IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 475 OF 2020

WAYSAFI INVESTMENT COMPANY ..... APPELLANT

VERSUS

1. **ANGELINA REUBEN SAMSON ..... 1ST RESPONDENT**
2. **REUBEN SAMSON KAHUZA ..... 2ND RESPONDENT**

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

(Matuma, J.)

Dated the 20th day of May, 2020
in
DC. Civil Appeal No. 4 of 2022

.....

JUDGMENT OF THE COURT

1st & 8th June, 2022

WAMBALI, J.A.:

This second appeal which has been preferred by the appellant, Waysafi Investment Company against the respondents, Angelina Reuben Samson and Reuben Samson Kahuza (the first and second respondents respectively) emanates from the decision of the High Court of Tanzania at Kigoma in DC. Civil Appeal No. 4 of 2020. It is noteworthy that the decision of the High Court was reached in an appeal which originated from the decision of Kasulu

District Court (the trial court) in Civil Case No. 8 of 2018 that ended in favour of the appellant.

According to the record of appeal, the dispute between the parties traces its background to the hire purchase agreement of a motor vehicle make Isuzu Registration No. T.515 AEM, the property of the second respondent for the year 2013/2014. It is apparent from the same record of appeal that the second respondent authorized the first respondent, his daughter, to conclude a contract of hiring the said vehicle to the appellant to be used for the transportation of waste materials within Kasulu District for the payment of TZS.100,000.00 per working day. It was further pleaded that following the agreement, the respondents performed their obligation for 175 days, attracting a claim of TZS.17,500,000.00. The appellant denied the claim and contended that the requisite amount for the transportation services was paid to the driver of the vehicle one Shomari Bayana. The appellant also challenged the ability of the first respondent to conclude a contract on behalf of the first respondent.

As it were, the dispute between the parties found its way to the District Court of Kasulu in which the respondents sued the appellant claiming TZS.17,500.000.00 being the amount due for the work executed for 175 days; TZS. 20,000,000.00 as general damages for loss of business, disturbance and inconveniences; interest at bank rate at 22% over the claimed principal sum; interest of 18% at court rate, costs of the suit and any other relief.

The respondents' claims were strongly contested by the appellant; hence a full trial was conducted.

At the climax of the trial I. D. Batenzi, the Resident Magistrate who presided over the trial found that the respondents had not substantiated their claims, hence the suit was dismissed in its entirety with costs. Particularly, the trial court concluded that apart from the oral evidence of PW1, nothing was tendered in court to substantiate the allegations as documentary annextures attached to the plaint were not tendered in court as exhibits.

Aggrieved, the respondents successfully appealed to the High Court. Basically, among the complaints of the respondents,

one of them was premised on the alleged unfair trial on account of the trial court's rejection of the documentary evidence which would have been tendered as exhibits to support their case. The respondents' disagreement with the trial court's decision found favour in the High Court, as their appeal was allowed as alluded to above. Specifically, on the issue of rejection of documentary evidence the High Court reasoned and stated as follows:

> *"... The appellant's documentary exhibits were all rejected because of lack of due diligence of their advocate but technically the court too which stood as a mere observer rather than the justice administrator. Up to this juncture, I agree with Mr. Kabuguzi learned advocate that the trial in the instant suit to some extent was not fairly conducted. This alone would entitle me to order a retrial but I think otherwise as I found the 5th ground of appeal wealth (sic) to be determined."*

Apparently, according to the record of appeal, the 5th ground of appeal which the High Court decided to determine on merits concerned the failure of the trial court to scrutinize properly the oral evidence even in the absence of documentary

evidence. To this end, the first appellate judge proceeded to analyse the oral evidence and ultimately, he decided the appeal in favour of the respondents as indicated earlier. Consequently, the respondents were awarded TZS.17,5000,000.00 as principal sum; TZS.5,000,000.00 as general damages for the unjustified non payment of the principal sum and costs both at the trial and on appeal.

It is against the judgment and the decree on appeal of the High Court that has prompted the appellant to approach the Court through a memorandum of appeal stuffed with the following grounds of appeal:

> *"1. That, having found that documentary evidence by the respondents had been mistakenly or technically rejected by the trial court rendering the trial unfair, the Hon. High Court Judge erred in law and in fact in not ordering a new trial or taking of additional evidence where such documents would be tendered and parties heard on them for or against the case instead of determining the appeal on merits without contractual documents.*

2. *That, since the parties' contractual relationship was basically documented through a hire purchase agreement and waybills, the Hon. High Court Judge erred in law and in fact in holding that the contents thereof, could be proved by oral evidence instead of the documents themselves as best evidence thereby wrongly distinguishing this Hon. Court's decision in* ***Daniel Apael Urio's*** *case supplied.*

3. *That, having decided to re-evaluate the oral evidence on record and finally determine the appeal, the Hon. High Court Judge erred in law and in fact in finding basing on records, that Tshs.17500,000/= had been proved by the Respondents and the award of Tshs.5 milion as general damages justified.*

4. *That, the Hon. High Court Judge erred in law and in fact in the manner it restated the role and functions of the trial Resident Magistrate in the conduct of the case vis a vis the roles of parties or their representatives in the conduct and defence of the case.*

5. *That, the Hon. High Court Judge erred in law and in fact in unfairly applying the doctrine of privity of contract in favour of the Respondents and not against them in as far as the hire-purchase agreement executed by the 1st Respondent while the motor vehicle is owned by the 2nd Respondent is concerned.*

6. *That, whether in law, the first respondent would legally present herself as owner of the suit motor vehicle and enter into a hire-purchase agreement with the appellant instead of the 2nd Respondent, a registered owner thereof without vitiating the contract and affecting on matters of locus standi thereto.*

7. *That, the High Court erred in law and in fact in shifting the burden of proof of the Respondents claims and or settlement thereof unto the Appellant/Defendant at the trial court.*

8. *That, the High Court erred in law and in fact in ordering costs for the Respondents at the trial court*

without justification or assigning reasons for so doing having themselves failed to prosecute their case."

The appeal is strenuously contested by the respondents. Pursuant to rule 106(1) and (7) of the Tanzania Court of Appeal Rules, 2009 parties lodged their written submissions for and against the appeal respectively.

At the hearing of the appeal, the appellant was represented by Mr. Ignatus Rweyemamu Kagashe, learned advocate, while the respondents had the service of Mr. Method Raymond Gabriel Kabuguzi, also learned advocate. Both Counsel adopted the parties' respective written submissions and briefly submitted orally in support of their respective positions for and against the appeal.

Arguing in support of the first ground of appeal, Mr. Kagashe submitted that as the first appellate judge in his judgment had come to the finding that the trial of the suit at the trial court was unfairly conducted for improper rejection of documentary evidence, and that the said irregularity sufficed to order a retrial, he was not entitled to have proceeded to determine the appeal on merits based on the oral testimonies of

the parties as prayed by the respondents in the fifth ground of appeal before the High Court. He submitted further that since proof of the suit essentially depended on the documentary evidence; particularly, the contract for hiring a motor vehicle executed on 20th August, 2014 and the waybills which were signed by the driver of the vehicle one Shomari Bayana and the appellant's representative; the first appellate judge wrongly departed from the best evidence rule enshrined under sections 61, 63 and 66 of the Evidence Act, Cap. 6 R.E 20019 (the Act) that require the contents of the documents to be proved by primary evidence in terms of section 67 of the same Act.

In the circumstances, the learned advocate submitted that since the first appellate judge had found that the hire purchase agreement and the waybills, together with motor vehicle registration card were in existence and possession of the parties but were wrongly rejected by the trial court, he was duty bound to either remit the case for retrial or take additional evidence by himself or by the trial court in terms of section 76(1)(a) and (d) or Order XXX1X Rules 27 and 28 of the Civil Procedure Code Cap. 33 R. E. 2019 (the CPC). It was thus the contention of Mr.

Kagashe that as in terms of sections 100(1) and 101 of the Act, no oral evidence would be given in proof of the written contract and its performance duly entered into, save for the documents themselves, the path taken by the High Court Judge of dealing with the appeal deprived it the right to see the documents, hear the parties an them and decide the appeal based on the weight they deserved. In the end, he urged us to allow the first ground of appeal.

On the adversary side, Mr. Kabuguzi spiritedly opposed the appellant's counsel argument on the first ground. He argued that though the High Court found that the documentary evidence by the respondents had been mistakenly or technically wrongly rejected by the trial court rendering the trial unfair, it was yet legally proper for the first appellate judge not to order a new trial. It is his submission that there was sufficient oral evidence on record to entitle the first appellate judge properly determine the appeal on merit as he did by resolving the respondents' complaint in the fifth ground of appeal.

Placing reliance on the decision of the Court in **Loitare Medukenya v. Anna Navaya,** Civil Appeal No. 7 of 1998

(unreported), Mr. Kabunguzi argued that the trial court's judgment was properly faulted by the High Court as it ought to have critically scrutinized the oral evidence of both parties on record and made finding thereon. He thus contested Mr. Kagashe's argument and prayer that in terms of section 76(1)(a) and (d) of the CPC, the first appellate judge having found that the trial was unfair for the rejection of documentary evidence, he could have ordered a retrial or the taking of additional evidence. In his view, the overriding objective principle enshrined under section 3A (1) and (2) of the CPC enjoined the first appellate court to determine the appeal expeditiously by scrutinizing the oral evidence which was available on record without the unadmitted documentary evidence rather than remitting the case for a re-trial by the District Court of Kasulu as argued by Mr. Kagashe.

