IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CIVIL APPEAL NO. 12 OF 2022

(Arising from the decision of the Resident Magistrate's Court of Musoma at Musoma in Civil Case No. 17 of 2020)

STANBIC BANK TANZANIA LTD .... APPELLANT

VERSUS

WINNERS COMPANY LTD .... RESPONDENT

JUDGMENT

3rd November, 2022 & 23rd February, 2023

M. L. KOMBA, J.:

Before the Resident Magistrate's Court of Musoma (the trial court) the respondent herein filed a civil suit against the appellant herein and one Billostar Debt Collectors who is not a part in this appeal. The respondent was claiming a total sum of Tshs. 24,661,500/= as a specific damages and Tshs. 60,000,000/= as a general damages for the loss she suffered on 31st May, 2017 and 01st June, 2017 after the disturbance and destruction done by Billostar Debt Collectors (who was instructed by the appellant)at Nyakanga, Rung'abure and Sirori Simba, the areas where the respondent had been carrying and performing road construction project.

As it was evidenced by both parties before the trial court, briefly, the story is the respondent and the appellant entered into two lease agreements. The first agreement was of 8th July, 2013 where the respondent as the **lessor** and the appellant as the **lessee** they entered into a contract of purchasing a new Caterpillar Excavator with registration number T 311 CLQ for consideration of Tshs. 405,011,034/= whereas the **lessee** was obliged to pay Tshs. 81,106,850/= to the **lessor** as the down payment upon signing a lease and further 34 rentals of Tshs. 9,210,137.40/= each payable on the 15th day of each successive month commencing on 15th August, 2013 to 15th June, 2016 and the residual value of the goods was Tshs. 1,549,375/=.

The second agreement entered between the parties on 11th July, 2014 where the subject matter of the lease was a new Ford Ranger with registration number T 354 CYE. The consideration of the contract was Tshs. 125,074,249.14/= and the **lessee** was obliged to pay Tshs, 19,500,000/= as the down payment upon signing a lease and further 46 rentals of Tshs. 1,782,543.71/= each payable on the 15th day of each successive month commencing on 15th August, 2014 to 15th June, 2019 and the residual value of the goods was Tshs. 404,170.25/=.

It appears that, the respondent faulted to pay rentals on the amount of money they agreed and on the due payments' dates. The situation led the appellant to instruct Billostar Debt Collector to collect the Caterpillar Excavator and Ford Ranger from the respondent on the basis of the breach of contract. The Billostar Debt Collectors collected the Caterpillar Excavator from respondent for two days and caused her to suffer a loss of Tshs. 24,661,500/= the respondent claimed as a specific damages.

When the matter was heard before the trial court, the appellant also raised a counter claim against the respondent claiming the breach of contract by the respondent and she prayed the court *inter alia* that the respondent be ordered to pay Tshs. 139,393,222.17/= as outstanding rental charges, the respondent be ordered to surrender the Caterpillar Excavator with registration number T 311 CLQ and Ford Ranger with registration number T 354 CYE.

Upon hearing the suit, the trial court ordered and decreed that;

1. The plaintiff (the respondent herein) should pay the 1st defendant (the respondent herein) an outstanding balance of Tshs. 94,921,722.17/=.
2. The trial Court was not entitled to order the plaintiff to surrender the Caterpillar Excavator with registration no. T 311 CLQ and Ford

Ranger with registration no. T 354 CYE to the appellant as their contract still subsists.

3. The 1st defendant should pay the plaintiff Tshs. 24,661,500/= as specific damages and Tshs. 10,000,000/= as general damages.
4. The defendant to pay costs of the suit.
5. The parties should seat together and find out as to how much the plaintiff should be paying the 1st defendant as rentals in respect of the excavator contract following the adjustment of the contract period from 36 months to 60 months.

Being amused by the part of the said trial court's decision, led the appellant to lodge the present appeal before this court to challenge the same. In her petition of appeal, the appellant advanced the seven grounds of appeal to contest the decision of the trial court. Those grounds read as follows: -

1. That the trial magistrate erred in law and facts by its finding that the appellant attached without court order the respondent's Caterpillar Excavator with Registration No. T 311 CLQ while the appellant simply attempted to repossess (repossession) the said Excavator;

2. That having found the respondent defaulted to pay rental installments for the use of Caterpillar Excavator with Registration No. T 311 CLQ and Ford Ranger with Registration No. T 354 CYE, the trial court erred in law and facts by holding that the attempt to repossess (repossession for two days) of the leased Caterpillar Excavator with Registration No. T 311 CLQ was unnecessary and unlawful;
3. That the trial magistrate erred in law by holding that the respondent suffered specific damage amounting to Tshs. 24,661,500/=;
4. That the trial magistrate erred in law by holding that repossession of the leased Caterpillar Excavator with Registration No. T 311 CLQ inflicted on the respondent mental and psychological disturbance henceforth proceeded to award Tshs. 10,000,000/= as general damages;
5. That the trial magistrate erred in law and fact that after answering issues number 1,2 and 3 to the counter-claim in affirmative, failed to order the payment of Tshs. 129,583,222.17/= and repossession of the Caterpillar Excavator with Registration No. T 311 CLQ and a Ford Ranger with Registration No. T 354 CYE;

6. That the trial magistrate erred in law and fact by ordering parties to sit around the table in order to ascertain the mode of payment of the outstanding debt instead of ordering immediate payment of Tshs. 129,583,222.17/=;
7. That the trial magistrate erred in law by awarding costs to the respondent and by his failure to award costs to the appellant.

When the appeal was called on for hearing before this court, the appellant was represented by George Mwaisondola whereas the respondent enjoyed the services of Amos Wilson, both the learned Advocates.

Submitting in support of the appeal, the appellant counsel opted to argue the grounds of appeal in seriatim. Starting with the first ground of appeal, Mr. Mwaisondola submitted that they faulted the decision of the trial court that the appellant attached the Caterpillar Excavator with Registration No. T 311 CLQ without court order. He argued that what the appellant did was simply to repossess the Caterpillar Excavator. The counsel contended that the basis of the case between the parties was the two contracts proved by exhibits P2 and P3 before the trial court. He went further and elaborate that in exhibit P2 at clause 13.2.2 empower the appellant to repossess the item incase there is a default and it does

not require the court order to be issued. Mr. Mwaisondola proceeded that as per Exhibit D3 tendered before the trial court, the appellant instructed the Billostar Debt Collectors to repossess the item from the respondent. He explained that exhibit P4 is the registration card of the Caterpillar Excavator which bear the name of the appellant as one of the owners. He therefore argued that the appellant was taking her property as one of the owners.

Regarding the second ground of appeal, the appellant's counsel submitted that the trial court was erred to decide that the attempt to repossess the contracts subject matters was unnecessary and unlawful. Citing the case of **The Private Agricultural Sector Support Trust and Another vs Kilimanjaro Cooperation Bank Limite,** Consolidated Civil Appeals No. 171 and 172 of 2019 CAT at Moshi and **General Tire E.A Ltd vs H.S.B.C Bank PLC,** [2006] TLR, the appellant argued that the appellant as the bank entered the loan contracts with the respondent to purchase the said CaterpillarExcavator and Ford Ranger and that the respondent is obliged to pay the loan back as per contracts and the appellant had an obligation to recover the loan. He argued further that, since the respondent faulted to pay the loan as

per their contracts, the appellant was right to repossess the contracts items.

On the third ground of appeal, Mr. Mwaisondola faulted the trial court to award the respondent the specific damages to the tune of Tshs. 24,000,000/= as the respondent did not prove the same. The counsel was of the views that the specific damages must be specifically proved. He contended that the explanation at page 17 and 18 of the trial court proceedings had no valid documents to show and support the amount claimed by the respondent as a specific damage. He gave an example that there was no pet cash voucher and hiring contracts.

Mr. Mwaisondola went further and state that as per exhibit P2 clause 12.2.3 and exhibit P3 clause 13.2.3 the parties agreed that when the appellant do repossession the expenses and costs should be borne by the respondent.

