

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA**

HC. CIVIL APPEAL No. 21 OF 2018

(Originating from Musoma District Court Civil Case No. 33 of 2016)

SPENCON SERVICES (T) LIMITED ----- APPELLANT

VERSUS

GRADIATORS INVESTMENT COMPANY

LIMITED & ANOTHER----- RESPONDENT

JUDGMENT

30th April, & 2nd July, 2020

TIGANGA, J

Before the District Court of Musoma at Musoma the respondent, namely Gradiators Investment Company Limited and Martin Maina Wanjon sued the applicant Spencon Services (T) Limited, claiming for various equipments a total of which was valued to USD 89,500/= USD equal to Tanzania shillings 179,000,000/= (one hundred and seventy nine millions) as a result of the breach of contract between the parties entered into on 13th, 18th and 19th May 2016 via the Agent namely Marcus Guru who sold the said equipment on behalf of the defendant (now the appellant). Those equipments are listed in the plaint which initiated these proceedings. The respondents also claimed for costs and any other relief as the trial court

could deem fit and just to grant. After full trial, the trial court though *ex parte* granted the claim.

The reason as to why this case was heard *ex parte* before the trial court was that although the defendant filed their written statement of defence, the same was apparently not filed in that case. This is because the exchequer receipts issued in respect of the payment of the filing fee of the written statement of defence shows a different numbers which is Civil Case No. 33 of 2018, while the case before the trial court was Civil Case No. 33 of 2016. In view thereof, it was held that the said written statement of defence was deemed to have not been filed, that is why the case was heard *ex parte*.

Having been satisfied that the plaintiffs (now the respondents) proved the claim at the required standard, the defendant (now the appellant) was ordered to hand over the motor vehicle with registration number T. 158 CXD make Scania, motor vehicle with registration No. KBP 230V make Tata tipper and Dymapac Compact Rouser with registration No. KBC 613, to the 1st Plaintiff, who is now the 1st Respondent, Gladiators Investment Company limited.

It was also decreed that, the defendant (now the appellant) handover the motor vehicles with registration No. KBG 701E, KBG 701E, KBG 859R and KBE 098E, KBG 859R and KBE 098E make Toyota Hilux to the plaintiff Martin Maina Wanjoh.

Besides the main case, there was an Application No. 101/2016 which was for attachment before judgment in which all properties listed in the plaint were attached before judgment which was granted on 23/12/2016.

Aggrieved by the decision of the trial District Court, the appellant filed seven grounds of appeal as follows:-

- i. That the trial court erred in law and facts in entertaining a preliminary objection that was based on factual findings.
- ii. That the trial court erred in law and fact in holding that the appellant had failed to prove the payment of court fees for the written statement of defence.
- iii. That the trial court erred in law in hearing and determining a suit over which it had no jurisdiction.
- iv. That the trial court erred in law and facts in admitting as exhibits, documents which were not annexed to the plaint by the respondent.
- v. The trial court erred in law and facts in holding that the second respondent had proven his case in clear absence of evidence to that effect.
- vi. In the alternative to ground number iv and v above the trial court erred in law and fact in relying solely on the purported sale between the appellant and the respondent as proof of the sale agreement the parties.
- vii. The trial court erred in law and fact in basing its judgment on documents which were not annexed to the amended plaint.

In consonance with those grounds of appeal, the appellant prayed the following orders:-

- a) That the appeal be allowed and the proceedings, ruling and orders of the District Court of Musoma in Civil Case No. 33 of 2016 be quashed and set aside.
- b) The appellant's written statement of defence be restored to the record of trial court.
- c) Determination on merit of Civil Case No. 33 of 2016 at the District Court of Musoma, at Musoma.
- d) Costs of the appeal, and
- e) Any other relief that this honourable court deems fit to grant.

In this appeal, the respondents were served through news paper, Mwananchi of 08th August 2019 but never appeared. That necessitated *ex parte* hearing of the appeal.

At the hearing, the appellant was represented by Mr. Robert Mosi learned, Advocate who in his argument decided to argue all seven grounds of Appeal. Addressing the court on the filed grounds he submitted that, the first two grounds, that is the 1st and 2nd grounds are prior or before the judgment and the remaining five grounds are after judgment.

Arguing in support of ground number 1, which is to the effect that the trial court erred in law and fact by entertaining the preliminary objection basing on the factual findings. He recited the principle that preliminary objection on point of law must arise from the pleadings. In support of this

proposition he cited the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** [1969] E.A 696.

