IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC. CIVIL APPEAL No. 18 OF 2020

(Arising from the decision of the District Court of Nyamagana in Civil Appeal No. 24 of 2019, Originating from Mwanza Urban Primary Court in Civil Case No. 219 of 2019)

RAMADHANI MAJEBU ..... APPELLANT

VERSUS

KUNISA CHAMRIHO NYAMSHA ..... RESPONDENTS

J U D G M E N T

Last Order date: 13.05.2020

Judgment Date: 19.05.2020

A.Z.MGEYEKWA, J

The appellant appealed against the judgment of the District Court of Nyamagana in Civil Appeal No.24 of 2019, which was decided in favour of the respondent.

The background to this appeal is briefly as follows. The respondent filed a Civil Case No. 219 of 2019 before the Mwanza Urban Primary Court against the appellant claiming a payment of Tshs. 28,000,000/=. The trial court decided in favor of the respondent, the appellant could not see justice thus he appealed to the District Court which upheld the decision of the trial court. The appellant was aggrieved by the first appellate court therefore he decided to file the instant appeal before this court containing four grounds of appeal as follows:-

1. *That the appellate court erred in law for failure to observe that the trial court had no jurisdiction to entertain the matter.*
2. *That the appellate court misdirected itself for failure to observe the evidence on record adduced in the trial court did not support the claim.*
3. *That the appellate court erred in law for failure to observe that there was no admission of facts and claims in law to warrant the judgment in admission.*
4. *That the appellate court erred in law for failure to find that failure to join a proper and necessary party to contract, vitiated the whole proceedings as well as a miscarriage of the administration of justice.*

The hearing was done by way of written submission whereas, the appellant filed his submission in chief as early as 26th May, 2020 and the respondent file a reply as early as 1st June, 2020 and the rejoinder was

filed in court on 4th June, 2020. Both parties complied with the court calendar.

In support of his appeal, Mr. Mushobozi, learned counsel for the appellant opted to start submitting the 4th ground of appeal, he argued that the appellate court erred in law for failure to find that failure to join a proper and necessary party to contract, vitiated the whole proceedings as well as a miscarriage of the administration of justice. He avers that one Dotto Paul @Abel is both necessary and interested party and was not joined and it is his prayer that this court to find that non-joinder of a necessary party by the trial court resulted into the serious irregularity.

Elaborating, he cited the case of **Stanislaus Kalokola v Tanzania Building Agency And Mwanza City Council**, Civil Appeal no. 45 of 2018 CAT and the case of **Abdulatif Mohamed Hamis v Mehboob Yusuph Mohamed and Fatma Mohamed**, Civil Revision No. 6 of 2017 CAT at DSM, the Court of Appeal of Tanzania held that on the absence of the necessary parties, the court may fail to deal with the suit and shall be not able to pass an effective decree.

He insisted that since the contract involved two people; the appellant and one Dotto Abel, failure to join them in the suit is an irregularity and renders the whole process nullity.

Submitting on the 3rd ground of the appeal that the appellate court erred in law for failure to observe that there was no admission of facts and claims in law to warrant a judgment in admission, he avers that, the judgment on admission entered by the trial court was wrong as the trial court failed to analyses what was agreed upon by the appellant. Insisting, he referred this court to the cited the case of **Abdulatif Mohamed Hamis** (supra) that the trial court did not follow a proper procedure on ascertaining if the statement by the appellant was clear, unambiguous and unequivocal.

He insisted that, the trial court failed to comply with Section 44 of the Primary Court Civil Procedure Rules GN No. 310 of 1964 for failure to ascertain what matter was specifically admitted by the appellant. Supporting his claim he cited the case of **Zerina Akbala Shari v Moshi** 1963 EA. 230 and the case of **Southern Highlands Participatory Organisation v Wafanyabiashara Njombe Saccos Ltd, Uwemba Sacoss Branch**, Commercial Case No. 122 of 2015 that the judgment on

admission was not given for not being clear and ambiguous. He contended that the provision of the Civil Procedure Code, Rule 4 Order 12 is more or less similar to Rule 44 of the Primary Court (Civil Procedure) Rules G.N No. 310 of 1964 which was the core point for determination by the trial court.

