

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 2 OF 2018

(c/f Originating from Resident Magistrate's Court of Manyara at Babati Civil Case No. 3 of 2010)

SAID KILAMBWANDAAPPELLANT

(As the administrator of the estate of the late Yusuph Said Kilambwanda)

VERSUS

THE TANZANIA ONE MINING COMPANY LTD.....RESPONDENT

JUDGMENT

DR. OPIYO, J.

The appellant Said Kilumbwanda is appealing against the decision of the Resident Magistrate Court of Manyara at Babati in Civil case No 03 of 2010, in which the trial court dismissed his claim for not being proved. Aggrieved he has preferred the present appeal on the following grounds namely:

1. The honourable trial court erred in law by violating mandatory provisions of Order VIII A rule 3(1) of the Civil Procedure Code despite the High Court's Order given in Civil Appeal No 29 of 2011.

2. The honourable trial court erred in law by not guiding the appellant who is totally illiterate and unrepresented by an advocate to present his case as fully as possible without appearing to lose its impartiality.
3. The Honourable trial court erred in law by not considering that the evidence of plaintiffs witnesses who testified during trial could have been admitted as part of plaintiffs case under section 35 (a) (b) (i) (ii) and (iii) of the Evidence Act. Cap 6R.E 2002.
4. The honourable trial court erred in law by not giving the appellant to address on his case generally on the whole case after the close of his case by rushing to fix it for delivery of judgment and in consequences, denied him the opportunity of being fully heard.
5. The honourable court erred in not awarding general damages in the circumstances of this case as awarded in the original trial and thereby caused great injustice to the appellant.

Before me the appellant was represented by Mr. Chadha learned advocate while respondent was represented by Mr. Mgalula learned advocate. On 29/06/2018 when the matter was scheduled for hearing Mr. Chadha was present but the counsel for the respondent was absent without notice, Mr. Chadha prayed for the matter to proceed *ex parte*, the prayer that was granted.

Arguing the first ground of appeal, Mr. Chadha told this court that, Hon. Judge Massengi in Civil App. No. 29/2011 originating from the same present case in which the present respondent who was the appellant, ordered for retrial in order to enable the court to comply with Mandatory provision of order VII rule 3 of the Civil Procedure Code, Cap. 33 RE 2002. But this order has not been complied with till to date because, after that the case went for retrial and during the retrial the RM's Court struck out the case on the ground that it was time barred. Again civil Appeal No. 8/2015 was filed, and again High Court allowed the appeal and ordered trial *denovo* by another Magistrate. Again for some Reasons the Lawyer withdrew the case on the ground that he wanted to appeal against the judgment of the High Court. The appellant appealed to the High Court, that the order for withdrawal was taken by fraud or gross negligence and the High court sent back the file (Hon Judge Maghimbi) that the application for restoration be re-heard.

It was his argument that, after that, the case was restored and head by RM's Court (Mguruta Hon.) who by an over sight started the case at the stage of hearing (1st page of typed *ex parte* proceedings). Thus, the case went without complying with original order of complying with order VIIA rule 3 in that mediation proceedings were not conducted.

He further submitted that, respondent was present on the date the court fixed the matter for hearing, but subsequently the court proceeded *ex-parte*. On this ground he did pray that the *ex-parte* decree be quashed

and set aside with the direction that trial court comply with this court's order of 16/Jan/2013 by Massengi, J. he did also prayed that the matter be transferred to Arusha RM's Court to allow him to represent the appellant.

I have gone through the records, on this complaint the record clearly shows that, after the decision of Massengi, J, which ordered trial de novo on 16 January 2013 for failure to comply with provision of order VIII A rule 3(1) of the Civil Procedure Code. The file was remitted back for trial *denovo* as ordered. But, unfortunately the plaintiff died on the same year in October 17th. His father Said Kilambwanda took over as administrator of his estate. He filed amended plaint which impleaded him as a representative of a deceased. Defendant filed a notice of preliminary objection on time limitation of the suit, the objection which was sustained by the trial court and suit dismissed. On appeal, the decision was reversed in Civil Appeal No. 8/2015 (Mwaimu, J as he then was).He allowed the appeal by quashing the decision of RM's Court and ordered a suit to be returned back to the trial Court for trial *denovo* in compliance to the original order.

Again for the second time it was indeed remitted back and put before another Magistrate, but for some reason advocate Lumambo who was representing the suit withdraw the same on 25/2/2016.Plaintiff successfully challenged the withdrawal order through application for restoration. The withdrawn suit was successfully restored by this Court on 18/09/2017 (

Maghimbi J.). Having been restored and placed before Hon. Mguruta on 12/12/2017 for trial *de novo*. She erroneously formed opinion that according to the records, the case has to proceed where it ended which she said it was at the hearing stage. In her own words she wrote;

"Having restored this case, let the case proceed from where it ended. The records show that it was at the Hearing Stage."

This was a misdirection as she forgot that, this matter was ordered for trial *de novo* for not complying with provision of order VIII A rule 3(1) of the Civil Procedure Code. she again overlooked mediation stage. Under that wrong impression, she proceeded to fix a date of hearing at 14/12/2017. On that date hearing commenced in presence of Mgalula representing the Defendant and Plaintiff was not represented. On the next date of hearing that is on 18/12/2017, the defendant did not appear and the matter was ordered to proceed *ex parte*. The matter proceeded to the end and the Plaintiff lost the case culminating to this appeal.

From this background, as correctly submitted by Mr.Chadha, the trial magistrate indeed erred by violating mandatory provisions of Order VIII A rule 3(1) of the Civil Procedure Code despite the High Court's order in Civil Appeal No 29 of 2011 by proceeding with the hearing of the matter without passing through mediation again. Based on this finding, I find strength in appellants first ground of appeal and proceed to nullify proceedings, judgment and decree of the trial court (Hon. Mguruta dated

19/12/2017 The suit is remitted back for trial *de novo* before another magistrate for the same reasons of no passed the mediation in violation of order VIII A rule 3(1) of the Civil Procedure Code. The matter should be expedited as it has been lagging in the court corridor for considerably too long now, with no fault on the part of appellant. I make no order as to costs.

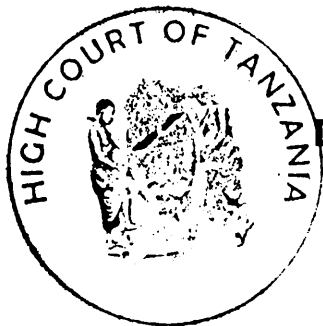
(SGD)

DR.M.OPIYO,

JUDGE

7/09/2018

I hereby certify this to be a true copy of the original.



HL
S.M. KULITA,

DEPUTY REGISTRAR

ARUSHA

11/9/2018