As to the fourth ground of appeal, the appellant's counsel faulted the trial court to award the respondent a general damages to the tune of 10,000,000/= for mental and psychological disturbance suffered by the respondent. Referring to section 15 of the Company Act, the counsel was of the opinion that once a company is a corporate it acquired the legal personality, thus it is incapable of suffering mental disturbance. He

proceeded that PW1 as a director said he was frustrated but he was not a co-plaintiff nor a co-defendant.

As regard to the fifth ground of appeal, Mr. Mwaisondola submitted that their complain was on counter claim where the appellant claim the remaining sum or order of repossession of two items and that both issues were concluded in affirmative but her prayers were not granted.

On sixth ground of appeal, the appellant's counsel blamed the trial court order that the parties should meet and negotiate on how the respondent will pay Tshs. 129,583,222.17/=. Referring to the case of **Stanbic Bank Tanzania Ltd vs Byson Mushi,** Civil Appeal No. 55 of 2019 HC at Mwanza, Mr. Mwaisondola was of the views that the trial court was supposed to direct how much to be paid rather than order the negotiation.

Lastly on the seventh ground of appeal, the appellant's counsel argued that it was not right for the trial court to order the appellant to pay the costs of the suit as she was also succeeded on her counter claim. The appellant concluded by praying this court to quash trial court decision and grant what the appellant prayed in the petition of appeal.

Responding to the submission made by the appellant's counsel, the respondent's counsel, Mr. Amos Wilson submitted the following on the

first ground of appeal, that the trial court was correct to say that the appellant did attachment and not repossession due to the fact that the repossession procedure as per their contracts was violated. Mr. Amos proceeded that as to the exhibit P2 clause 12.2.2 must be accompanied with clause 13 as well as exhibit P3 clause 13.2.2 should read together with clause 14 that repossession followed the contracts termination. The counsel added that the clauses provide that if any party think her rights has been infringed, she must go to court.

As to the second ground, Mr. Amos submitted that repossession by the appellant was unnecessary and unlawful because it was done contrary to their contracts. The counsel was of the opinion that the appellant was supposed to demand first and then go to court instead of appointing an agent direct to attach the property. Mr. Amos contended that the facts show that the parties were in good communication and the respondent was continuing to pay the appellant an outstanding amount. Referring to the case of **The Private Agricultural Sector Support** (supra) as cited by the appellant's counsel, Mr. Amos stated that the respondent did not deny the loan and the payment was not in dispute.

Replying on the third ground, the respondent counsel agreed that the specific damages must be proved. He argued the court to revisit page 7

and 8 of the trial court judgment to see how the trial court was satisfied on specific damages together with exhibit P1. He added that on the issue of being proved without valid documents is the new fact.

On the fourth ground the respondent's counsel conceded that the company is an artificial body, but he argued that the company has mind from those who control it and when they affected it is so the company. The counsel continued that the attachment by the appellant was done on site and led the respondent to lose trust from those who gives her tender.

As to the fifth ground the respondent's counsel submitted that in the eyes of law the respondent was defaulted but the payment was in progress so she was not denied the loan. He continued that apart from default, the appellant put the respondent in a difficult situation as DW1 noted there are clauses in a contract inserted without his knowledge. Mr. Amos added that the trial court failed to order payment of such amount due to insertion of some clauses in contracts which were not known to the respondent.

Regarding to the sixth ground, it was the respondent's counsel contention that due to the circumstances of the case, the trial court was right to order negotiation between the parties. He stated that the

contract was valid as it was not cancelled regardless that payment was done in later days. Mr. Amos argued to believe that the respondent economic hardship was caused by the appellant. The appellant did not terminate the contract she know she is the source.

Replying on the last seventh ground of appeal, the respondent counsel submitted that the trial court was right to order the appellant to bear the costs of the suit because the respondent suffered economic hardship caused by the appellant. The counsel went on to pray the court to upheld the decision of the trial court.

Rejoining, Mr. Mwaisondola reiterated his submission in chief and added that exhibit P2 was not cancelled, the contract was expired when the repossession was done.

Having heard submissions of the both parties and keenly pass through the records of the appeal, I am now called to determine whether the appeal at hand is meritorious. In doing so, I will deal with the grounds of appeal advanced by appellant and submitted by both parties one after another.

