IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO.246 OF 2018

(Originating from the Ruling and Decree of the Resident Magistrate's Court of Kibaha in Civil Case No. 15/2017, Hon. R. Kangwa RM, dated the 15th day of October, 2018)

TONGA FUETA .....APPELLANT

VERSUS

STEVEN PWELE SHOWE ..... 1st RESPONDENT

EVA PWELE SHOWE ..... 2nd RESPONDENT

JUDGMENT

Date of the last order: 29/01/2020
Date of Judgment: 21/2/2020

NGWALA, J.

The appellant is aggrieved with the decision of Kibaha Resident Magistrates' Court in the Civil Case No. 15 of 2017. In the said suit, the appellant was the plaintiff. The appellant claimed against the Defendants, the (respondents in this Appeal) jointly and severally for payment of Tshs 200,000,000/= (Two Hundred Million Only) being expenses and damages caused by the defendants in execution of the Decree of Kibaha Primary Court dated the 5th day of May 1981.

Upon filing their Written Statement of Defense, the defendants raised a Preliminary Objections that they were sued in their personal capacity instead of being sued as administrators of the deceased estate and that

the actual value of the subject matter was not disclosed. The trial court sustained the Preliminary Objection. The suit was struck out. The appellant being aggrieved with that Ruling and Decree of the Resident Magistrate's Court of Kibaha delivered by Hon. R. Kangwa dated the 15th day of October, 2018, has appealed to this Court against the whole decision on the following grounds;

> *"1. The trial court erred in law and in fact in acting on the preliminary*
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> *objection which was raised in the Defendant's Written Statement of Defence and Counter Claim which was filed out of time and in none compliance with the previous orders of the same court.*

2. *The trial Court erred in law and in fact in upholding the preliminary objection that the legal administrators of the estate of the late Pwele Showe were sued in their capacity and should defend themselves in that capacity and not as administrators.*
3. *The trial Court erred in law and in fact in acting on a document annexed to the Defendant's Written Statement of Defence and Counter Claim as "ANNEXURE-AA" and decided in favour of the respondents jointly and severally, while in fact the said annexure was an exhibit referring to the appointment of the Second Respondent as an administratrix and needed*

Counter Claim which is a document exhibiting that the 2nd respondent was an administrator of the estate of the late Pwele Showe. The annexure which had not yet been admitted was wrongly referred to by the trial magistrate. This was a fatal error and contrary to the principles stated in **Mukisa's case supra**. The annexures appended to pleadings can only be valid after being admitted by the court in evidence as exhibits. As the said annexure referred to the name of EVA Pwele while the 2ndrespondent was sued in the name of EVA PWELE SHOWE it was argued that the names were of two different people.

Submitting on the 4th ground of the appeal, Mr. Nyange complained that in Reply to the respondents Written Statement of Defence they also raised notice of cross preliminary objections whose contents was construed wrongly in the decision of the said court dated the 08/03/2018, which allowed the respondents to re-file a new WSD. It made an order to file a fresh WSD which is totally different from the old one, as it contained a fresh notice of preliminary objection and counter claim. The counsel stated that the issue of amendment was never applied by the respondents but it was a result of the objection by the appellant herein.

The counsel for the appellant challenged the order by trial Resident Magistrate that overruled their objection by saying that the respondents were correct to do whatever they did as the order dated 08/03/2018 did not limit them and rejected their submissions that the respondents had to file the Amended WSD.

He contended that as the first WSD which had a notice of preliminary objection was expunged from the record, it was not proper for the

respondents to file a fresh WSD with another new objection without the leave of the court. According to Mr. Nyange for the purposes of record, there should have been a WSD by the respondents which had no errors so that the matter would move to another stage which was for the first pre-trial conference and not to raise issues which were not raised in the former WSD as per Order VI Rule 7 of the Civil Procedure Code, Cap 33 R.E. 2002, which provides that;

> *"No pleadings shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same".*

The appellant's counsel had submitted the order which allowed the WSD to be filed was also bad at law because, after the objection the remedy was not to allow the respondents to file a fresh WSD but to order the appellant to proceed ex-parte because the WSD was expunged and there was no WSD. He urged this court to hold that the trial court had no mandate to issue that order because the respondents neither prayed for the said order nor was the trial court properly moved to issue it.