It is his submission, that the trial court erred by allowing the respondents to submit on the preliminary objection which was based on fact and which was not part of the pleading, which resulted to the struck out of the appellants defence, on the ground that it was improperly filed contrary to the law. Submitting in support of the first ground of appeal which raises the complaint against the findings of the trial court, which was to the effect that the appellant failed to prove the payment of court filing fees for the written statement of defence. He also argued that, that was not a point of law because it required a factual proof which is beyond the limit of preliminary objection. On that, the counsel submitted that the appellant managed to produce the proof of such payment although the receipt had some errors on the year, instead of being 2016; it was 2018 while all other details were corrected. It is his submission that the appellant went as far as producing the receipt from NMB Bank with receipt No. 928414 dated 11th June 2018 which receipt had the details.

However, the court disregarded all these evidence and concentrated on the error. He submitted that once the party had paid necessary fees for lodging any document, the responsibility of that party ends there. The issue of how to record and what is to be recorded in the receipt is the domestic affairs of the court's account department and a party cannot be blamed for the errors committed or caused by the staff of the court in recording.

On that, he made reference to the case of **Msasani Peninsula Hotel Limited and six others vs Barclays Bank Tanzania Limited & 2 others**, Civil Application No. 192/2006, where at page 6, the Court of Appeal discussed on the issue of at what time the court fees is deemed to be paid and if there is any error or defect after the party has paid the same due to the fault of the court staffs the party cannot be condemned for it. He submitted therefore that, in the case before the trial court, the court erred to condemn the appellant for the error committed by the court's staff.

Regarding the third ground of appeal, which raises the compliant that the court had no jurisdiction to entertain a suit. He submitted that, the total amount claimed is Tshs. 238,782,500/= say (Two hundred and thirty eight millions, seven hundred and eight two thousands and five hundred), which amount is beyond the pecuniary jurisdiction of the Magistrates' Courts as provided under section 40 (2) (b) of the Magistrate Courts Act [Cap 11 RE 2002] as amended by the Written Laws (Miscellaneous Amendment) Act No. 03/2016, which provides for Tshs. 200,000,000/= on immovable properties. He cited the case **Tanzania China Friendship Textile Limited vs Our Lady of The Usambara Sisters**, [2006] TLR 7 CAT, in which it was held that, since the trial court had no jurisdiction, the proceedings were a nullity.

On the fourth ground of appeal, that the court admitted the exhibit which were not annexed to the plaint. He cited Order VII Rule 14 (1) of the Civil Procedure Code [Cap 33 RE 2019]. He submitted that the sale agreement and the deposit slip were not annexed to the plaint but were

tendered and admitted as exhibit against Order VII Rule 18 (1) of the CPC (supra), which prohibit the documents which was not annexed to the pleading not to be admitted, unless the leave of the court had been granted.

Regarding ground No. 5, which raised the complaint that the second respondent had proven his case in clear absence of the evidence to that effect, He submitted that the evidence which were taken to have proved the claim that exhibit P1, P2 and P3 were not annexed to the plaint and so it was not proper to have them admitted without leave of the court.

With regard to ground 6 of the appeal, that it was not proper to rely solely on the purported sale agreement between the appellant and the respondents, without taking regard that the same were illegally admitted as indicated in ground 4 and 5 of the appeal, that cutters to the seven ground as well. For that reason, he prayed the appeal to be allowed, the proceedings be quashed, ruling of the District Court which excluded the written statement of defence be set aside, the same be restored in the records of the trial court and the Civil Case No. 33/2016 be determined on merit and the costs for proceedings, in this appeal be provided as well as any other relief as the court may deem fit and just to grant.

Now, that being a comprehensive summary of the grounds of Appeal and the submission in support of the appeal, I will, for convenience purpose, start with the first ground of appeal which raises a complaint that the preliminary objection that the defence was not properly before the court, as it was not filed at all, following the receipt which is alleged to be

the evidence of payment of its filing fee to bears a number of another case that is Civil Case No. 33/2018 instead of reciting Civil Case No. 33/2016.

Secondly, that even the date of the receipt was on 01/04/2018, apparently that being a date even before the filing of the amended plaint for which that amended written statement was filed.

This type of objection is in fact challenging the issue which apparently is the factual issue. However, since it is a law that except where a party is exempted to pay fees by law, every document filed in court as a pleading must as a matter of law be paid for a filing fees prescribed by the Court fees Rules.

The non compliance with that requirement cannot be termed as factual; it is legal in the sense that the non payment of fees in respect of any pleading which is not exempted vitiates the filed document. On that, I find though **Mukisa Biscuits Company Limited vs West End Distributor Limited** (supra) is a good law in as far as the quality and a tribute of the preliminary objection is concerned in this case, it is therefore distinguishable. For that reason, I find the ground of appeal to have no merit and it consequently fails.

