IN THE HIGH COURT OF TANZANIA

AT MWANZA

CIVIL APPEAL NO. 03 OF 2019

(Appeal from the Judgment of the District Court of Chato at Chato (Kato, S.M, DRM i/c) Dated 16th of December, 2016 in Civil Case No. 04 of 2016)

LEAH NSABI LUDIGIJA ..... APPELLANT

VERSUS

CHATO DISTRICT COUNCIL ..... RESPONDENT

JUDGMENT

Date of last order: 10.07.2019

Date of Judgment: 12.09.2019

ISMAIL, J.

The Appellant instituted a suit in the District Court of Chato at Chato, for payment of the sum of TZS. 13,275,000/=, being the value of 531 empty drums which were allegedly unlawfully confiscated from her by an employee of the respondent, on the ground that the said drums were deposited at a place and in a manner which is injurious to health. Confiscation of the drums was associated with arraignment of the appellant in court on a charge of causing nuisance that is to be injurious or dangerous to health, contrary to

the provisions of ***sections 34 (a), (b), 54 and 61 (1)*** of the Public Health Act, 2009. The charge was dismissed for want of prosecution. Following the discharge, the appellant instituted Civil Case No. 04 of 2016, whose decision was delivered on 16th December, 2016. In the said judgment, which is a subject of the present appeal, the appellant's claims were dismissed on the ground that the same were premised on the claim of malicious prosecution that the appellant had failed to establish.

The trial court's decision did not go well with the appellant. She took up the ladder to this Court, preferring the present appeal which has three grounds of appeal, reproduced as follows:

1. *That, the learned Honourable Trial Magistrate erred in law and fact by failure to consider, discuss and resolve issues raised during trial of the suit.*
2. *That, the learned Honourable Trial Magistrate erred in law and fact by raising issues and dealing with extraneous matters without affording parties an opportunity to address the same, hence arriving at a wrong conclusion.*

3. *That, the learned Honourable Trial Magistrate grossly misdirected himself by declaring the act of confiscation by the Respondent as being lawful, without there being tangible and enough evidence warranting confiscation of 531 drums on uncontested fact of ownership of the same by the appellant.*

While the appellant was represented by Mr. Alfred Daniel, learned advocate, the respondent enlisted the services of Mr. Godlove, the respondent's solicitor. When the matter came up for orders on 10th of July, 2019, the Court acceded to the parties' proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

Submitting in support of the first ground of appeal the appellant's counsel contended that the impugned judgment did not conform to the provisions of ***Order XX Rules 4*** and ***5*** of the Civil Procedure Code (CPC) which provide for what should be considered in composing a judgment and obligates courts to state findings and reasons upon which the decision is based, by taking into account issues raised. He argued that although issues were framed, the trial magistrate gave them a backburner, choosing to

pick only one. The learned counsel was of the view that the trial magistrate abdicated his duty when he failed to make a finding on two of the three issues framed.

With respect to the second ground of appeal, the appellant held the view that the impugned decision was based on extraneous issues which did not constitute the parties' contention. These are issues relating to cause of action and the contention that the appellant's claim hinged on malicious prosecution. She contended that these were issues which were not traversed by the parties and no evidence was adduced to that effect. The counsel contended that as a result of this lone ranger indulgence, a miscarriage of justice was occasioned, and he fortified his view by citing the case of ***Peter Ng'homango v. The Attorney General***, Civil Appeal No. 114 of 2011 (unreported). The appellant concluded this point by arguing that determination of these two new issues, in the exclusion of the parties, was tantamount to denying them the right to be heard.

