IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., GALEBA, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 360 OF 2019

JONATHAN KALAZE ..... APPELLANT

VERSUS

TANZANIA BREWERIES LIMITED .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Ebrahim, J.)

dated the 9th day of October, 2015

in

Civil Appeal No. 13 of 2012

JUDGMENT OF THE COURT

9th & 13th May, 2022

MKUYE, J.A.:

The parties to this appeal, prior to the facts leading to the present controversy enjoyed a contractual relationship in which the appellant was appointed as a Mini-wholesale dealer to sell the respondent's products to retail customers. They entered into a contract to which, under clause 3.3 of the same covered the period between 12th October 1998 and 11th October 1999, inclusive of the dates. It is however noteworthy that, the controversy between the parties is not based on the agreement but rather on matters which cropped up after the same had expired. The appellant claimed that after the dealership contract

between the two had ceased, he continued with his private business which included operating a bar and restaurant outlets. According to the appellant, the respondent, through its employees began to frustrate his business supplies. It was alleged by the appellant that the respondents' sales representatives issued directives to the new operators of the Mini-wholesale dealer not to offer for sale her products to the appellant. The appellant on getting wind of this ill-hatched plan responded by lodging a formal complaint to the management of the respondent (Exhibits P1 and P2) but he did not get any response from the respondent. The appellant, believing that his business was being injured, instituted civil proceedings against the respondent claiming, among others, as shown at para 7 of the plaint that in consequence of such interference he lost business profits and further claimed general damages of an amount to the tune of Tshs. 100,000,000/=.

Upon hearing the parties, the trial court found in favour of the appellant and awarded him general damages to the tune of Tshs. 100,000,000/= with an interest of 7% on the decretal amount.

Aggrieved by that decision, the respondent successfully appealed to the High Court. In allowing the appeal, the High Court based its decision on the grounds that it was wrong for the trial court to award general damages of Tshs. 100,000,000/= while the claim was of a

nature of specific damages which required to be specifically pleaded and strictly proved. The High Court held further that had the appellant wanted to claim general damages only, he should not have pleaded loss of business and profit as he did. In addition, it found that the appellant's claim that the respondent stopped other agents from selling or supplying the respondent's products to the appellant was not proved and further that there was no documentary proof to show that there was a bar and restaurant business that existed.

Undaunted, the appellant has lodged before this Court a memorandum of appeal on four grounds of appeal to the effect that:

1. *That, the High Court misdirected itself in determining the appeal in disregard to the pleadings actually before the trial court.*
2. *That, the High Court erred both in law and fact by its finding that a party cannot plead for general damages only when he has suffered loss of business as a result of a tortuous act.*
3. *That, the evidence on record provides sufficient material for award of general damages.*
4. *That, as a whole the decision of the High Court is against the evidence on record and the law applicable to the circumstances of the case.*

At the hearing of the appeal, the appellant was represented by Mr. Emmanuel John, learned advocate whereas, the respondent was represented by Ms. Marina Mashimba, also learned advocate.

On taking the floor, counsel for the appellant opted to argue grounds No. 1 and 2 separately and grounds No. 3 and 4, together.

In respect of the 1st ground of appeal, Mr. John began his submission by stating that, parties are bound by their pleadings and also the court, in making its decision is bound by the pleadings. He added, contending that the court cannot decide on what has not been sought in the pleadings of the parties. He pointed out that the first appellate court, in deciding that the appellant ought to have sought for special damages, which formed the basis of its decision was improper since it was outside the scope of what was stated in the pleadings.

In response, Ms. Mashimba, while agreeing that the parties are bound by their pleadings, submitted that the appellant had pleaded in paragraph 7 of the plaint to have suffered loss of business and profit which are of a nature of special damages which he failed to prove any financial loss. According to the learned counsel for the respondent, the appellant ought to have proved loss of business so as to be entitled to general damages. But he failed to prove. She maintained that the first

appellate judge was guided by the pleadings and not outside the pleadings as claimed by the appellant.

As regards the 2nd ground of appeal, the counsel for the appellant submitted that it was not proper for the first appellate court to have forced the appellant to seek for special damages. In support of this contention, he relied on the case of **Dr. Abraham Ismail Muro v. National Institute for Medical Research and Another,** Civil Appeal No. 68 of 2020 (unreported), in which, the Court, having cited the case of **Melchiades John Mwenda v. Gizelle Mbaga (Administrix of the Estate of John Japhet Mbaga – deceased) and 2 Others,** Civil Appeal No. 57 of 2018 (unreported) stated as follows:

> *"It is elementary law which is settled in our jurisdiction that the Court will grant only a relief which has been prayed for - see also* ***James Funke Gwajilo v. Attorney General*** *[2004] T.L.R. 161 and* ***Hotel Travertine Limited and 2 Others v, National Bank of Commerce*** *[2006] T.L.R 133."*

After all, Mr. John contended that by virtue of Order II rule 2(1) of the Civil Procedure Code, [Cap 33 R.E. 2019] (the CPC) a party is entitled to relinquish/waive his right.

In rebuttal, Ms. Mashimba submitted that it is not true that the first appellate judge required the appellant to seek for special damages.

It was the learned counsel for the respondent's argument that, all that was stated was that the appellant had not proved loss of business or profit and there was no evidence which would have influenced the first appellate court to have awarded any general damages.

Regarding the 3rd and 4th grounds of appeal which were argued together, Mr. John submitted that the evidence of PW1 shows the extent at which the respondent interfered with the appellant's business which evidence was supported by PW3. He added that, exhibits P1 and P2 also supported PW1's evidence. According to counsel for the appellant, the respondent did not cross examine the witness on the issue of interference by the respondent and that there is documentary evidence, the same cannot be disputed by oral evidence. It was, therefore, a humble submission of the appellant's counsel that the appellant had ably proved the claim against the respondent and was entitled to the general damages claimed.

In response, Ms. Mashimba submitted that there was neither oral evidence from PW1 nor documentary evidence to show that there was interference by the respondent with the appellant's business. She pointed out that the appellant had not produced any receipts or business returns to show that, indeed, he operated a bar and restaurant business. She added that, even the persons who were pleaded in para 5 (i), (ii)

and (iii) of the Plaint to have been instructed by the respondent not to sell her products to the appellant were not called to testify in court. In this regard, the learned counsel invited the Court to invoke an adverse inference against the appellant for having not called such key witnesses who, it is alleged that they received instructions from the respondent not to sell the latter's products to the appellant.

Further to that, it was submitted that PW3, who gave evidence on behalf of the appellant had never been mentioned by the appellant in the pleadings as one of the agents of the respondent and that, neither was he mentioned in evidence by PW1. In support thereof, counsel invited the Court to its decision in the case of **Saidi Hemed v. Mohamed Mbilu (1984) TLR 113.**

Ms. Mashimba further assailed the appellant's evidence in that those witnesses whom their voices appear in the cassette recordings (Exhibit D3) did not appear in court to affirm that the voices therein, belonged to either of them. Responding to the contents of Exhibit P1 which was a complaint letter written by the appellant to the respondent, the learned counsel submitted that its existence did not prove that what was written therein is correct. On that basis, counsel urged the Court to uphold the findings of the first appellate judge that there was no sufficient evidence, as correct.

In a brief rejoinder, Mr. John submitted by reiterating his earlier stance, that parties are bound by their pleadings and that it was not necessary to prove special damages in order for one to be awarded general damages. The learned counsel for the appellant wound up by admitting that there were some weaknesses in the appellant's case but maintained that it is the duty of a plaintiff to choose witnesses to testify for him and that decisions should be based on issues raised at trial.

Having heard the submissions from both parties to the appeal, we think, the issue for this Court's determination is whether the appellant was able to prove his claim on the balance of probabilities to warrant the award of Tshs. 100 million as general damages.

Our starting point would be to give an exposition of the law relating to pleadings. As rightly stated by both parties for which we are in agreement, the parties are bound by their own pleadings and any amendment thereof should be with the leave of the court. However, a plaintiff is duty bound to prove his case. This is in accordance with section 110 of the Evidence Act, [Cap 6, R.E. 2019] which provides that he who alleges the existence of any fact has a burden of proof, of course with the understanding that, in civil matters, the standard of proof is one on a balance of probabilities. This stance has been reiterated by the Court and in numerous occasions. See: **Charles**

Richard Kombe v. Evarani Mtungi and Two Others, Civil Appeal No. 38 of 2012; and **Barclays Bank (T) Limited v. Jacob Muro**, Civil Appeal No. 357 of 2019 (both unreported).

In the 1st ground of appeal, the learned counsel for the appellant faults the first appellate Judge for deciding that the appellant ought to have sought for special damages which was beyond the scope of the pleadings. As already stated earlier on, the first appellate Judges' finding was that if the respondent wanted to claim for general damages only, he should not have pleaded loss of business and or profit. We note that in paragraph 7 of the Plaint, the appellant had pleaded as follows:

> *"That, in consequence of the matters aforesaid* ***the plaintiff has been seriously affected in his bar and restaurant business and lost the profit he would have otherwise made*** *and has been greatly* ***injured in his said business and has been put to considerable trouble, inconvenience*** *and expense and has suffered loss and damage* ***and the plaintiff claims general damages at Tshs. 100,000,000/= with interest at commercial rate."*** [Emphasis added]

From the above excerpt there is no gainsaying that, apart from the claim of general damages of Tshs. 100,000,000/= with interest, in the preceding part of that paragraph the appellant's claim based on his business of bar and restaurant that was affected, loss of profit, injury to

his business, inconvenience and expenses. Not only that, but also at pages 65 and 66 of the record of appeal, the appellant (PW1) testified to the effect that he lost his business and suffered mental anguish. At page 66 of the record of appeal, the same PW1, said that he lost his business and entire life, whatever that meant. It is, therefore, undisputed that the appellant had in addition to pleading unquantifiable damages namely he also pleaded loss of business and profit which were specific in nature and required to be specifically pleaded and strictly proved. Fortunately, before the High Court, the learned advocate for the appellant, in a way, admitted that in order for one to claim loss of business, he must claim special damages which was, right in our considered view. This position was also taken in the case of **Msolele General Agencies v. African Inland Church,** (1994) T.L.R. 92 where it was held that a claim of loss of business or profit falls within a specific claim requiring strict proof.

With that said, we agree with Ms. Mashimba that the first appellate court did not make its decision out of the pleadings as the issue of loss of business and profit were pleaded in the Plaint and the PW1's testimony in court. In this regard, this ground in unmerited and we dismiss it.

As regards ground no. 2 contesting the first appellate court's finding that the appellant ought to have sought special damages, we are

mindful that Mr. John, submitted among others that, a party can waive some claims under Order II rule 2(1) of the CPC. The said provision states that:

> *"**Every suit shall include the whole of the claim** which the plaintiff is entitled to make in respect of the cause of action; **but a plaintiff may religuish any portion of his claim in order to bring the suit within the jurisdiction of any court**."* [Emphasis added]

In reading the said provision of the law, we think, the learned counsel has cited it out of context. We say so because, the provision in the first place requires, as a general rule and in mandatory terms the plaintiff to include the whole of the claim in the suit. It then provides as an exception to religuish or waive any portion of claim, for a specific reason, which is to enable the suit to be within the jurisdiction of the court. It means that the said provision cannot be invoked as, and when the plaintiff just desires. In this case it cannot be said with certainty that, that was what was intended by the appellant. Unfortunately, even the learned counsel for the appellant did not explain the circumstances, if any, for the appellant to have relinguished the claim for specific damages if at all existed. In other words, with respect, the appellant ought to observe the provisions of Order II rule 2 (1) of the CPC to the letter if he seriously wanted to rely on it. At any rate, we agree with the

learned counsel for the respondent that the first appellate court's finding was based on what was in the pleadings and the testimony of PW1. Hence, this ground of appeal has no merit and we dismiss it.

As regards the 3rd and 4th grounds of appeal relating to the proof of interference by the respondent into the appellant's business necessitating an award of general damages, we associate ourselves with Ms. Mashimba's submission that there was no such proof be it by oral or documentary. This is because, **one,** although the claim by the appellant, according to the plaint, was based on the alleged interference by the respondent's act of forbidding the dealers from supplying the latter's products to him, PW1 adduced no evidence to show such interference. He relied upon exhibits P1 and P2 in which he allegedly complained to the respondents but the same were not substantiated and more importantly, they were not even acknowledged to have been received by the respondent. On top of that, as was rightly submitted by Ms. Mashimba, a mere existence of allegations contained in the said exhibits P1 and P2 is not conclusive proof of the allegations against the respondent. In which case, it cannot be said that it was a documentary evidence which could not be countered by oral evidence as Mr. John wanted us to believe.

Two, PW1 had mentioned in paragraph 5(i), (ii) and (iii) of the Plaint that certain Margreth, Mr. Masalu and Kotecha were procured by the respondent not to supply or sell her products to him. However, none was called to substantiate the claim in court. Of course, we note that there was an attempt to call one, Julius Masalu as PW2 but for unknown reasons, he disappeared without concluding his testimony. It is also on record that, one, Edingtone E. Mrema testified as PW3. This witness gave evidence that he was stopped by the respondent's employees from selling her products to the appellant but unlike the other three persons who were mentioned in the plaint he was neither mentioned in it nor listed as one of the plaintiff's witnesses. As such, even his testimony is doubtful as an afterthought.

Three, there were three cassettes (exhibit P3 collectively) allegedly recorded from Magreth, Masalu and Kotecha by the appellant which intended to show that the respondent prohibited them from selling or supplying her products to the appellant. However, those persons were equally not called to testify in court to that effect or for that matter affirm the voices therein to be theirs. We think, these were material witnesses who could have proved the existence of such interference, if at all there was any. Failure to do so, we are inclined to agree with Ms Mashimba's argument that this is a fit case for the Court to draw adverse inference as was held in **Saidi Hemed's** case (supra). **Four,** the

contention that the appellant operated a business of bar and restaurant was not proved as there was no receipt, returns or anything relating to such business was produced in court. In view of the above, we have no hesitation to uphold the first appellate court's finding that the interference allegedly committed by the respondent which, was the basis for general damages sought by the appellant, was not proved.

Based on the foregoing, we are of the settled mind that the first appellate court cannot be faulted. In the final analysis, we find no merit in the appeal and, we accordingly, dismiss it with costs.

DATED at **MWANZA** this 13th day of May, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 13th day of May, 2022 in the presence of the appellant in person and Ms. Marina Mashimba, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL