

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 121 OF 2019

(Arising from the Judgment of District Court of Bagamoyo in Civil Appeal No. 04 of 2018, date on 12th day of February, 2018 before Hon. T. Geoffrey, **RM**, Original Civil Case No.04 of 2018 Mwambao Primary Court)

ERNEST JOHN SEMIONO **APPELLANT**

VERSUS

AKWILINA MASSAWE **RESPONDENT**

JUDGMENT

11th June & 10th July, 2020

E. E. Kakolaki, J

The appeal before this court originates from the decision of the District Court of Bagamoyo in Civil Appeal No. 04 of 2018. The appellant being discontented with the decision knocked this court's door canvassed with two grounds of appeal which I will soon state. The appeal is contested by the respondent. When the matter came for hearing on 04/05/2020 the appellant who was represented prayed for court's leave to have this appeal disposed by way of written submission and undertook to notify the respondent who was absent on that date of setting the filing schedule. Filing schedule was entered directing the appellant to file his submission in chief on or before 18/05/2020, respondent's reply

submission on or before 01/06/2020 and rejoinder submission by the appellant on or before 08/06/2020 and the matter was to be mentioned on the 11/06/2020. However the respondent filed her reply submission on the 04/06/2020, three days out of time. I will also discuss and decide on this delay in the due course.

As stated above in this appeal the appellant had the services of Mr. Mussa Kiobya learned advocate whereas the respondent defended herself. In order to appreciate the status of this appeal I find it incumbent to narrate albeit so briefly its background story.

The respondent successfully sued the appellant for breach of contract before the Mwambao Primary Court in Civil Case No. 04 of 2018. The respondent had loaned the appellant money Tshs. 3,500,000/= on agreement that the same will be repaid in 30 days assumingly with interest, all money to be repaid totalling Tshs. 4,200,000/=. The appellant defaulted to repay as a result the respondent sued the appellant claiming a total sum of Tshs. 5,880,000/= and after full trial the trial court gave her a judgment of Tshs. 5,880,000/= in favour of the respondent. Aggrieved the appellant unsuccessfully appealed to the District Court of Bagamoyo vide Civil Appeal No. 04 of 2018 whose judgment was delivered on the 27/04/2018 varying the decision of the trial court and awarding the respondent Tshs. 3,500,000/= as principal sum advanced as loan to the appellant plus Tshs. 1,000,000/= as damages for breach of contract. Discontented the appellant is now before this court by way of appeal expressing his dissatisfaction in two grounds. Prior to the filing of this appeal the appellant found himself time barred and successfully filed an application for extension of time to appeal out of time in this Court through Misc. Application No. 336 of

2018, whereby 14 days extension of time within which to appeal were issued to him, thus the appeal was filed in time. The grounds of appeal preferred by the appellant are:

1. That the District Court erred in law and fact in making decision by ordering the Appellant to pay addition amount to the tune of Tshs. 1,000,000/= as a breach of contract without prayers to that effect.
2. That the District Court erred in law and fact for making decision with material irregularity for disregarding ground number 3 of the Appellant's appeal which occasioned to injustice.

As intimated before I will discuss and determine the status of the respondent's reply submission to the appellant's submission in chief. The appellant raised it that the respondent filed her reply submission out of time. She was supposed to file it on 01/06/2020 but filed the same three days later 04/06/2020. He submitted, this is inexcusable and amounted to failure to defend the appeal against her something which entitles this court to disregard it. To buttress this point a case of **Famari Investment (T) Ltd Vs. Abdallah Seleman Komba**, Misc. Civil Application No. 41 of 2018, (HC-unreported) citing the case of **P3525 Lt Idalya Maganga Gregory Vs. The Judge advocate General**, Court Martial Criminal Appeal No. 2 of 2002 (unreported) was cited. It was stated in that case that:

"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequences of failure to file

the written submissions are similar to those of failure to appear and prosecute or defend, as the case may be. Court decision on the subject matter is bound ... similarly, courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions within the time frame ordered.

Needless to state here that submissions filed out of time and without leave of the court are not legally placed on records and are to be disregarded,"

It is true and I agree with the appellant's submission that written submissions filed out of time are not legally placed on record and must be disregarded. In this appeal the respondent did not comply with the date of filing the reply submission as a result the same was filed three days out of time. When appeared in court on the 11/06/2020 she neither bothered to seek an extension of time within which to file the same nor offered any explanation for her failure to file the same in time. That default in my opinion and as held in the case of **P3525 Lt Idalya Maganga Gregory** (supra) amounts to respondent's failure to defend her appeal. I will therefore not consider her submission.

Having so found, I now turn to consider and determine the two grounds of appeal raised by the appellant. It is Mr. Kiobya's contention in the first ground that the learned magistrate was wrong for not holding that the trial magistrate was wrong to order payment of Tshs. 5,880,000/=, the amount which was neither pleaded nor proved. He further faulted the learned magistrate for deciding on the issue not pleaded thus erroneously ordering the appellant to pay damages of Tshs.

1,000,000/= for breach of contract in excess of Tshs. 3,500,000/=. He had it that, the 1st Appellate Court ordered the appellant to pay the respondent damages of Tshs. 1,000,000/= in excess on allegation of breach of contract without assigning reasons as to how he reached to that decision as the same was not pleaded in the plaint or claims filed in the trial court. He said parties are bound by their pleadings and the respondent never pleaded nor prayed for damages on breach of contract. For the foregoing, it was wrong for the court to award the respondent that amount, Mr Kiobya submitted and prayed the court to find the ground meritorious. He cited the case of **Mosote General Vs. African Inland Church** (1994) TLR 192 to support his stance.

It is true and I agree with Mr. Kiobya that, the said Tshs. 1,000,000/= awarded to the respondent in the name of damages for breach of contract was wrongly awarded. It is settled law that parties are bound by their pleadings. The respondent when registering her claims in the trial court never pleaded and prayed for specific damages nor did she raise it at the appeal stage. It is trite law that specific damages must be specifically pleaded and strictly proved. This was the position in the case of **Zuberi Augustino V. Anicet Mugabe** (1992) TLR 137, at page 139 that:-

*"It is trite law and we need not cite any authority that **special damages must be specifically pleaded and proved.**"*(emphasis supplied).

Following the principle above cited, it is not known as to how the learned magistrate arrived to the decision of awarding the respondent that specific damages without first being pleaded and proved evidence.

It was expected of him to assign reasons as to why the respondent was entitled to the said specific damages failure of which makes the said finding unjustifiable and therefore a nullity. This ground has merit and is upheld.

On the second ground Mr. Kiobya is faulting the District Court for disregarding the 3rd appellant's ground of appeal which led it into making a decision with material irregularity. In that third ground the appellant was challenging the primary court's judgment for not containing framed issues and reasons for the decision which is contrary to the law. He cited the said laws to be The Magistrates Court (Primary Courts Judgment of Court) Rules GN. No. 2 of 1988 under provision of Rule 3(1) stating that:

"Where in any proceedings the court has heard all the evidence or matter pertaining to the issues to be determined by the court, the magistrate shall proceed to consult the assessor present, with the view of reaching a decision of the court"

Mr. Kiobya added that, the above cited provision must be read together with Rule 44 of the Magistrate's Court (Civil Procedure in Primary Courts) Rules GN. No. 199 of 1983 which states:

"At the first hearing of a proceeding the court shall ascertain from each party whether he admits or denies the allegations made against him by the other party and shall record all admissions and denials and shall decide and record what matters are in issue".

Submitting further he said, framing of issues is mandatory as per the above cited provisions as the same confines the court to specific areas of dispute so as to decide the matter to its finality. To stem his point he referred the court to the case of **Nkulubo Vs. Kiberege** (1973) E.A 103. It was his assertion that in this case at the trial court stage no issues were framed, the omission that made the court to arrive at its decision unanimously. He faulted the appellate court for saying nothing on this error.

I have gone through the record as well as the impugned judgment and observed that it is true the framed issues and reasons for the decision are missing. To appreciate the gist of this point it is imperative that I quote last part of the trial decision:

"Mahakama inaona kuwa kwa kuwa mdaiwa mwenyewe amekubali kuwa ni kweli katika maelezo yake kuwa alimkopesha mdai kupitia mama yake mdogo aitwae Luphina Philipo Kizenge. Hivyo Mahakama hii inamuamuru ndaiwa amlipe mdai kiasi cha shilingi 5,880,000/= milioni tano, laki nane na themanini elfu ndani ya miezi mitatu (3) kuanzia tarehe ta uamuzi huu..."

Literally the said passage can be interpreted as follows:

"Since the defendant has admitted in his testimony to have secured loan from the plaintiff through her aunt one Luphina Philipo Kizenge, this court orders the defendant to pay the plaintiff a total sum of Tshs. 5,880,000/= (Five million eight hundred eighty thousand) in three months from the date of this decision..."

From the above quoted part of the trial court judgment one can ask what constitutes the judgment of the court? There is no clear definition of the term judgment. As per Blacks Law Dictionary, Bryan A. Garner, 8th Edition, a judgment is defined as:

"A court's final determination of the rights and obligations of the parties in a case."

It is trite law that judgment of the court must contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. The judgment of the trial court complained of by Mr. Kiobya lacks points for determination which are the framed issues. As rightly submitted by Mr. Kiobya the submission which I cherish, no issues were framed by the trial court as per the requirements of Rule 44 of the Magistrates' Courts (Civil Procedure in Primary Courts) GN. No. 119 of 1983. The rule makes it mandatory that before hearing of any civil case starts in the primary court, the presiding magistrate must ascertain with parties what are the matter admitted and denied on the claims or allegations tabled against the other party. Thereafter admissions and denials will be recorded and finally decide and record disputed issues to be determined by the court. The purposes of recording issues were over emphasized in the case of **Nkulubo** (supra) at page 105 where the court had this to say:

"Framing of issues confines the court to specific areas in which the dispute hinges, after knowing the issues the court will be in a better position to decide the matter to its finality."

A case decided without having issues framed is a good as cruising a ship without a compass and map in which the captain is bound to lead the

ship into a wrong destination for missing the direction to take him through the right and intended destination. This is what happened to the primary court magistrate in this case where the trial court proceeded to order the appellant to pay the respondent Tshs. 5,880,000/= without assigning reasons as to why and how it reached to that decision which in my opinion is wrong as it is not supported by evidence in record. It follows therefore that the judgment entered by the primary court was nothing but a nullity as it based on evidence not adduced in court. It is trite law that judgment of any court must be grounded on evidence properly adduced otherwise the purported decision becomes a nullity. This position of the law was stated by the Court of Appeal in the case of **Mohamed A. Issa Vs. John Machel**, Civil Appeal No. 55 of 2013 when held that:

*"We take to be trite law that the judgment of any court or quasi-judicial tribunal must be grounded on evidence properly adduced during the trial, **otherwise it is not a decision at all. The purported decision becomes a nullity**" (emphasis supplied).*

The appellate court ought to have seen this error and rectify it but equally failed to do so as complained of by Mr. Kiobya. It follows therefore that since the trial court's decision was a nullity even the appellate court's judgment suffers the same consequences for being predicated on a nullity decision. It is therefore the finding of this Court that the appellate court erred to disregard the 3rd ground of the appellant. This ground also succeed.

Mr. Kiobyia also attempted to argue other two grounds which were never raised as grounds of appeal before. No leave of the court was sought to amend the memorandum of appeal before he could proceed to argue them. I see no point of labouring much energy on this issue as parties are bound by their pleadings. Since the appellant did not raise them in his memorandum of appeal he is therefore estopped from raising and arguing them at this stage.

Having so found and as found earlier in the first and second grounds that both trial and appellate courts' judgment are nullity I am inclined to hold that this appeal has merit and is hereby allowed on both grounds of appeal. I therefore proceed to invoke the revisionary powers of this Court under section 44(1)(b) of the Magistrates Court's Act, [Cap. 11 R.E 2009] by quashing the proceedings of both the appellate and trial courts and set aside the judgments and orders thereto. The respondent is at liberty to institute a fresh suit if she so wishes subject to limitation of time.

I order no any costs.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of July, 2020.


E.E. KAKOLAKI

JUDGE

10/07/2020



Delivered at Dar es Salaam today on 10/07/2020 in the presence of the appellant, Respondent and **Ms. Lulu Masasi** Court clerk.

Right of appeal explained.

E.E. KAKOLAKI

JUDGE

10/07/2020