Regarding the 5th ground of appeal, the counsel for appellant asserted the trial court erred in law and fact by failing to order the appellant to proceed ex-parte or pronounce a judgment in favour of the appellant under Order VIII Rule 14(1) or 14(2)(a) and (b) of the Civil Procedure Code, Cap 33 R.E. 2002, after the first Written Statement of Defence was expunged on 08/03/2018 and a new Written Statement of Defence was filed without authority.

Replying to the 1st ground of appeal, the learned counsel for the respondents Mr. G.S. Ukwonga said the respondent's written statement of defence was filed timely and in compliance with the order of the court. The appellant was and is fully aware of this fact as expressed in his submission. The respondents Written Statement of Defence hereinafter referred to as WSD was expunged as a result of the appellant's own objection. In expunging the WSD, the trial court concluded that *"The remedy is to allow the defendants to re-file the new WSD"*. Mr. Ukwonga submitted further that the defendants now respondents had filed the WSD in compliance with the Ruling of the court dated the 8th day of March, 2018 after the trial court had determined the objection by the plaintiff. That new WSD which contained the counter claim was filed on 11th day of April 2019 in compliance with the court order. Expunging of the previous WSD amounted to having no WSD in record of the court. Mr. Ukwonga said the court rendered a remedy which legally was an express extension of time when the court ordered re-filing of a new WSD because the situation was as if the respondents had filed No defence.

The Ruling of the court was read on 8th day of March 2018. The trial court fixed the matter for mention on the 27th day of March 2018 with a view of giving the respondents 21 days within which to file their WSD. On 27th day of March, 2018 the copy of the Ruling was not in place and the same was certified on the 26th day of March,2018. On 27th day of March,2018 the court ordered the respondents to file their WSD by the 12th day of April, 2018 and on the 11th day of April,2018 the respondents filed their WSD. On

Furthermore, he said the appellant is fully aware of the relationship between the late Pwele and Eva the 2nd respondent. The 2nd respondent has not raised at any stage that Stephen the 1st respondent was not one of the late Pwele's generation.

On the issue of cause of action it is argued in reply that the plaint demonstrated that the respondents have been sued in their individual capacities. The respondents are beneficiaries and administrators of the estate of the late Pwele Showe. The appellant had no cause of action against the respondents. What makes the respondents connected with the suit is the estate of the late Pwele Showe.

Mr. Ukwonga, considered the definition of Mulla to be correct. The only nagging issue was what evidence is the appellant to adduce against the respondents if the estate of the late Pwele is not in issue?

Replying to the 3rd ground of appeal, Mr. Ukwonga said that the same is not different from the 2nd ground. The respondents annexed to their WSD and Counter Claim annexure "AA" which is the Letters of Administration of the estate of the late Pwele Showe. The late Pwele Showe had a case with the appellant herein. The respondents herein upon the demise of Pwele Showe stood firm in defending his estate. This fact has been known to the appellant and the courts where the matters came up that Pwele had died. Eva Pwele Showe the 2nd respondent was chosen by the beneficiaries to be the administratrix and the court established this status by granting her annexure "AA".

This document "AA" has been known to the appellant. The said document has the seal of the court, but the appellant said that the same must be proved in evidence. This document has been judicially noticed. The trial court held "... *the defendants/respondents were executing their duties as the administrators of the estate of the late Pwele Showe. No way out, they have to be sued as administrators and not at their individual capacity*". Thus in support of the decision of the trial court, Mr. Ukwonga asserted that, there was nothing wrong on the part of the court to have decided so because this has been the reality.

The learned counsel for the respondent said the trial court noted that there were several mistakes that were done in respect of this dispute between the late Pwele and the appellant and that court held that *"even if the correspondences or applications were done through wrong names, yet we cannot allow the same mistake in a suit ignoring, the error may lead to a decree which would not be enforceable".*

Mr. Ukwonga pointed out that, the whole problem in this matter, is only if the appellant and her advisors were upright, this appeal is not necessary. It has no objective to achieve. He said the objection disposed by the trial court was purely on point of law. The law requires parties to a suit to be well identified otherwise many people would be driven to court without course as it was in this case. Mr. Ukwonga did not reply to the 4th and 5th ground because they are wrong grounds to deal with.

This court has carefully gone through the trial court record and the submissions of the respective counsels for the parties on the grounds of appeal. I consolidate grounds 1st, 4th and 5th. In relation to the first ground

of appeal, this court found out that it is true the Written Statement of Defence by the respondents/defendants was expunged by the trial court on 8th day of March, 2018. But on 27th day of March, 2018, the trial court ordered a Written Statement of Defence to be filed and fixed the date for mention on 12th day of April, 2018. When the matter came for mention on 12th day of April, 2018, the Written Statement of Defence was already filed. Thus, I consider that the Written Statement of Defence was filed within time and had complied with the order delivered on 27th day of March, 2018. The court could not just disregard the Written Statement of defence because it was filed after the trial court had exercised its power and gave more time to file the Written Statement of Defence.

By extending time to file the same, the trial Magistrate considered the ***Rule of Natural justice*** of ***audi partem alteram***, on the right to listen to the other side, or to let the other side to be heard as well, on a fair hearing, in which each party is given the opportunity to respond to the evidence against him or them. This is a right where a party to the case has a right to be heard by the court as embodied under **Article 13(6)(a) of the Constitution of the United Republic of Tanzania of 1977** as amended from time to time that provides:-

> "(6) to ensure equality before law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:
>
> (a) When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of

Appeal or other legal remedy against the decision of the court or of the other agency concerned.

For the foregoing reasons, the first, fourth and fifth grounds of Appeal have no merit at all.

Regarding the second ground of appeal, the trial court was right to refer Eva Pwele Showe as an administratrix of the estate of deceased. This is shown by the Letters of Administration issued on 24th day of November, 2003. This court emphasize that Eva Pwele Showe was supposed to be sued as the administratrix of the estate of deceased. It is noted that the appellant has continued to make the same mistakes carelessly. Though the appellant is complaining that the first respondent was not the administrator of the deceased estate, he fail to consider that the he is the beneficiary of the estate of deceased.

The issue of the trial Magistrate acting on the document annexed to the defendants' Written Statement of Defence as raised on the third ground, I consider it to be an extraneous factor or a story to this court that never ensued at the trial Court. On this ground the appellant did not state how injustice was occasioned and or he was prejudiced by the trial court to act on annexture AA. The position of law is clear on this point as observed in the case of **SERAFIN ANTUNES AFFONSO VS. PCRTAN ENTERPRISES & OTHER COM. CASE NO. 17 OF 2000 where Hon. Kalegeya, J (as he then was)** stated that;

"The trite position of the law is that when deciding on whether or not a cause of action is disclosed, we only have to

task our eyes within the four corners of the plaint. We only have to peruse the plaint alone ***together with its annexure if any,*** *with this limited ambit, we do assume that the factual allegations thus made, whether expressly or impliedly are true (emphasis supplied)".*

The authority cited above is clear that in scrutiny whether the party has a cause of action against another, the court will check on the plaint. The courts however have a duty to peruse the pleadings to see if they a proper and in accordance with the law. Though the above authority did not mention the Written Statement of Defence, but the court cannot just close its eyes until the matter is fixed for hearing. This ground also does not hold water.

In the upshot, in the circumstances I find all grounds of appeal to have no merits. Accordingly, I dismiss the appeal in its entirety with costs and uphold the decision of Kibaha Resident Magistrates' Court on this matter. Since the suit was struck out by the trial Magistrate, the appellant has avenue to file a fresh suit at Kibaha Resident Magistrates' Court, by suing the proper parties if he so wishes.

It is so ordered.

A.F. NGWALA
JUDGE
19/2/2020

21/02/2020

Coram: Hon. Ngwala, J.

For the Appellant - Mr. John Nyange (Advocate)

For the Respondent - Present

CC: Manumbu

Court: Ruling delivered in the presence of the appellant and his counsel and the Respondent.

Court: Right of Appeal to Court of Appeal of Tanzania explained.

A.F. NGWALA

JUDGE

19/2/2020