On the third ground, the appellant was emphatic that the trial court was in serious error when he ruled that confiscation of the drums was lawful because the respondent issued a written notice and that the same was served upon the appellant. The learned

counsel for the appellant took an exception to the trial court's reliance on the reasoning in ***Karimjee v. The Commissioner of Income Tax*** (1972) HCD 61, in which it was held that confiscation after notice is lawful if the person on whom the notice was served failed to comply with it. The thrust of the appellant's submission on this point is that what is referred as a written notice was not tendered as an exhibit, and DW1 only testified by a mere word of mouth without substantiating that the said notice was indeed issued and left unheeded. This happened, the counsel contended, while DW1 admitted that he did not tender it in court and he would do so if need arose. This contention was buttressed by citing the decisions of the Court of Appeal in ***Mohamed A. Issa v. John Machela***, Civil Appeal No. 55 of 2013 (unreported); and ***Kapapa Kumpindi v. The Plant Manager Tanzania Breweries Ltd***, Civil Appeal No. 32 of 2010 (unreported). He wound up by submitting that in the cited decisions, emphasis was laid on the need to deliver a reasoned judgment which is based on evidence properly adduced in court, and that whenever a point is raised *suo motu,* the parties must be given an opportunity to address it. He vehemently claimed that this was not done in this case, and he was of the view that this was a

fundamental flaw which is serious enough to justify allowing the appeal. The appellant prayed that the appeal be granted with costs.

The respondent's rebuttal was equally strenuous. The learned counsel for the respondent came out forcefully and defended the trial court's decision as sound and reasoned. With respect to the first ground, the respondent leapt to the trial court's defence and argued that confiscation of the drums followed the due process of the law, when a notice was issued telling the appellant to move from the area and but to no avail. The respondent made reference to the criminal trial proceedings in which it was alleged that the appellant admitted that a notice was served on her to that effect. On the trial magistrate's decision to combine issues, the respondent felt that this is a practice which gains its legitimacy from ***Order XX Rule 5*** of the CPC.

Submitting on the second ground of appeal, the respondent's counsel sought to distinguish the circumstances under which the **Peter Ng'homango's case** was decided with the present circumstances. He contended that, whereas issues in the cited case were raised *suo moto*, in the present case the trial magistrate picked

the issues from the pleadings, and he singled out ***paragraphs 6 and 7*** of the plaint and annexures ***Rwelu 1 and Rwelu 2*** as the basis therefor. Quoting part of the trial court's decision, the respondent refuted that the judgment was based on extraneous issues.

Rejoining on ground three of the appeal, the learned counsel for the respondent wondered why the appellant is denying what was obvious, in that annexure Rwelu 1 and fact No. 6 in the proceedings of the criminal trial show the appellant as admitting that she was served with the notice that required her to relocate the drums from her place of operation. The respondent did not find anything of substance in the appellant's challenge on this ground as it is clear that notice was served. The respondent prayed that the appeal be dismissed with costs.

I have gone through the submissions by both counsel, simultaneous with carrying a thorough review of the original record. Having done so, I wish to state from the outset, and without any fear of contradiction, that this appeal is meritorious and must succeed. I will justify my position by tackling each of the grounds of appeal.

The learned counsel for the appellant has passionately submitted, in respect of the first ground, that the impugned

judgment did not conform to the tenets of a good judgment as laid down by the provisions of **Order XX Rules 4 and 5** of the CPC. The basis of this argument is that the said judgment was not responsive to all the issues raised and that it responded to issues which were not canvassed in the evidence submitted during trial. These are matters that touch on cause of action and malicious prosecution. The respondent's counsel is not convinced. He sees nothing anomalous in the judgment, since every issue was adequately covered and that confiscation of the drums was evidenced by the appellant's own evidence, through annexures submitted in the trial court.

I fully subscribe to the appellant's contention on this ground. My scrupulous review of the judgment takes me to page 3 at which four issues are listed as having been framed to lead the trial proceedings. While analysis in respect of the first issue was covered at page 3 and part of page 4, the rest of the issues which were seemingly collapsed into one, during the trial magistrate's analysis, no analysis or discussion in respect thereof was made. What comes immediately after the conclusion of the first issue is the discussion on malicious prosecution which was heavily used by the trial magistrate to settle the contest in the trial proceedings. Clearly, this was utterly

uncommon and violative of the principles that govern composition of judgments and I find a lot of plausibility in the appellant's argument and reliance on the authorities cited in this respect.

Failure to consider material issues in a judgment is not a mere slip. It is an intolerable omission which is a serious travesty of a judgment, which borders on an epic miscarriage of justice. In ***Stanslaus Rugaba Kasusura and the Attorney General v. Phares Kabuye*** [1982] TLR 338, the Court of Appeal had the following observation:

> *"The judgment is fatally defective; it leaves contested material issues of fact unresolved.* ***It is not really a judgment because it decided nothing in so far as material facts are concerned*** *.... It is in fact a travesty of a judgment....* ***The trial judge should have evaluated the evidence of each of the witnesses, assessed their credibility and made a finding on the contended facts in issue.*** *He did not do so."*

This authoritative position was acknowledged in subsequent decisions. In **Kukal Properties Development Ltd V. Maloo and Others** (1990 – 1994) EA 281, the Court of Appeal of Kenya had an opportunity to discuss the effect of failure to decide on issues framed. It held:

"A judge is obliged to decide on each and every issue framed. Failure to do so constituted a serious breach of procedure"

The holding in the **Kukal case** was stated with approval in **Alnoor Sharif Jamal V. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 (unreported) where in the Court of Appeal held:

"With due respect to the learned Judge, we think that he abandoned what was before him and ambarked on something that had not, as yet, been asked of him ..... In the light of the above considerations we find that the trial judge made a fatal error in failing to make a specific order relating to the petition that was before him ....."

This firm stance of the Courts emphasizes what is stated in ***Rules 4*** and ***5 of Order XX*** of the CPC, and was restated in ***Lutter Symporian Nelson v. Attorney General and Ibrahim Said Msabaha***, Civil Appeal No. 24 of 1999 (unreported) and the following finding was made:

"A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to minimum, it must show that no material portion of the evidence laid before the court has been ignored. In ***Anurali Ismail v. Regina*** *1 TLR 370 Abernethy J, made*

some observations on the requirements of the judgment. He said:

> ***A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported, and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a court of appeal to know what facts are found and how.***"

The Court of Appeal did not relent on this. In ***Mkulima Mbagala v. R.***, (CAT) Criminal Appeal No. 267 of 2006 (unreported) it held thus:

> *"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case among the two is more cogent. In short, such an evaluation should be a conscious process of analyzing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at. See, for instance,* ***D.R. PANDYA v. R*** *(supra),* ***SHANTILAL M. RUWALA v. R [1957] E.A.***

570 and IDDI SHABAN @ AMSI v. R *(supra). It now behooves us to discharge this duty."*

I find nothing in the impugned judgment that comes anywhere close to what the Court of Appeal put as a threshold of a good judgment in the just cited decision. The trial magistrate ignored, with impunity, material issues which would drive him to a conclusion on whether the appellant's claim has any semblance of merit and make an appropriate finding that takes into consideration evidence adduced by the parties. This he did not do, and I find that such failure was nothing short of flagrant abdication in his noble duty. I allow this ground of appeal.

With regards to ground two of the appeal, the gravamen of the appellant's complaint is that extraneous matters influenced the decision of the trial magistrate. The appellant's counsel has singled out the findings on malicious prosecution and cause of action as the mighty influencers of the decision that went against her. The respondent discounts this argument. He holds that there was nothing extraneous about malicious prosecution, since matters relating to malicious prosecution were covered in the appellant's statement of claim, specifically paragraphs 6 and 7, and annexures Rwelu 1 and

Rwelu 2. I have had a chance of going through the entire statement of claim and, specifically, the cited paragraphs and annexures. Nothing comes anywhere close to the respondent's inference that malicious prosecution was one of the claims. Not even the respondent's written statement of defence touched on that subject. The cited annexures contained nothing that would lend any credence to the respondent's contention, either. Cognizant of the fact that issues are deduced from the facts as pleaded in the pleadings, the question of malicious prosecution, which was the most decisive finding in the impugned judgment, would take a significant prominence in the framed issues. This is not the case here, and the simple reason for that is that the same was simply not a matter that was pleaded. It was never the appellant's contention in the trial proceedings.

The decision by the trial magistrate to dwell on it and give it a superseding effect over the issues which were framed and unanimously agreed by the parties was nothing short of a resort to extraneous matters which had no connection whatsoever to what was placed before the trial court for determination. It was an act of imposition which was abhorred in the ***Peter Ng'homango, Kapapa***

Kumpindi's cases (supra) the reasoning of which I fully subscribe to. The position in the two cases cited by the appellant are overly consistent with the observation which was made by the Supreme Court of India in the matter of ***Messrs Trojan & Co. v. RM N.N. Nagappa Chettiar*** A.I.R 1953 SC. It held:

> *"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment to the plaint, the* ***Court was not to grant the relief not asked for and no prayer was even made to amend the plaint so as to incorporate in it an alternative case.***"

Accordingly, I see a lot of sense in the appellant's dissatisfaction in respect of this ground and I allow it.

The last battleground in this appeal is in respect of the third ground of appeal. The appellant contends that no evidence was adduced to justify the decision to confiscate the drums. The counsel for the appellant argued that while DW1 testified to the effect that he ordered confiscation of the drums, no evidence was adduced to prove that a written notice was issued to require her to cease and desist from what was considered to be an unlawful conduct. The respondent is opposed to this thinking. He cited annexures Rwelu 1 and Rwelu 2 in which the appellant was arraigned in court and

admitted to the fact that she was warned of her business conduct and told to remove her drums.

It is a canon of civil justice that ***"the person whose evidence is heavier than that of the other is the one who must win*** (see ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113). This principle goes with the other principle that requires that the person who alleges must prove that his allegation is solid and convincing. Looking at the matter, it is discernible that divergence between the parties relates to the question as to whether, the defendant tendered evidence of a written warning which was used by the trial magistrate to make a finding that the confiscation was lawful. While it is not disputed that DW1 testified to the effect that the appellant was warned and given prior notice to relocate her business, nothing was tendered in court to substantiate what is now considered to be an empty talk. This view is backed by the fact that DW1 admitted that he had not tendered the notice and that he was ready and willing to tender it if he was required to do so. That requirement was not deemed to be important by the defendant.

Since the lawfulness or otherwise of the confiscation hinged on the production of a written notice which was not tendered, up until

the conclusion of the defence case, it was quite against all odds that the trial court handed a win to a person whose evidence was not heavier. In that respect, I find that the reasoning in ***Mohamed Issa's case*** (supra) cited by the appellant of immense relevance and militating against the trial magistrate's finding. I am profoundly convinced that a case has been made out to warrant allowing of this ground of appeal, as well.

In the upshot, as I held above, I find that the appeal is meritorious and I allow it. I consequently grant the prayer for payment of the sum of TZS. 13, 275,000/=, plus interest thereon at the current commercial rate from the date of confiscation to the date of this decision. The appellant is to have the costs of this matter.

It is so ordered.

DATED **at MWANZA** this 12th day of September, 2019.

M.K. ISMAIL

JUDGE

Date: 12/09/2019

Coram: Hon. M. K. Ismail, J

Appellant: Mr. Alfred Daniel, Advocate. The appellant is present in person

Respondent: Absent

B/C: B. France

Court:

Judgment delivered in chamber, in the presence of Mr. Alfred Daniel, Advocate for the appellant who is also in Court and in the absence of the respondent, and in the presence of Ms. Beatrice B/C, this 12th day of September, 2019.

M. K. Ismail

JUDGE

At Mwanza

12.09.2019