with the appellant that it is not controverted that his boat and other fishing gear were confiscated by the respondent following the former's failure to supply fish as per agreement. They were never to be returned. These were the boat container GH worth 24m/=; Two Yamaha fishing engines CC 40 @ worth 4m/=; and a water pump worth Sh. 600,000/=, We hold that the appellant should be compensated for this loss.
- The appellant had claimed for interest over the foregoing items. For the reasons we gave while setting aside the various interest awarded to the respondent by the trial court, we adopt them here as well.

The appellant requested general as well as special damages. Special damages are claimed as a result of loss of

business following the confiscation of his fishing gear. He claims Sh. 2,000,000/= per day from the day the confiscation took place to final payment. However, there is no proof of that loss.... how the appellant came to that figure, his pleading in the counter claim notwithstanding. It is trite law that special damages must be specifically pleaded and proved. In the instant appeal however, the appellant, satisfied that requirement although the sum of Sh. 2,000,000/= per day is on the higher side. Taking the evidence in its totality, we award the appellant the sum of Shs. 30,000/= per day from the date of confiscation to the date of this judgment.

The appellant asked as well for general damages at the discretion of the Court. General damages are such as the law will presume to be direct, natural or probable consequence of the act complained of and aimed at restoring an injured party as far as possible to the position prior to the injury. (See: ***Tanzania Saruji Corporation vs African Marble Company*** (2004) TLR 155.

In the instant appeal it is evident that following the confiscation of his fishing tools, the appellant suffered loss, anxiety and the like, which we believe should be atoned to. Having considered all the circumstances of this case including the award for special damages, we think the sum of Shs. 5,000,000/= would do. We award him that sum as general damages.

In conclusion, this appeal succeeds to the extent shown herein. That is –

- The award of Shs. 209,012,396/12 in favour of the respondent is set aside.
- The appellant's claim for Sh. 517,082,500/= being for fish sold to the respondent fails.
- The appellant's claim for the total sum of 32,600,000/= being for the loss of his fishing equipment at the hands of the respondent is accepted and awarded.

- The appellant is awarded Sh. 5,000,000/= as general damages.
- The appellant is awarded the sum of Shs. 30,000/= per day as special damages from the date of confiscation of his fishing tools to the date of delivery of this judgment.

Each party to bear its costs of this appeal.

**DATED** at **MWANZA** this 21st day of March 2013.

M.S. MBAROUK
**JUSTICE OF APPEAL**

S.J. BWANA
**JUSTICE OF APPEAL**

K.M. MUSSA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original

P.W. BAMPIKYA
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**