

**IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL APPEAL NO. 106 OF 2019

(Originating from the judgment of the District Court of Mafia at Mafia
before Hon. Maroa RM., in Civil Case No.1 of 2018 delivered on the 26th
February, 2019)

LB MAFIA ISLAND COMPANY LTD.....APPELLANT

Versus

RAMADHANI BAKARI YUSUPH.....RESPONDENT

JUDGMENT

4th June, - 9th July, 2020

J. A. DE - MELLO J;

Aggrieved by the decision of the **District Court of Mafia** at **Mafia** before **Hon. Maroa RM, in Civil Case No.1 of 2018** delivered on the **26th February, 2019**, the Appellant lodged the following grounds

- 1. That, learned Trial Magistrate erred in law and, fact to arrive at conclusion that, the Respondent proved the case under the balance of probabilities.**
- 2. That, the learned Trial Magistrate erred in law and, fact to strike out/dismiss the appellants counter claim without affording the Appellant right to be heard.**

3. That, the learned Trial Magistrate erred in law and, fact to proceed with the trial of the suit without complying with the mandatory procedure to conduct mediation before trial.
4. That, the learned Trial Magistrate erred in law and, fact to arrive at the conclusion that the sand mixer machine was hired while the respondent did not prove that fact under the balance of probability.
5. That, the learned Trial Magistrate erred in law and fact to base on and treat the appellants written submission as evidence to prove that, there was no sale but hire agreement of the sand mixer machine.

Basing on the above grounds the Appellant prays for the judgment and decree of the **District Court** be set aside and his appeal allowed.

Briefly, it is a sand mixer that was subject of the suit in the lower Court as to whether it was sold or hired to the Respondent. The Trial Court entered judgment in favour of the Respondent ordering payment of **TShs. 1,700,000/=** as principle amount, **TShs. 5,000,000/=** as a general damages and, **30% interest** from the date of the Judgment to the final settlement of the decretal amount.

On **21st May, 2020** this Court ordered the matter be heard **Ex-Parte** owing to the persistent absence of the Respondent granting written submissions due to **Covid-19 pandemic**, with the Appellant to file his written submissions on 4th June, 2020. He is in compliance and grateful for this. Joining ground 1 and, 4 together, Counsel for the Appellant submits that, on cross examination, **PW2, PW3** and, **PW4** admitted to have not

witnessed the negotiation and conclusion of the machine hiring agreement but ably informed by the Respondents and, **DW1** who was the Principal Officer of the company produced an internal memo as **exhibit D1** showing the machine was bought for **TShs. 1,700,000/=**. That, evaluation of evidence is highly dependent on the legal principles adduced by **section 110 & 112** of the **Evidence Act, Cap. 6** and, **section 112** which provides for the burden of proof to lie with one who alleges and Respondents, one moving the Court by way of a suit failed to do so. Regarding the second ground, the Appellant's Counter claim against the Respondent was **Suo Motto** dismissed by the Trial Magistrate without affording the Appellant his right to be heard the act which violated the principles of natural justice. With regard to third ground that, it is the same **Trial Magistrate Hon. Maroa RM.**, one who conducted mediation of the case instead of assigning the said case to another Magistrate against the procedure rendering the Trial null and, void as observed in the case of **Charles Rick Mulaki v William Jackson Magero, Civil Appeal No. 69 of 2017, High Court of Tanzania at Mwanza (Unreported)** of which it was held;

"The omission to conduct mediation vitiates the judgment and the proceedings of the Trial Court".

Lastly, on the fifth ground, Counsel submits that the Trial Magistrate treated Appellant's submissions as part of evidence, contrary to the procedure. He prayed for this Court to allow the Appeal with costs based on the submission above. As echoed, the Appeal is heard in the absence of a defiant Respondent having been satisfied to have been duly notified.

Other than the law, several cases have subscribed to such to include the case of **Mkurugenzi Tarime Goodwill Foundation vs. Editha Salongo Tibamanya, Revision No. 23 of 2019, High Court of Tanzania, at Musoma (unreported)**


"It is in the interest of State that litigation should come to an end. Parties cannot litigate endlessly. They need time out of litigations to undertake economic activities".

Being satisfied, the above reasons sufficed for the Court to proceed as it did, in Ex Parte.

In answering the above grounds, I find it logical to address the second ground upon which perusal from lower Court file, establishes it to be without merit. I say so based on what transpired on the **29th August, 2018** the Counter claim was **Struck Out** in line with **Order VIII, Rule 12** of which states;

"Where a Defendant has set up a Counterclaim the Court may, if it is of the opinion that the subject matter of the Counterclaim ought for any reason to be disposed of by a separate suit, order the Counterclaim to be Struck Out or order it to be tried separately or make such other order as may be expedient."

The available remedy if at all, was for the Appellant to appeal against that ruling. As such, the right to be heard was dully exercised.



On the third ground, and, yet after another perusal, the proceedings of the Trial Lower Court indicates that, on **1st of October, 2018**, mediation was skipped with a reason that there is only one Magistrate in place, who then ordered for **final PTC** to be on **17th October, 2018**. **Order VIII C, Rule 1** of the **Civil Procedure Code, Cap. 33, R.E 2019** provides for the Mediation as it reads;

"Where negotiation or mediation or other similar alternative procedure for resolving the matters in dispute between the parties is directed by the court under a scheduling order made under sub-rule (2) of rule 3 of Order VIIIA or under sub-rule (1) or rule 3 of Order VIIIB, such negotiation, mediation or similar alternative procedure, other than arbitration, shall be conducted in accordance with directions issued by the Chief Justice".

Order VIIIA, Rule 3 of the **Civil Procedure Code, Cap. 33, R.E 2019** provides for the mediation to be conducted when the pleadings are completed within **twenty one (21) days**.

As well, **Order VIII B, Rule 3**, states that;

"Where, after full compliance with the directions made under sub-rule (2) of rule 3 of Order VIIIA, the case remains unresolved, a final pre-trial settlement and scheduling conference shall be held, presided over by the judge or magistrate assigned to try the case for the

purpose of giving the parties a last chance to reach an amicable settlement."

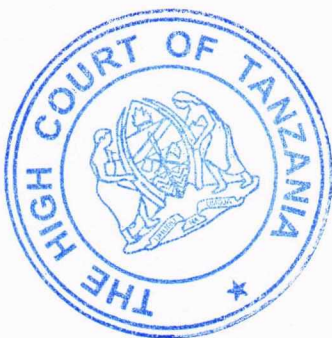
The above provisions therefore makes mediation to be mandatory. In the case of **Charles Rick Mulaki vs. William Jackson Magero, Civil Appeal No. 69 of 2017, High Court of Tanzania at Mwanza (Unreported)** as cited by the Appellant, **Hon. Maige J** held that;

"...It is trite law that, mediation is mandatory procedure in civil proceedings unless for matters on which the procedure does not apply". Failure to conduct mediation vitiates the judgment and, proceedings of the Trial Court, which in the instant matter this only ground disposes the Appeal as invoke my Revisionary powers under **section 44(1) (b) of the Magistrates Courts Act, Cap. 11, R.E 2019** nullifying the Judgment and Decree that, the Trial Court passed.

I therefore remit the file for Re-Trial before another Magistrate with further directive that, the same should be placed for mediation.

No order as to the cost.

It is so ordered.




J. A. DE-MELLO

JUDGE

9th JULY, 2020