First, I am persuaded to put it clear that I totally agree with both parties that there were two lease contracts between them and fact that the respondent faulted the contracts by failure of paying due payments as

per the terms of the contracts. However, the evidence shows that their contracts was ended on 15th June 2016 and 15th June 2019 but on the first contract the respondent was proceeded to pay the appellant and appellant proceeded to receive the money even after expiration of contract. The appellant did not take any measures as the contract was expired, this made me to believe their contract was renewed or still existing by the conduct of the parties (Implied contract).

Implied contracts are a creature of the statute. Section 9 of the Law of Contract Act, [Cap 345 R. E. 2019] (the Act) provides: -

> *'In so far as the proposal or acceptance o f any promise is made in words, the promise is said to be express; and in so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.'*

See the case of **British American Tobacco Kenya Limited vs. Mohan's Oysterbay Drinks Limited,** Civil Appeal No. 209 of 2019.

On first and second ground of appeal, it is appellant's counsel contention that the appellant did not attach the item rather than she repossess the item from the respondent as per the contract they entered. Mr. Amos opposes the claim on the fact that exhibit P2 (Caterpillar Excavator Contract) clause 12.2.2 and exhibit P3 (Ford Ranger Contract) clause 13.2.2 provide that the repossession of the item should follow the

termination of the contract and that the appellant should have obtain the order of the court first.

When I went through clause 12.2.2 of exhibit P2 and clause 13.2.2 of the exhibit P3 I found the clauses provide for the same explanations. The clauses read;

> *'.... after due demand, cancel this agreement, obtain possession of the goods and recover from Lessee, as pre-estimated liquidated damages, the total amount of rentals not yet paid by the Lessee, whether same are due for payment or not.'*

From the above excerpt, it apparent that the clauses stipulate that the repossession of the items should follow the demand note and cancellation of the contract. As for the demand note, I can say that exhibit D1 tendered before the trial court prove that the appellant issued her demand note to the respondent pertaining the contracts default. However, the demand note (exhibit D1) was issued on 13th September 2017 and the appellant tried to repossess the item on 31st May, 2017 to 01st June, 2017, that shows the appellant issued the demand note after repossession. On the issue of contract termination, there is no evidence that proved the appellant cancelled the contract before repossession. From this point I swayed to agree with the respondent's counsel

submission that the appellant repossession was violated their contracts terms and therefore this ground has no limbs to stand.

As to the issue of specific damages awarded to the respondent by the trial court, am at per with the counsel that the specific damages must be proved specifically. See the case of **Samwel Kimaro vs. Hidaya Didas,** Civil Appeal No. 271 of 2018 CAT at Dar es Salaam, **Strabag International (GMBH) vs. Adinani Sabuni,** Civil Appeal No. 241 of 2018 CAT at Tanga and **Stanibic Bank Tanzania Limited vs Abercrombie & Kent (T) Limited,** Civil Appeal No. 21 of 2001 CAT at Dar es Salaam.

The appellant's counsel argued that the respondent failed to prove her specific damages he claimed before the trial court. He contended that there was no valid document tendered to support the amount claimed by the respondent. Mr. Amos, the respondent's counsel conflicted the said point and argued that the respondent manage to prove specific damage as was in Exh. P1 which assisted the trial court to conclude that respondent was entitled to. I read Exh P1 find that respondent provide an itemized costs incurred when she was out of use of the hired equipment. I found no fault for trial court to rely on Exh. P1 to award what has been awarded and I found this ground to be devoid.

Regarding the issue of general damages as raised in fourth ground, the position of the law regarding an award of general damages is settled. There is a number of authorities stating that general damages are normally awarded at the courts discretion and need not to be specifically proved. See **Stanibic Bank Tanzania Limited vs. Abercrombie & Kent (T) Limited** (supra) and **Alfred Fundi v. Geled Mango and Two Others**, Civil Appeal No. 49 of 2017 at Mwanza (unreported). However, it is trite law that, interference of the award of damages is only permissible if it will be seen that the magistrate or a judge assessed the said damages by using a wrong principle of the law. If it happens so, the appellate court should disturb the quantum of damages awarded by the trial court. In **Davies vs. Powell (1942)** 1 All ER 657 which was approved by the **Privy Council in Nance vs. British Columbia Electric Rail Co. Ltd** (1951) AC.601 at page 613 it was stated as follows:

> *'Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case ...before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking into*

> *account some irrelevant factor or leaving out of account some relevant one); or, short of this that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage'*

In this appeal, I found this is not the issue to detain me long, the trial magistrate did assign the reasons for awarding the respondent a general damage to the tune of Tshs. 10,000,000/=. At page 13 paragraph 3 of the trial court judgment it reads;

> *'As it is without doubt that the plaintiff company was prevented to operates its work by the defendant's act, the plaintiff also was to a greater extent disturbed in his mind and psychologically, I find that the amount of Tshs. 10,000,000/= as general damages suffice to make him good.'*

I found the reasons given is practical and logical and the Magistrate did exercise his discretion power judiciously.

As to the issues regarding the fifth ground of appeal, the appellant's argued that although the issues raised by the appellant in counter claim answered in affirmative, her prayers was not granted. On this point I see contrary, one prayer of the appellant in her counter claim was granted and another was not granted but the trial court gives an explanation. The trial court ordered the respondent to pay an

outstanding amount to the appellant and regarding the issued of repossession of the two contractual items the trial court stated that it cannot give such order as the contracts between the parties still subsist.

On the order for negotiation, without further ado, I am totally at per with the trial court decision of this point. Taking into consideration that the parties' contracts were ended but their contractual obligation was still existed by conduct and performance of the parties, their contract was still on, but since the initial and formal contract was already expired, I also find the need of the parties to sit together and negotiate how they will deal with the matters. In the case of **Mariam E. Maro vs. Bank of Tanzania,** Civil Appeal No. 22 of 2017 CAT at Dar es salaam, the Court of Appeal held that:

> *'In view of the above, we are of the considered view that the respondent acted well within the letter of the Voluntary Agreement. It is the law that parties are bound by the terms of the agreement they freely enter into. We find solace on this stance in the position we took in* ***Univeler Tanzania Ltd v. Benedict Mkasa t/a Bema Enterprises,*** *Civil Appeal No. 41 of 2009 (unreported) in which we relied on a persuasive decision of the Supreme Court of Nigeria in* ***Osun State Government v.Dalami Nigeria Limited,*** *Sc. 277/2002 to articulate:*

Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute.'

Prompted from the above decision, in our case at hand, I found it is correct for the parties themselves to negotiate and decide the new terms since their first contracts were already expired but they are still in contractual obligations by implied contract. Therefore, the order of negotiation as issued by the trial court is not disturbed.

Lastly, on the issue related to the award of costs to the respondent, it is a well-known principle that granting costs is a discretion of the court. Nonetheless, the same has to be exercised judiciously. This was well stated in the case of **Anna Ufoo Ulomi vs. Ramadhani Mohamed**, Land Appeal No. 15 of 2016.

'Regarding costs, the law gives discretion for the court/tribunal to impose costs. Where the Court directs that no costs shall be paid, the court shall state its reasons; section 30 (1) of the Civil Procedure Code.'

In the above case the court said where the court directs that no costs shall be paid it shall give reasons. In the case at hand the trial court Magistrate finds just to award the costs to the respondent and he did so. I am hesitating faulting the trial Magistrate for his order to award the costs of the suit to the appellant as he exercised his entitled power. Section 30 (1) of the Civil Procedure Code [Cap 33 R.E 2019] reads:

> '***30.***-*(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law from the time being in force, the costs of, and incidental to, all suits shall be in the discretion of the court and* ***the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid;*** *and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.'*

The law is settled that, to grant or refuse to grant costs is always court's discretion. Such discretion essential to be exercised judiciously. And further, those costs in the suit are a right of a winning party unless there are reasons for not awarding them. The trial Magistrate explained at page 13 of the judgment that, the respondent being awarded the special and general damages, the appellant should pay her plus the costs of the suits.

In the circumstances, I found that the present appeal is without merit, I therefore went on dismissing it in its entirety.

It is so ordered.

DATED at **MUSOMA** this 23rd day of February, 2023.

M. L. Komba

Judge

23rd February, 2023