

TANZANIA / JUDGMENT

20150122 TZHC Mwanza

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TZHCDECIDED
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I IN THE HIGH COURT OF TANZANIA ' ' . \ I • I IN THE DISTRICT REGISTRY OF MWANZA .
ATMWANZA \ LAND APPEAL CASE NO 29 OF ~13 (from the decision of Mwanza District Land and
Housing Tribunal in Land Case No. 130 of 2008) HAMZA ADAM I I I I I I I . I I I I I I . I I I I I I . I •
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JUDGMENT

04/12/2014 & 22/01/2015 SUMARI, J. The respondent instituted the case against the appellant at the Land District and Housing Tribunal praying intera/ia for the following reliefs:- payment of Tsh 100,000/= being average net profit from 10.09.2008 to 10.11.2008; Tsh 100,000/= being average net profit from 10.10.2008 until final disposal of the application; payments of Tshs . .5,000,000/= anticipated average net profit the applicant could l have earned from the loan advanced ' to him by HASS Petroleum(T) Limit~d; Tshs. 8,000,000/= being 40% of the said loan which the respondent have been compelled to pay; Tsh. 5,000,000/= as general damages; Tshs. 2,000,000/= as putative damages 1~ =

- and an order that the appellant be ordered to open up the locked premises and the respondent be at the liberty to take his parts and other belongings therein to the alternative premises. This being the first appeal, ∴ it is my duty to_ analyze the evidence of both sides so as to satisfy · myself whether the decision of the trial Court was justified according to the evidence adduced. See the case of Damson Ndaweka Versus Ally Saidi Mtera Civil Appeal No. 5 of 1999, CAT (unreported). According the facts· on record, as_ accepted by the trial tribunal the genesis of the respondent's claim against the appellant is that, sometimes on 1st September 2007, the appellant and respondent entered into a lease agreement whereby the appellant leased his suit business premises located at Plot No. 246 Block "U" Pamba road within Mwanza city for an annual consideration price of Tsh. 1,200,000/=. As per the agreement between the appellant and respondent the lease· contract between the two contending parties was supposed to expire on 30th August, 2008. In his sworn testimony during trial, the respondent alleged that, he used to sell used spare parts in the suit premises and that before the lease - . ~ 2 ' ~ contract had expired, on 1st July 2008 the appellant served the respondent ' .__r ~ with a three months notice to terminate the lease agreement. That on 10th September, 2008 when the respondent went to his business premises or shop he found the door locked with padlocks. That a th day prior to that incident, that is, on 09 September,

2008 one Alfred Sebangella from Uganda had sold him some used spare parts valued Tsh. 56,620,000/=. That Alfred Sebangella demanded to be paid an advance of Tsh. 20,000,000/= but because the respondent did not have such amount of money he entered into a loan agreement with one HASS PETROLEUM who advanced him that amount on conditions that the respondent will supply them used spare parts. That as it was late evening hours around 5.00pm Alfred Sebangella declined to accept the said amount, that is, Tsh. 20,000,000/= for safety reasons of which the respondent kept that amount of money in the suit premises. That having realized his shop was locked the respondent reported the matter to the ten cell leader who summoned the appellant. The appellant admitted that he is the one who locked the respondent's shop. Indeed, it is the appellant's act of locking the respondent's business that sparked this instant dispute, as such, the respondent successfully referred the dispute to the District Land and Housing Tribunal praying for the reliefs stated therein earlier hereinabove. Indeed the fact that the respondent's suit premises was locked by the respondent was supported by the ten cell leader one Ramadhan Mrisho (PW2) who tendered the minutes of what transpired on 10.09.2008" ex. P2". Also, Dericla Mtegeko (PW3) an employee of HASS PETROLEUM, supported that the respondent had a contract with them and they advanced him with Tsh. 20,000,000/= loan and if he fails to pay the same he was subjected to a penalty of 8,000,000/=. In his affirmed defence, the appellant (DW1), testified that he started to rent the disputed premises to the respondent since 01.09.2003. That the contract with the respondent was renewed annually. It was his testimony that on 01/07/2008 he notified the respondent that after the expiration of the lease the respondent was supposed to handle back the suit premises to him. He insisted that after the contract between the appellant and respondent had expired on 09/09/2008 he reported to the street chairperson (PW2) where he complained to him about that the respondent was neglecting to pay rent to wit he put four padlock in the respondent's shop. The respondent was called for mediation several times but he did not appear. DW1, categorically denied to have known the agreement between the respondent and HASS PETROLEUM, he categorically denied the fact that the respondent lost a sum of Tsh 20,000,000/= as he alleged. He tendered the said notice "exhibit D.2" and mediation letter was admitted as "exhibit D3". Finalizing his defence the appellant, totally denied the respondent's claim sought in his application. After full trial, the learned chairperson decreed that; the appellant should pay the respondent the following: .

- i. Application is allowed for avoidance of doubt the Tsh 100/000/= be paid daily from the date of closure of business premises till final payment. ii. Also this Tribunal granted Tsh. 20/000/000/= but was not pleaded on the Application and amendment of pleading could have been thought,
111. Cost of the suit. ~ 5 The appellant felt aggrieved with the judgment and decree of the trial Court of which he preferred an appeal before this Court setting forth two grounds of appeal as follows:-

1. That the respondent did not prove loss of Tsh. 100,000/= may, being the average daily profit he was earning prior the closure by the appellant of the suit premises the learned chairperson grossly erred in awarding the said sum to the respondent
 2. , That the award of Tsh 20,000,000/= was not Justified as the same was not pleaded nor proved by the respondent. During the hearing of this appeal, the appellant was represented by ·Mr. Adam Robert, learned counsel whereas the respondent was represented by Mr. Aron, learned counsel. In support of his grounds of appeal, Mr., Adam Robert submitted that the trial learned Chairperson erred in awarding the respondent a sum of · Tsh 100,000/= daily as loss of profit while the said amount was not 6 IL-
- proved. That the special damages which the respondent was awarded were 0 · supposed to be proved before the same was granted. That Section 3(2)(b) of the law of Evidence Act, Cap 6 requires the plaintiff or the defendant to prove his claim on preponderance of probabilities. In reply to this ground Mr. Aron, learned counsel submitted that there was a proof that the respondent was a businessman with legal tenancy agreement with the appellant. That the trial Tribunal correctly directed itself as far as the proceedings were concerned. Now, the crucial question to be determined by this honourable Court is whether the respondent proved his claim for loss of profit. Indeed after going through the Court's record I am positively satisfied that the respondent failed to prove his claims for loss of profit. It cannot be faulted that the claim of loss of profit falls under special damages which ought to be strictly proved. Unfortunately, there is no scintilla of evidence from neither the respondent nor his witnesses to support his claim that he was earning an average of Tsh. 100,000/= daily profits per month. However, reasonably one cannot simply deny the fact that the respondent was earning through his business. I thus believe he is entitled to at least a ~ 7 y , minimum rate of daily loss he incurred. This is rated to at least Tshs. "¼J · 20,000/= daily loss. I am very mindful of the law that, once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one (see Masolele General Agencies v. African Inland Church Tanzania (1994] TLR 192 (CA). and Zuberi Augustina v Anicet Mugabe, (1992] TLR 137). However, in this particular case reasonably one cannot simply deny the fact that the respondent was earning through his business .. I thus believe justice demands that the respondent is entitled to at least a minimal rate of daily loss he incurred. This is rated to at least Tshs. 20,000/=daily ·loss. I therefore fault the award of Tshs. 100,000/= daily and substitute thereto an award of Tshs. 20,000/= (twenty thousand) daily from the date of closure till full payment. · . As for the 2nd ground of appeal, Mr. Adam learned counsel submitted that the award of Tshs. 20,000,000/= was not justified as the same was not pleaded nor proved by the respondent. He fortified his arguments with the provision of Order 6 Rule 3 of the Civil Procedure Code, Cap. ·k· 8
- 33(R.E.2002) and the case of Thorp versus Holds Worth (1876) Vol.3 \..J · C.D. 637. ' Responding to what was submitte? by the appellant's counsel, the respondent's counsel submitted that Tshs. 20,000,000/= awarded were not pleaded, he submitted that there was rio such an award of that amount. That there is no way the respondent can execute the alleged

award which he did not plead. Indeed, it is of course a salutary and necessary rule that every party is bound by his or her own pleadings see *Pushpa Patel Versus The Fleet Transport Co.Ltd* (1960) E.A; 1025. It was also stated in *Juma versus Manager, PBZ Ltd and Others*, Civil Appeal No. 07 of 2003, CAT (unreported), that, "Needless to say the parties and the court are bound by the pleadings and issues framed; and proceed to deliberate on such issues, this issue was not before the trial court and hence it was not dealt with". On the question of Tshs. 20,000,000/= awarded to the respondent I have upon going through the judgment of the trial tribunal, found the following words of the trial learned Chairperson:- 'I "...I could also have granted the Tshs. 20,000,000/- but was not pleaded on the application and amendment of pleadings could have been thought" There is no gainsaying that the above stated words are self explanatory that since the respondent did not plead Tsh. 20,000,000/=. The trial learned chairperson saw no need to grant it to him. The said Chairperson went further to state that the respondent would have thought ' to amend his pleadings if he thought his claims were meaningful. ' Astoundingly, looking at the contents of the decree with respect of this issue, it reads as follows:- ii. Also this Tribunal granted Tsh. 20,000,000/- but was not pleaded on the Application and amendment of pleading could have been thought. Notably, there is a great confusion between the award of Tshs. 20,000,000/= in the decree and judgment Since the same was not pleaded but as amply stated by the Chairperson but erroneously decreed it, I hereby invalidate or fault the amount of Tshs. 20,000,000/= granted to the respondent. Notwithstanding the above stated, it cannot be disputed that the actions and conduct of the appellant were not praiseworthy. Though the contract between the appellant and respondent had expired as from 01/09/2008 the appellant was not supposed to lock the disputed premises. If the appellant thought that the respondent was notorious in paying rent or had failed to vacate his premises the appellant was not supposed to take the law in his hands, he would have, taken a course of law and refer the matter to the land tribunals so as to claim for arrears of rent, if any, and vacant possession of his premises. By putting the pad locks in the respondent business premises, the appellant disallowed the respondent to take his goods therein to some other places and resumed with his business an act which caused daily loss. The courts cannot applause and celebrate such conducts. I think a relief of general damages to the tune of Tsh. 5,000,000/= as prayed by the respondent in his application. General damages can be asked for by "a mere statement or prayer of a claim" see the case of *The Judge i/ c High Court, Arusha and N.I.N Munuo Ng'uni Civil Appeal No. 24 of 1998* reported in TLR [2002] CA. Similarly putative or exemplary damages, is inevitable under the prevailing circumstances of this case. I am of the opinion that they should be awarded too. In the case of *Davies v Mohanlal Karamshi Shah*

[1957] E.A. 352, it was held inter alia that "punitive or exemplary damages are, as their names imply, damages by way of punishment or deterrent. They are given entirely without reference, to any proved actual loss suffered by the plaintiff'. Also in the case of *Rev. Christopher Mtikila Versus Attorney General* [2000] T.L.R 180, Munuo, J.A. quoted with approval the words of the House of the Lords in *Rookes versus Barnard* [1964] AC 1229

through Lord Delvin, stressing that any award of exemplary damages must be strictly justifiable as compensation for injury sustained. An award of Tshs. 2,000,000/= for putative damages also meets the hands of justice, the respondent shall therefore enjoy the award. In line of the foregoing, the appellant's appeal party succeeds to the extent explained herein below. That the ,appellant shall pay to the 12 ~ (- • respondent Tshs. Twenty thousand (20,000/=) daily loss from the date of v- closure till final payment instead of Tshs. 100,000/= awarded by the trial Tribunal. The appellant shall pay to the. respondent general damages of Tshs. Five million (5,000,000/=) and Tshs. Two million (2,000,000/=), for putative or exemplary damages. The appellant is also ordered to return to the respondent all the properties confiscated from the business premises in good condition. It is accordingly ordered. The appellant shall bear costs. ~ A.N.M. SUMARI JUDGE AT MWANZA 22/01/2015 ~~~'l'~ ,/f' 13 I I . i

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