

TANZANIA / JUDGMENT

finca microfinance bank vs peter makanji 2022 tzhc 86 27 january 2022

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF DAR-ES-SALAA,) DAR-ES-SALAAM CIVIL APPEAL NO. 100 OF 2021
(Originating from the judgement and Decree of the District Court of Kiiombero at Ifakara in Civii
Case No. 07 of 2017) FINCA MICROFINANCE BANK APPELLANT VERSUS PETER MAKANJI
RESPONDENT

JUDGMENT

Hearing date on: 23/11/2021 Judgment date on: 27/01/2022 NGWEMBE, J. The appellant Finca Microfinance Bank is in this court challenging the judgement and decree of the trial court, which was decided in favour of the respondent. The trial court decreed that the appellant should pay the respondent special damages to the tune of TZS. 59,003,000/=; General damages of TZS. 20,000,000/= and costs of the suit. The genesis of this appeal goes back to the loan facility letter executed by the appellant and one Faida Lucas Mwendesha of Muhola, Morogoro way back to 15th January, 2015. The loan facility involved TZS. 8,000,000/=. The agreed credit period was 12 months. The loan comprised interest rate of 4% per month, costs of preparing such loan was 0.5% of the total loan. Penalty 0.5% per day up to 30 days and other costs incurred by the appellant in collection of those debts. The source of conflict between the appellant and the respondent arose when the appellant confiscated all goods of the respondent in his shop located at shop No. 32 at Ifakara Main Market area. Presumably such confiscation was a direct consequence of failure of Mr. Faida Lucas Mwendesha to repay such loan to the appellant. The appellant claimed to have proved that the said shop belongs to Faida Lucas Mwendesha. That the appellant verified that the shop belongs to Faida Lucas Mwendesha. The market leaders also assured them that the shop was rented to Faida Lucas Mwendesha. As a result, FINCA advanced a loan of Tshs 8,000,000/= to him. The guarantor to that loan facility was Martin Matangila (Plot no. 530 block C). Following default of Faida Lucas to repay such loan, the appellant on 10th day of July 2015 decided to confiscate all properties in shop No. 32, which they believed to belong to Faida Lucas Mwendesha. The interesting twist of this appeal, indicates that, the respondent herein appeared before the District Court of Kilombero at Ifakara- Morogoro asserting that, he is the owner of business in shop No. 32 and prayed against the appellant the following reliefs; first a declaratory order that the appellant's act of confiscating the respondent's properties is

unjustifiable, unlawful and illegal; second special damages to the tune of Tanzania Shilling Fifty Nine Million and three thousand (59,003,000/=); third general damages for embarrassment suffered by the respondent due to illegal acts of the appellant to the tune of Tanzania shillings Thirty Million (30,000,000/=); fourth costs of the suit. Also, the respondent prayed for the Interest at the court rate from the date of judgement to satisfaction of the decree and Interest at commercial rate of the principal sum from commencement of the suit to the final judgment. At the end of trial, the learned Magistrate decided In favour of the respondent and ordered that:- the defendant's (appellant) act of confiscating the plaintiff's goods was unlawful and unjustifiable; the defendant is ordered to pay the amount of TZS 59,003,000/= as compensation for specific damages to the plaintiff; the defendant Is ordered to pay the plaintiff TZS 20,000,000/= as general damages; no Interest at court rate neither commercial rate Is ordered. Being dissatisfied with the trial court's decision, the appellant has preferred this appeal challenging the trial court's judgement clothed with five (5) grounds namely:-

1. The trial magistrate erred In law for failure to analyze properly the evidence adduced;
2. The trial magistrate erred In law for awarding the respondent excessive amount of money as special damages without proof and justification;
3. That the trial court erred In law for awarding the respondent general damages without justification;
4. The trial magistrate erred In law for making findings, which were not supported by any evidence; and
5. That In analyzing evidence the trial magistrate was bias. When this appeal came for hearing, both parties were represented by learned advocates. While the appellant was represented by advocate Yusta Kibuga, the respondent was represented by advocate Bageni Elijah. In arguing the appeal, the learned advocate for the appellant successfully prayed to consolidate three grounds and argued them jointly (first, fourth and fifth), while the remaining two grounds were argued separately. Commencing with the consolidated grounds (1, 4 and 5), the learned advocate advanced reasons pointing on failure of the trial magistrate to analyse properly the evidences adduced therein. Also raised the issue of biasness of the trial Magistrate in deciding their suit. Forcefully, argued that there was no evidence that the confiscated properties were owned by the respondent and that the owner was Faida Lucas Mwendesha who defaulted the appellant's loan. To justify her argument, she attacked the validity of a piece of paper prepared by the respondent and tendered in court as evidence of the properties confiscated by the appellant. That, such piece of paper lacked authenticity, and more so, the respondent had no Tax Identification Number (TIN) from TRA. The one tendered in court was obtained on 3rd August 2015, while the alleged confiscation of those properties were done on 10th July 2015. Above all, she challenged that, the respondent had neither business licence nor lease agreement from the shop owner. Therefore, the trial court had a duty to determine who was the owner of that properties. In response therein, Mr. Bageni Elijah reasoned quite convincingly, that the trial Court properly exercised its

duty in analysing the available evidences before arriving to the conclusion. That the evidences of the respondent(PW1) proved to the balance of probabilities that he was the true tenant of shop number 32, where the properties were confiscated. Second the testimonies of PW1 was supported by PW2 and PW3 whose evidences were all linked with the ownership of properties confiscated by the appellant; third the evidence of the respondent proved that when he rented the shop No. 32 it was empty and the alleged Falda Lucas Mwendesha had no business therein; fourth, the properties which were confiscated by the appellant belonged to the respondent and no one had claim of right over them save the respondent; lastly, to question or raise an objection on appeal over a document which was admitted unopposed during trial (PMM2) is irregular and unacceptable. Responding on failure of the respondent to possess business licence, the learned advocate termed It as Irrelevant and unfounded argument. He justified that, the appellant found the respondent's wife at the shop, when they went to confiscate their properties. That, the appellant did not and does not deny to have confiscated the respondent's properties. In that effect exhibit PMM 3 support the testimonies of PW1, PW2, and PW3. Therefore, the ground lacks merits and is unfortunate. Arguing on the second ground. The learned advocate for the appellant contended that, the award of specific damages was excessive and was granted without proof. Challenged the trial Magistrate that she relied on PE3, the inventory and the photos taken during confiscation of those properties. Further, submitted that, those exhibits did not display the total amount of the confiscated properties. Thus, justified that the specific damages of Tanzania Shilling 59,003,000/= was not supported by evidence. Supported her argument by referring to the case of Zuberi Augustino Vs. Anseth Mgabe [1992] T.L.R 137(CAT), where it was held that specific damages must specifically be pleaded and proved. In response Mr. Bageni Elijah conceded that as a general rule, specific damages must be specifically pleaded and proved. Argued that, the respondent during trial, complied with such rule by pleading specifically and adduced specific evidences to prove such damages. In so doing the respondent tendered exhibit PMM2 indicating specific amount as pleaded, and the appellant never objected its admissibility, thus, amounted into admission. The inventory of the confiscated properties when read together with exhibits tendered therein supported the evidences of the respondent which proved specific damages. Submitting on the 3rd ground, the advocate for the appellant contended that, general damages awarded to the tune of TZS. 20,000,000/= was unjustified. Justified her argument by rightly pointing out that, general damages are awarded on discretionary powers of the court upon having justifiable reasons. Referred this court to the case of NMB Vs. Maisha Mussa Uledi, Civil Application No. 410/07 of 2019, whereby the Court insisted that, general damages are awarded by the trial court after consideration and deliberation on the evidence on record, able to justify the award. In this appeal the award of general damages by the trial court were not justified. Hence, prayed this appeal be allowed and quash the proceedings, judgement and decree of the trial court with cost. In response therein, Mr. Bageni for the respondent, like in the 2nd ground, conceded on the legal principles laid down by the advocate for the appellant, that in awarding general damages the court has discretionary powers, which always are exercised judicially. However, he departed from the appellant's argument, by supporting the trial

court's award of general damages. He buttressed that there was justification and proof that the appellant confiscated, without any cause, the respondent's properties which was unlawful and illegal. Hence caused suffering to the respondent. He cited the case of Tanzania Sany Cooperation Vs. Africa Marble Co. Ltd [2004]T.L.R 155. Rested by praying this appeal be dismissed with costs. In brief rejoinder the advocate for the appellant reiterated her submission in chief and added that the evidence of PW2 was contradictory with that of PW1 and that the admissibility of exhibit PE3 was correct, but did not prove the claim. Having calmly summarized extensively the rival arguments of learned counsels, and upon going through the entire evidences on record, I find certain issues are not disputed by either party. First, it is a fact that the disputants met for the first time in this dispute. Prior to it had no relationship, be it, business relationship or rental; second the source of this conflict is the action of the appellant to confiscate the properties in shop No. 32; third, the business relationship which led into confiscation of the alleged respondent's properties were between the appellant and one Faida Lucas Mwendesha who is not a party to this appeal; lastly, the appellant does not dispute to have confiscated all properties in shop No. 32. The Issues in dispute are; who was the true owner of the confiscated properties between the respondent and Faida Lucas Mwendesha? Second whether the appellant conducted due diligence prior to confiscation of those properties? I am sure in answering these two questions will lay a solid foundation on the grounds advanced by the appellant in this court. Perusing Inquisitively on the proceedings of the trial court, at pages 12 to 14, It is clear that the respondent rented the said shop from one Faida Luca Mwendesha two months prior to expiry of his tenancy agreement. That those shops belong to Kllombero Town Council and the tenancy agreement expired on 20/4/2015. That the respondent's tenancy agreement was witnessed by James Ntezlwa and Masatu Mathlas. This fact is supported by PW3 as per page 36 of the proceedings whereby he confirmed that the respondent commenced his business in that shop on year 2015. On 29/6/2015, the appellant came to his shop twice intending to collect or confiscate properties of Faida Lucas. Without laboring much on this point, the evidence on record speaks louder that Faida Lucas Mwendesha was a tenant in shop No. 32, but prior to expiry of his tenancy agreement, he subleased it to the respondent. In fact, Faida Lucas had premeditated decision to flee from paying Finca's loan. Therefore, to answer the first question, it goes like a brightest day light, that the evidence points all fingers to the respondent that on the fateful date, he was the true owner of the confiscated properties. The second issue is equally simple as was rightly observed by the trial magistrate, that the appellant lacked due diligence in the whole exercise of confiscating those properties. Had they conducted thorough due diligence, obvious they would have observed that Faida Lucas Mwendesha has jumped their loan and has disappeared in an unknown place, thus may turn into criminal investigation and criminal trial. More so, the appellant had an alternative remedy to claim its money from collaterals. The loan accessed by Faida Lucas was guaranteed by Martin Matangiia as per pages 61-62 of the proceedings. Doing what they did was equally improper and unprofessional. Having answered those two issues, I now turn to discuss and determine grounds of appeal as were advanced by the appellant and rightly argued by both parties. The consolidated grounds of appeal, fall within

the principles enunciated under sections 110 and 111 of the Evidence Act Cap. 6 R.E. 2019. As rightly summarized above, during trial, the respondent proved that he was a businessman owning properties in shop No. 32, located at Ifakara Main Market area. Such fact was supported by PW3 and his complaint was also reported to the Ward Executive Officer who testified as PW2. Moreover, he produced T.I.N number marked exhibit P.E.I, report by WED marked exhibit PE. 2, the Inventory and photos taken on June 2015 and July 2015 marked as exhibit P.E 3. Such pieces of evidence had only one purpose, that is to prove ownership of the suit properties unless contradicted by more reliable evidences. In the absence of that other evidences, obvious will remain forever as true and reliable facts. Maybe I should add a leaf on the argument advanced by the learned advocate for the appellant that, the inventory was made by the respondent with some photos. This is a fact, which ought to be contradicted by another more reliable documentary evidences. In this appeal, the appellant is merely challenging the validity of that inventory without producing a more reliable evidence. For instance, it was expected the appellant could produce the list of properties they confiscated attached with valuation report from experts. Such valuation report would provide the true value of the confiscated properties. Such evidences would help the trial court to weight on which side had more reliable evidences. Usually, courts decide cases based on evidences from parties. It cannot decide a suit based on its own facts and findings. A.D. Singh's on Judgements and How to Write them, A*** edition, defined judgement to mean an expression of the opinion of a judge arrived at after due consideration of the evidence and of the arguments advanced before him. It is a cardinal principle which must not be forgotten that a court judgement should be based strictly on the evidence on record, and not on outside evidence, however acquired. The same position is provided for in Civil Procedure Code, Order XX Rule 4 of CPC that:- "A judgement shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision" 10 Moreover, the late Judge Buxton D. Chipeta in his book Civil Procedure in Tanzania, A Student Manual at page 203 defined judgement in a civil suit to mean;- "a reasoned account and exposition of the principles of law applicable to such facts and the decision to the rights and liabilities of the parties to the suit" Above all, the contents of a judgement were emphasized by the Court of Appeal in the case of Hamis Rajabu DIBagula Vs. R,[2004] T.L.R. 19,thus, the court judgement must be clear in respect of material facts; systematic, that is, flow of logical thinking up to the conclusion; and straight forward. It goes therefore that, in the absence of any other relevant and reliable evidences against the inventory produced by the respondent during trial, the trial court was right to consider it. Therefore, I find the appellant's complaint is unfounded. Accordingly, the consolidated grounds of appeal lack merits. Considering on special damages, I fully agree with both counsels, that the principle therein is well developed in our jurisdiction. That whoever claims for special damages must first plead, second must establish and prove it on balance of probabilities. This principle drew its inference from Lord Macnaghten in Bolag Vs. Hutchison [1950] A.C. 515 at 525 where he ruled that special damages are exceptional in their character and therefore, they must be claimed specifically and proved strictly. Such understanding was adopted in our jurisdiction through several decisions of the Court of