With respect to the 2nd ground of appeal, Mr. Mushobozi avers that, the party cannot be given what was not pleaded on the complaint. He insisted that the respondent did not seek interest.

Finally, on the 1st ground of appeal, the appellant's Advocate submitted that the trial court has no jurisdiction to entertain matters that originates from the commercial transaction therefore the 1st appellate court was wrong to uphold the same. Defending his position, he cited the case of **Waziri Hassan v Arafa Bakari** Civil Appeal No. 12 of 2017 HC Tanga (unreported) and the case of **Sheila Elangwa Shaidi v Wilfred Moses Lukumay** Civil appeal No. 203 of 2018 HC Dar Es Salaam (unreported).

In conclusion, Mr. Mushobozi, prays this court to allow the appeal, quash the decision and proceedings of the two courts below and the matter be tried de novo.

In repost, Mr. Bernard Msalaba opted to start with the 4th ground of appeal, he argued that the appellant is wrong to invoke section 3A, B and C and 95 of the Civil Procedure Code Cap.33 [R.E 2019]. He argued that, unlike the necessary party who is indispensable, the presence of proper party is dispensable and in the case, at hand, Dotto Abel is not a necessary party and the sum of Tshs. 28,000,000/= was given to the appellant alone it did not to include the other party; Dotto Abel as claimed by the appellant. He distinguished the cited cases by the appellant's Advocate and urged this court to find that this ground is baseless.

Submitting on the 3rd ground of appeal, Mr. Msalaba avers that, the admission by the appellant on the trial court was clear, unambiguous, and unequivocal and no reservation was made. He insisted that the appellant effected Tshs. 1,000,000/= on 26.09.2019 as part payment. He went on to argue that all cases cited by the appellant's Advocate are distinguishable and therefore irrelevant.

On the 2nd ground of appeal, Mr. Msalaba insisted that the evidence on records supports the claim, the judgment of the trial court, and the 1st appellate court were proper and justifiable. He went on to argue that, the sum of Tshs. 28,000,000/= was given to the appellant alone and Dotto Abel being a partner of the appellant was known to himself and not to the respondent therefore the appellant cannot escape liabilities to pay. On the commercial interest awarded by the trial court, the learned counsel for the respondent insisted that it was proper for the court to grant such interest award as the court has the discretion to do the same. He prays this court to find this ground is demerit.

Finally, on the 1st ground, the learned counsel for the respondent argued that the trial court had jurisdiction to try the matter. He invited this court to go through the 1st appellate court records. He insisted that the sum of Tshs. 28,000,000/= are within the jurisdiction of the trial court and the matter was properly instituted. He prays this court to dismiss the appeal with costs for being devoid of merit.

Rejoining, the learned counsel for the appellant insisted that, the respondent has raised new matters which were not pleaded that the

appellant effected Tshs. 1,100,000/= as part payment of Tshs. 28,000,000/=.

In relation to the 3rd ground of appeal, Mr. Mushobozi forcefully argued that the respondent is wrong as the court relied on the agreement which was not tendered on oath as evidence by the party. He insisted that the trial court failed to test each and every fact which was admitted by the appellant.

He further added that on the issue of interests, it is with no doubt that the court has the discretion to make an award but the same should not be made on the reliefs that were not prayed by the party. On the issue of jurisdiction, insisted that, the issue of jurisdiction can be raised at any stage of hearing a case. Mr. Mushobozi fortified his submission by referring this court to the case of **Sheila Elangwa** (supra) that the court jurisdiction can be raised at any stage to include the appellate stage. He reiterated his submission in chief that the trial court had no jurisdiction to entertain the matter and therefore prayed this court to allow the appeal with costs.

After a careful perusal on record of both two courts below and submissions made by the parties' Advocates, I must clearly state that I am fully aware that this is a second appeal. I am therefore supposed to deal with questions of law only, and interference should only be done where it appears on the face of it that, there has been a misapprehension of the evidence, miscarriage of justice, or violation of some principle of law or practice. This has been the position of law in this country in the case of **Amratlal D.M t/a Zanzibar Hotel** [1980] TLR 31, it was held that:-

> *"An appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice."*

Guided by the above authority, and as stated on the 3rd ground of appeal that this appeal was a result of a judgment on admission entered against the appellant by the trial court, for that reason I opt to start determining the 3rd ground of appeal. It was the appellant claim that the 1st appellate court erred in law for failure to observe that there was no admission of facts and claims in law to warrant the judgment in admission. It was the learned counsel for the appellant claims that the trial court erred for not properly testing each and every fact as a result it entered

into judgment in admission which was not clear, ambiguous, and equivocal while the respondent learned counsel claimed that the trial court and the first appellate court decision were proper.

Upon determination, I revisited the trial court records and for clarity I, reproduce a part of what transpires at the trial court as follows:-

Tarehe; *12.06.2019*

Mbele ya; *(...)*

Washauri; *wapo*

Mdai; *yupo*

Mdaiwa: *yupo*

MAHAKAMA

Daawa limesomwa kwa mdaiwa kwa lugha ya Kiswahili anayoielewa nae anajibu:-

NI YA KWELI

Sgd

MAHAKAMA

Kwa kuwa mdaiwa amekiri madai kwa mahojiano kama ni kweli anadaiwa deni hiloatalipa lini na vipi?

Sgd

The judgment in admission is to the effect that the trial court records must clearly show what is specifically admitted and the admission must be clear, unequivocal, and unambiguous. In the case of **Southern Highlands Participatory Organisation v Wafanyabiashara Njombe SACCOS Ltd, Uwemba SACOSS Branch**, Commercial case No.122 of 2015 [29th April 2016 TANZLII] it was held that:-

> *" I, therefore, refuse to give the judgment on admission since the admission is not clear, the admission is ambiguous as it is not clear whether the defendant as a SACCOS admits liability ...."*

What transpired on the record is not clear as to what was agreed by the response of the appellant on a trial court with a statement that reads "Ni ya Kweli."

The civil cases in the Primary Court are governed by the Primary Court (Civil Procedure) Rules GN. No.310 of 1964 and judgment by admission is provided for under section 44 which states that:-

> "Section 44. *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. *[Emphasis is added]*

What was required to be done by the trial court was to record the admissions in detail and proceed to take or record explanations in detail from the complainant including admitting exhibits and to afford the appellant a chance to examine the exhibits and respond to both the detailed explanations given and the exhibits tendered by the complainant before the court. Then the court could be in position to record the admissions and denials before reaching its final decision.

On records, the contract was referred to as an exhibit and the trial Magistrate relied upon the said contract to reach his decision while the contract did not form part of the trial court proceedings as it was not admitted as required by the law. In the case of **China Henan International Corporation Group v Salvand K.A. Rwegasira**, Civil Reference No. 22 of 2005, the Court of Appeal of Tanzania (unreported) held that the role of rules of procedure in the administration of justice is fundamental. I agree with the appellant learned counsel that the first appellate court was required to hold that there was no proper admission

of facts and claims thus it was wrong relying on a document that was not part of the case.

With the foregoing observation, I find no need to discuss the remaining grounds of appeal, which was raised by the appellant as to do so would be a mere academic exercise.

In the upshot, I allow the appeal, in the exercise of my power under section 29 (b) of the Magistrate's Court Act, Cap.11 [R.E 2019], I quash the court proceedings and set aside the judgments of the two subordinate courts. I further order the matter be heard afresh by another Magistrate with a new set of assessors in compliance with the law and procedure stated above. Each party shall bear his own costs.

Order accordingly.

DATED at Mwanza this 17th June, 2020.

A.Z.MGEYEKWA

JUDGE

17.06.2020

Ruling delivered on 17th day of June, 2020 whereas Mr. Mwita Emmanuel, learned counsel for the appellant and Mr. Msalaba, learned counsel for the respondent were remotely present.

A.Z.MGEYEKWA

JUDGE

17.06.2020