In the event, Mr. Kabuguzi prayed for the dismissal of the first ground of appeal for lacking merits.

On our part, having carefully considered the contending arguments of the parties' counsel in respect of the first ground of

appeal, the crucial issue for our determination is whether the complaint in the respective ground has merit.

Firstly, we have no hesitation to state that in view of the trial court's record of proceedings in the record of appeal, the first appellate judge properly found that the circumstances that led to the rejection of the respondents' documentary evidence rendered the trial to be unfairly conducted. The issue for our consideration thus, is whether it was proper for the first appellate judge to have proceeded to determine the appeal on merit by scrutinizing the available oral evidence on record.

Our thorough perusal of the trial court proceedings in the record of appeal leaves us with no doubt that the circumstances and reasoning of the trial Resident Magistrate in rejecting the respondents' documents, particularly, the hire purchase agreement which constituted the parties' dispute on whether it was legally entered, the contents therein and the waybills, denied both sides of the case a right to be heard. This is more so as the rejection of the admission of the respective documents was made by the trial court even though the other side to the suit (the appellant) had not objected to its admission after it was tendered

by Angelina Reuben (the first respondent). For clarity, in rejecting the admission of the hire purchase agreement, the trial Resident Magistrate stated thus:

> *"Despite the absence of the defendant's objection I am not in the position to admit the document as exhibit. I am of this opinion basically on two grounds. One, the witness has not given any description upon which she was to identify the exhibit. But two the witness has not shown intention and in actual fact she has not prayed for the document to be tendered as exhibit. This is fatal to the tendering side. In the result, I dismiss the plaintiff prayer. It is so observed."*

From the above excerpt, with respect, we are settled that both reasons advanced by the trial Resident Magistrate in rejecting the admission of the agreement was unfortunate, as according to the record of proceedings, the respective witness (Angelina Reuben) had laid a foundation of how the document came about and that she wanted and was ready to identify it if she was shown the writings. Besides, she indicated her intention to identify the agreement before the respondents' advocate prayed that the document be admitted as exhibit. For the sake of

consistence, we deem it appropriate to reproduce the relevant part of the record:

> *"PW1 ... This agreement was reduced into writing. If I can see these writings, I can identify it.*
>
> *Mr. Abdulheri: There is a document a hire agreement entered between the parties I pray this document be admitted as exhibit.*
> *Mr. Kagashe: I have no objection."*

Clearly, as we have intimated above, the procedure adopted by the trial Resident Magistrate in rejecting the admission of the document was, with respect, legally unjustified and rendered the trial unfair. Basically, the refusal denied both the parties and the trial court the opportunity to scrutinize it and give weight to the contents therein; more so, it being the basis of what constituted the alleged disputed agreement which culminated into the respondents' claim against the appellant.

Indeed, though the rejection of other documents came about after the objection from the other side, we think the circumstances and the reasoning of the trial Resident Magistrate indicated the improper application of the procedure laid down by

law. It is in this regard, we think, that in the sixth ground of appeal which was placed before the High Court, the respondents complained that the failure of the trial court to admit such crucial documents which were tendered and intended to be relied upon in evidence was unfair, and thus they prayed that in the interest of justice the same be admitted by the first appellate court.

In the circumstances, we respectfully take leave to differ with the respondents' counsel argument that the first appellate judge properly embarked on determining the fifth ground of appeal which required that court to determine the appeal by scrutinizing the available oral evidence on record amid the absence of documentary evidence whose copies were attached to the plaint but unfairly refused admission. We are however alive to the settled position that the High Court as the first appellate court would have legally determined the appeal by considering the evidence on record which was not properly analysed by the trial court and come to its own conclusion upon consideration of the whole evidence properly admissible (see **Kulwa Kabizi, Pauo Sindano Balele and Seleman Mleka v. Republic** (1994) T. L. R. 210).

Nonetheless, in the appeal at hand, we are settled that the rejection of the intended evidence by the trial court was not done during the cause of the analysis and consideration of the legally admitted evidence, but to non-admitted documentary evidence and for unjustified reasons. This in turn, rendered the trial unfair as miscarriage of justice was occasioned not only to the respondents but also to the appellant, who were denied the opportunity to be heard on the contents of the respective documents. We wish to emphasize that the right to be heard before a decision is made by the court on the dispute between the parties is one of the pillars of fair administration of justice such that its denial renders the proceedings and the resultant decision a nullity (see **Mire Artan Ismail and Another v. Sofia Njati,** Civil Appeal No. 75 of 2008 and **Independent Power Tanzania Limited v. Standard Chartered Bank (Hong Kong) Limited,** Civil Revision No. 1 of 2009 (both unreported).