Regarding the second ground of appeal, which raises a complaint that the trial court erred in law and fact in holding that the appellant had failed to prove the payment of court fees for the written statement of defence, as earlier on pointed out on the first ground of appeal, the appellant did not defend his case before the trial court because the amended written statement of defence which he allegedly filed defending

the suit was expunged on the ground that, the receipt bear the number of Civil No. 33/2018, (a strange case), instead of Civil Case No. 33/2016. The other factors which caused the exclusion of the said written statement of defence is the date of the receipt which suggested that the payment of the filing fees was filed about a month before the amended plaint had been filed. That meant, it was filed on 01/04/2018, while the amended plaint which was countered was filed on 24/05/2018, about more than a month after the written statement of defence was filed. But that is according to the exchequer receipt which signifies that the filing fees were paid.

However, looking at the amended written statement of defence, it was received by the registry officer on 11/06/2018; the receiving officer did not only receive by signature but affixed his stamp of the Registry officer Resident Magistrate court Musoma.

Arguing against the act of excluding the said written statement of defence the counsel for the appellant, submitted while acknowledging the error on the receipt in respect of the date and the case number, he nevertheless complained that the appellant was not the one to blame. Just like any other party to the case, he just paid fees; the details in the receipt were filled in by the judicial staff in the account section. In further proving that he paid for the said case and on the date when the court clerk received the document, he went as far as producing the Bank pay in slip showing that he paid the filling fees of the said amended written statement of defence showing that it was of Civil Case No. 33/2016, and the date of payment being on 11/06/2018. However all these evidence to show that he

paid were disregarded, consequence of which the filed written statement of defence was expunged, and the case was heard *ex parte*.

In his argument in this appeal the appellant relied on **Msasani Peninsular Hotel Limited and six others vs Barclays Bank Tanzania Limited and 2 others** (supra). Which held to the effect that;

"once the necessary fees for lodging the document had been paid, the responsibility of the applicant ended, what was left to be done was entirely the domestic affairs of the court; The applicant cannot be penalized for the inefficiency of the court. The fault is to be traced to the door step of the registry of the court. The applicant cannot be made a scapegoat"

I entirely agree that where a party to the case, has done his/her role, and left the rest to be done by the judicial staff, and that component to be done by the judicial staff is either not done or done in error, the party who did his job should not be punished for the wrong or in action of the staff of the judiciary. Doing that is punishing him for the wrong he did not actually commit. That being the case and taking into account the effort made by the appellant which would have prompted the Honourable learned Resident Magistrate to go a step further by calling that staff, who was said to have wrongly written a date and a case number to ascertain the truth falsity or the truthfulness.

The Constitution of the United Republic 1977, in its Article 13 (6) (a), provides;

"Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinacho husika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kikamilifu, na pia haki ya kukata Rufaa au kupata nafuu nyingine yoyote ya kisheria kutokana na uamuzi wa Mahakama au chombo hicho kinginecho kinachohusika: (emphasise supplied)

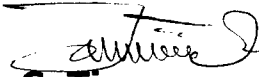
Looking at the way the written statement of defence was excluded and how the order for the *ex parte* hearing was made, it is obvious that the constitutional right to be heard was deprived by the trial magistrate unreasonably. That said, I find the second ground of appeal to have merit and allow it.

Looking at the nature of the rest of the grounds, it goes without saying that having found that the appellant was unreasonably denied the right to be heard, I find that there was enough evidence to prove that the appellant filed the amended written statement of defence in time, which was worthy of consideration by the trial court. That said, I vacate the order of the trial court which expunged the amended written statement of defence filed by the defendant before it, (who is the appellant in this case) and the order which ordered the suit to be proved *ex parte*. Consequently, I restore the said written statement of defence filed on 11/06/2018, and order that the case be tried from where an order which expunged the amended written statement of defence was made and that of hearing *ex parte*. The case be tried by another magistrate of competent jurisdiction.

The appeal is therefore allowed to that effect with costs.

It is so ordered.

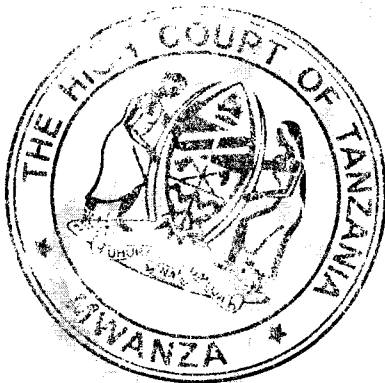
DATED at MWANZA this 02nd day of July 2020

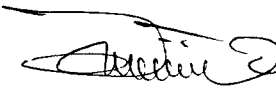

J. C. Tiganga

Judge

02/07/2020

Judgment delivered in open chambers in the presence of the parties via tele conference. Right of appeal explained and fully guaranteed.




J. C. Tiganga

Judge

02/07/2020