Appeal, including in the case of Zuberi Augustino Vs. Anicet Mugabe [1992] T.L.R. 137 at page 139 and 11 in Civil Appeal No. 21 of 2001 Stanbic Bank Tanzania Ltd Vs. Abercrombie & Kent(T) Ltd. According to Black's Law Dictionary, (8th edition) defined Special damages to mean "damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved" In this appeal, the respondent herein claimed in his plaint (paragraph 3) special damages of TZS. 59,003,000/= and general damages of TZS. 30,000,000/=. However, in paragraph 5 of the plaint he alleged his shop to have properties worth TZS. 55,303,000/= which amount was proved by an inventory admitted in court as exhibit PE3. Surprisingly such value of properties was not prayed for in the plaint. Perusing inquisitively on the trial court's proceedings, PW1 repeatedly insisted that the value of his properties was TZS. 55,303,000/= (See pages 14, 20 & 27 of the proceedings). Such value of the confiscated goods was not contradicted by the appellant. For instance, DW2 an officer from the appellant admitted to have confiscated all properties in shop No. 32. On page 64 of the proceedings, he admitted to have recorded all properties found in shop No. 32, but that recording did not indicate the value of those properties. Added that those properties were later sold. The proceeds of selling those properties were neither disclosed during trial nor in this appeal. Therefore, there is no comparative data on the true value of those properties. Moreover, DW2 testified that Faida Lucas took loan of TZS. 8,000,000/= and defaulted to repay a total sum of TZS. 6,912,953/= which triggered this suit at hand. 12 Considering more on the claim for special damages, I find the prayer of the respondent in his plaint was ambiguous in a manner as quoted hereunder: "That this Honourable court be pleased to order the defendant to pay the plaintiff a total sum of TZS. 59,003,000/= being compensation for specific damages incurred by the plaintiff" Literally, the plaintiff was asking the court for compensation of the value of his properties and special damages. Such drafting I think misled the trial court, hence ended up granting special damages to the tune of TZS. 59,003,000/= while same was not proved to the standard required by law. Much as I would apply the principles for special damages as discussed above, the same are not applicable in the circumstances of this appeal. Accordingly, the trial court was misled in granting special damages, which were only pleaded, but were not proved. Thus, the claim for special damages was wrongly granted. Considering on the claim for the value of the confiscated properties, I find the respondent was entitled to claim for recovery of his properties or equivalent value. It is a compensatory in nature or indemnity to the respondent for the confiscated properties. The respondent was entitled to recover his properties or equivalent value. I therefore, grant the respondent compensation of his properties to a tune of TZS. 55,303,000/= only as true value of his properties prior to confiscation. The last ground of appeal is related to award of general damages of TZS. 20,000,000/=. Both counsels have rightly argued on the basic 13 principles guiding award of general damages. First, it is awarded under discretionary powers of the court. The plaintiff need not even plead specific amount, rather the trial court may either grant or refuse to grant based on the prevailing circumstances of each case. However, the appellate court may interfere with the quantum of general damages fixed by the trial court. This position was held by the Court of Appeal in the case of Cooper Motor Corporation Ltd

Vs. Moshi/Arusha Occupational Health Services [1990] T.L.R 96. Despite the discretionary powers of the trial court to grant general damages, yet, this court has powers to consider and decided otherwise. In the circumstance of this appeal, I find the respondent did not deserve any amount more than TZS. 500,000/= as general damages. Finally, this appeal is partly successful and partly dismissed. For clarity and for the reasons provided for herein above, the respondent is entitled to the value of his properties of TZS 55,303,000/= and general damages of TZS 500,000/=, In the circumstance of this appeal, it is just and equitable to order each partly to bear his/her own costs. Order accordingly. P.J. NGWEMBE JUDGE 27/1/2022 Court: Judgement delivered at Dar es Salaam In Chambers on this 27th day of January, 2022 in the presence of Jovin Manyama for Yusta 14

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advocate for Appellant and Mr. Jovin Manyama for Bageni Advocate for the Respondent. Right to appeal to the Court of Appeal explained. PJ. NGWEMBE ..j) JUDGE 27/1/2022 15

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