In the later decision the Court categorically remarked that:

> *"... no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affects the interests of any person*

without first giving him a hearing according to the principles of natural justice..."

Therefore, a court of law should ensure that parties are accorded a hearing on merit concerning their dispute after ensuring that the due process of law is followed before making a decision one way or another, instead of rushing to the determination and conclusion on the pretext of expediating the hearing. It is in this regard that in **Independent Power Tanzania Limited v. Standard Chartered Bank (Hong Kong) Limited** (supra) the Court observed further that:

"Ex post factor hearings, therefore, should be avoided unless necessitated by exceptional circumstances, as they are at times riddled with prejudice apart from being a negation of timely and inexpensive justice, which we all strive for."

(See also **Thomas Peter @ Chacha Marwa v. The Republic,** Criminal Appeal No. 322 of 2013 and **Zena Adam Abraham and Two Others v. The Attorney General and Six Others,** Consolidated Civil Revision No. 1, 3 and 4 of 2016 (both unreported).

We do not, therefore, with respect, subscribe to the respondents' counsel submission that the path taken by the first appellate judge of determining the appeal on merit even after he had made a finding that the trial was unfair for rejection of the respondents' documentary evidence which were intended to be relied upon in evidence, was fully supported by the provisions of section 3A (1) and (2) of the CPC. For purpose of guidance, the respective section provides as follows:

> *"3A (1) The overriding objective of this Act shall be to facilitate the just, expedition, proportionate and affordable resolution of Civil disputes governed by this Act.*
>
> *(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, give effect to the overriding objective specified in subsection (1)."*

It is our considered opinion that, though among others the reproduced provisions aim at encouraging the expeditious hearing of the parties' dispute; at the same time equally and importantly, require the court administering justice to ensure parties are accorded just, proportionate and affordable resolution of civil

disputes. A court therefore will certainly earn the trust and respect of the litigants and the public at large by ensuring that there is fairness in the hearing of the parties' dispute and by rendering just and equitable decision. Indeed, it is the duty of the court determining the dispute between the parties to hold the ring even handedly without prejudging any party to the dispute.

Instructively, in **John Morris Mpaki v. The National Bank of Commence Limited and Ngalagila Ngonyani,** Civil Appeal No. 95 of 2013 (unreported), the Court emphasized the concept of the right to be heard in the following terms:

> *"The law that no person shall be condemned unheard is now legendary. It is trite law that any decision affecting the rights or interest of any person arrived at without hearing the effected party is a nullity, even if the same decision would have been arrived at had the affected party been heard."*

In the event and from the foregoing deliberation, we have no hesitation to conclude that the trial court's rejection of the documentary evidence at the admission stage was unfair in the circumstance of the case, and rendered the trial a nullity as miscarriage of justice was accessioned. It follows that the first

appellate court's proceedings and judgment which emanated from nullity proceedings are equally a nullity. Consequently, we allow the first ground of appeal.

Having found in favour of the appellant in respect of the first ground of appeal, we do not deem it appropriate to determine the remaining seven grounds of appeal. In the result, pursuant to section 4(2) of the Appellate Jurisdiction Act, Cap 141 R. E.2019, we revise and nullify the trial and first appellate courts' proceedings, quash the judgments and set aside the respective decrees for being a nullity. Accordingly, we allow the appeal on the basis of what we have found in respect of the first ground.

As to the way forward, we are of the decided view that in the circumstances of the case at hand, we cannot order the taking of additional evidence. On the contrary, the proper option at our disposal is to order a retrial as we accordingly do. We further order that an expediated hearing of the suit in Civil Case No. 8 of 2018 be held before another magistrate in accordance with the law.

Finally, the issue of costs has considerably engaged our minds. In the end, we are of the decided view that as the

circumstances which have necessitated the order of retrial have been occasioned by the omission of the two courts below to follow the procedure laid by law, it is in the interest of justice that parties bear their respective costs.

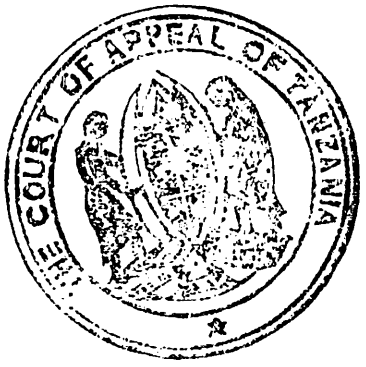
DATED at **KIGOMA** this 7th day of June, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 8th day of June, 2022 in the presence Mr. Ignatius Kagashe, learned Counsel for the Appellant and Mr. Method R. G. Kabuguzi, learned Counsel for the Respondents, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL