IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KWARIKO, J.A., And KENTE, J.A.)

CIVIL APPEAL NO. 9 OF 2011

PRAYGOD MBAGA.....APPELLANT

VERSUS

1. GOVERNMENT OF KENYA, CRIMINAL INVESTIGATION DEPARTMENT
2. THE HON. ATTORNEY GENERAL OF TANZANIA } **.....RESPONDENTS**

[Appeal from the judgment and decree of the High Court of Tanzania at Dar es Salaam]

(Nyerere, J.)

dated the 23rd day of August, 2010
in

Civil Case No. 112 of 2006

.....

RULING OF THE COURT

20th & 26th October, 2021

KWARIKO, J.A.:

The instant appeal is against the decision of the High Court of Tanzania (Nyerere, J.) sitting at Dar es Salaam. Initially, the second respondent filed an interpleader suit under section 63 and Order XXXIII of the Civil Procedure Code [CAP 33 R.E. 2002; now R.E. 2019] (henceforth the CPC), against the appellant and the first respondent. The subject matter of the interpleader suit was a motor vehicle Toyota Landcruiser Hardtop (the motor vehicle). According to the plaint filed by the second respondent, the appellant had reported to the Regional

Police Commander of Dar es Salaam that the motor vehicle bearing Registration No. T 690 ACE was his property having been stolen from him at gun point. The police launched an investigation and in the due course they were informed by the appellant that the motor vehicle had been located near his business premises at Sinza Dar es Salaam following which the police impounded it and found the same with Registration No. T 867 AEX being driven by one Patrick Ulomy Ngiloi.

Meanwhile, on 5th November, 2004, a motor vehicle with Registration No. KAP 920 C (GKA 522E) Toyota Landcruiser Pick up property of the first respondent was reported stolen. Through Interpol Nairobi, the first respondent received information that its stolen motor vehicle had been found and impounded in Tanzania. The officers of the first respondent came to Tanzania and identified the motor vehicle to be the one stolen from Kenya. Now, because there were two parties claiming ownership of the motor vehicle, the second respondent filed the interpleader suit for the court to declare who among them was the lawful owner of that property.

However, before the hearing of the case commenced, the appellant sought and was granted leave to be joined as co-plaintiff in terms of Order XXXIII Rule 4 (3) (b) of the CPC. The second respondent

became the first plaintiff while the appellant was labelled second plaintiff and the first respondent remained a sole defendant.

After hearing the parties, the High Court found that the first respondent had proved its case on balance of probabilities for the reason that the appellant had failed to prove that he had purchased the motor vehicle. It therefore declared the first respondent the rightful owner of the disputed motor vehicle. Consequently, the second respondent was ordered to handover the motor vehicle to the first respondent whilst the appellant was ordered to pay costs of the case to the respondents.

Aggrieved by that decision, the appellant preferred this appeal raising eight grounds but for what will transpire shortly, we find no pressing need to reproduce them herein.

At the hearing of the appeal, the appellant was represented by Mr. Wilson Edward Ogunde, learned advocate; whilst the first respondent had the services of Mr. Kepha Onyiso, learned Deputy Chief State Counsel from the Republic of Kenya. For its part, the second respondent was represented by Mr. Hangi Chang'a, learned Principal State Attorney

assisted by Mr. Masunga Kamihanda and Ms. Neema Mwaipyana, learned State Attorneys.

Before the commencement of hearing of the appeal, the Court wanted to satisfy itself on whether the procedure prescribed under Order XXXIII Rule 4 (3) (b) of the CPC was complied with by the trial court. We thus invited the counsel for the parties to address us on this issue.

On his part, Mr. Ogunde submitted that, subsequent to the appellant being made a co-plaintiff, the second respondent who had no interest in the suit ought to have been discharged from the case. He continued that, because the appellant had not filed any plaint, the trial court ought to have required him to do so and that the case would have proceeded as an ordinary suit between the appellant and the first respondent. The learned counsel argued that the omission rendered the trial and the resultant orders a nullity. He thus urged us to invoke the Court's revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] (the AJA) and nullify the proceedings of the trial court.

While concurring with the foregoing submission, Mr. Chang'a explained that the appellant ought to have been required to file a plaint and specify the nature of his claims because the second respondent's plaint did not address the appellant's claims and the reliefs sought. For that omission, the learned Principal State Attorney implored the Court to declare the proceedings of the trial court from 8th September, 2009 appearing at page 222 of the record of appeal a nullity and proceed to quash them. He argued that, in the circumstances, the second respondent deserves costs of preparing the interpleader suit.

On the other hand, Mr. Onyiso urged the Court to consider substantive justice and hold that the trial court properly determined the suit having determined the lawful owner of the motor vehicle in question. He argued that since this is a very old case, the procedural irregularity committed by the trial court should not override substantive justice of the case. Mr. Onyiso however, conceded that the case was tried without there being a plaint to support the appellant's claims and reliefs sought.

In his rejoinder, Mr. Ogunde contended that the said irregularity goes to the root of the case thus cannot be cured as suggested by his learned friend Mr. Onyiso.

We have considered the submissions by the learned counsel. The sole issue to be decided is whether the provisions of Order XXXIII Rule 4 (3) (b) were complied with by the trial court. However, before we determine that issue, we would like to put forth the meaning of an interpleader suit. According to the writing by **Mulla, The Code of Civil Procedure, 19th Edition Vol. 1,** Interpleader suit is defined at page 904 as follows:

> *"An interpleader suit is one in which the real dispute is between the defendants only and the defendants interplead, that is to say plead each other instead of pleading against the plaintiff as an ordinary suit. In every interpleader suit there must be some debt or sum of money or other property in dispute between the defendants only, and the plaintiff must be a person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to such of the defendants as may be declared by the court to be entitled to it."*

The foregoing definition explains why the second respondent filed interpleader suit as having no interest in the disputed property but the claimants were the appellant and the first respondent.

Going forward, for better understanding, we would like to reproduce Order XXXIII Rule 4 (3) (b) of the CPC as follows:

> *"(1) At the first hearing the court may–*
>
> *(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or*
>
> *(b) if it thinks that justice or convenience so requires, retain all parties until the final disposal of the suit.*
>
> *(2) Where the court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.*
>
> *(3) Where the admission of the parties do not enable the court so to adjudicate, it may direct–*
>
> *(a) that an issue or issues between the parties be framed and tried; and*
>
> ***(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff, and shall proceed to try the suit in the ordinary manner."*** [Emphasis supplied]

According to the cited provision, because the appellant was made a plaintiff, and since the original plaintiff did not claim interest on the

subject matter, she ought to have been discharged and the suit been tried in an ordinary manner. However, as correctly submitted by the counsel for the parties, the appellant had not filed any plaint to specify his claims and reliefs sought. Thus, the pleadings were not completed as required under Order VI Rule 1 of the CPC which defines a term 'pleading' as follows:

> *"Pleading" means a plaint or a written statement of defence (including a written statement of defence filed by a third party) and such other subsequent pleadings as may be presented in accordance with rule 13 of Order VIII."*

Similarly, it is settled law that an ordinary suit is initiated by filing in court a plaint. A plaint is a legal document that contains the content of any civil suit which shows the plaintiff's claim after filing suit.

In the circumstances therefore, the trial court ought to have required the appellant to file his plaint as against the first respondent and the case to proceed in an ordinary manner. This takes us to Mr. Onyiso's preposition that the omission was a mere procedural irregularity and he urged us to ignore it and go for substantive justice. We found this wanting because in the absence of the pleadings by all parties it cannot be said that there was trial of the suit. We thus cannot

apply an overriding objective principle on the said irregularity because it goes to the root of the matter. After all, overriding objective cannot be applied blindly in disregard of the rules of procedure that are couched in mandatory terms. In the case of **Mondorosi Village Council and Two Others v. Tanzania Breweries Limited and Four Others,** Civil Appeal No. 66 of 2017 (unreported), it was observed that:

> *"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case."*

Now, because the suit was tried in the absence of the appellant's plaint, it vitiated the trial and the resultant judgment of the High Court. We thus invoke the Court's revisional powers under section 4 (2) of the AJA and nullify the entire proceedings of the trial court from 8th September, 2009 appearing from page 222 of the record of appeal and quash the resultant judgment. Further, we discharge the second respondent from the suit as it would have been done by the trial court because it had no interest in the case. However, in the circumstances of the case, we do not give any order regarding costs of the interpleader suit as prayed by the second respondent.

In the event, we remit the court record to the trial court for the appellant to be accorded opportunity to file his plaint according to the law and the suit to proceed in an ordinary manner before another judge. We make no order as to costs this matter having been raised by the Court *suo mottu.*

DATED at **DAR ES SALAAM** this 25th day of October, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This ruling delivered this 26th day of October, 2021 in the presence of Mr. Wilson Ogunde learned counsel for the appellant, and in the absence of state counsel for the 1st respondent and Mr. Lukelo Samuel, learned Principal State Attorney assisted by Ms. Zamaradi Johanes, learned State Attorney, for the 2nd Respondent/Republic, is hereby certified as a true copy of original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL