IN THE HIGH COURT OF TANZANIA
AT BUKOBA

CIVIL APPEAL NO. 14 OF 2017
(Arising from Civil Case No. 14 of 2015 of the Resident Magistrate of Bukoba at Bukoba)

VICFISH LTD.....APPELLANT

VERSUS

THE REGISTERED TRUSTEES
OF THE ROMAN CATHOLIC
DIOCISE OF KIGOMA.....1st RESPONDENT

REV. FR. CASTUS RWEGOSHORA.....2nd RESPONDENT

JUDGMENT

Masoud, J.

The appellant and one Sued Bachumi were defendants in a civil case which was filed by the above mentioned two respondents "*in the resident magistrate of Kagera at Bukoba.*" The suit was hinged on tortious liability. The respondents sought for specific damages to the tune of Tshs. 27,074, 496/44, general damages and interests among other things. Having heard the matter the trial court found in favour of the respondents.

Aggrieved by the decision of the trial court, the appellant preferred this appeal on a total of four grounds of appeal. The four grounds of appeal

were a result of changes made with the leave of the court by the counsel for the appellant on the original grounds of appeal. Pursuant to the said changes, the 3rd and 4th grounds were combined as one ground as was the 5th and 7th grounds while the 6th ground in the original memorandum of appeal was abandoned. With such changes, the amended grounds of appeal for consideration of this court could best be presented as follow.

First, the trial court erred in deciding that it has jurisdiction to hear and determine the matter while the same was filed in the unknown registry; second, the failure of the trial court to comply with rules relating to Pre-trial Settlement and Scheduling Conference; third, admitting copies of documents in evidence without following proper procedures; and fourth, failure to, evaluate the evidence, and thereby failing to find that the appellant was not vicariously liable for the accident caused by Sued Bachumi outside the course of his employment and that there was no evidence to prove the claim on the balance of probability against the appellant.

Parties were represented by learned counsel. The appellant was represented by Mr Zedy Ally, whilst the respondents were represented

by Mr Elifasi Bengesi. In their respective submissions, the learned counsel addressed the amended grounds of appeal.

As to the first ground, the gist of the entire submissions of the counsel for the appellant which asked me to quash and set aside the impugned decision was that the trial court had no jurisdiction to deal with the suit. The reason was that the suit was filed in an unknown court of Resident Magistrate of Kagera Region at Bukoba instead of the Court of Resident Magistrate of Bukoba at Bukoba.

The counsel for the appellant relied on paragraph 2 of the schedule to the Magistrates' Courts (Courts of A Resident Magistrate) (Re-Designation) Order, GN No. 68 of 1981. The paragraph designated the Court of Resident Magistrate of Bukoba whose area of jurisdiction is Kagera region; and not the Court of Resident Magistrate of Kagera Region at Bukoba appearing on the plaint which was filed by the respondents to commence the proceedings in the trial court.

The court was also referred to the case of **Lukulile M. A vs Ladha Industries Ltd** Civil Appeal No. 278 of 2004 (unreported) where a plaint was improperly headed "*In the District Court of Dar es salaam at*

Kisutu" which is a non-existent court. This court as per Manento JK (as he then was) held that the plaint was improperly before the trial court and ought to have been rejected.

Replying on the submissions on the first ground of appeal, the counsel for the respondents argued that the point on the filing of the suit in a non-existent court was looked at by the trial court and was found not to be fatal as "*Kagera*" could simply be replaced with "*Bukoba.*" The error was thus curable as section 96 of the Civil Procedure Code, Cap. 33 R.E 2002 applies. The case of **GAP OIL (T) Ltd vs TRA and Others** Civil App. No. 9 of 2000 relating to application of slip rule was relied on. I was thus called upon to dismiss the ground with costs.

Rejoinder submissions relating to the first ground of appeal reiterated the submissions in chief. It was further maintained that the error is not curable, and that the issue was not comprehensively dealt with by the trial court.

With regard to the second ground of appeal, it was submitted that the proceedings of the trial court were irregular and hence null and void for the trial court's failure to comply with rules relating to Pre-trial

Settlement and Scheduling Conference. Drawing the attention of this court as to how the rules and procedure for pre-trial conference (PTC) were violated, the learned counsel for the appellant showed how the case file was placed for mediation without compliance with procedural requirements of pre-trial conference and thus without assigning the case an appropriate speed truck pursuant to the requirement of Order VIIIA of the Civil Procedure Code, cap. 33 R.E 2002. I was urged to find that the irregularity of failure to comply with the procedure was fatal and renders the entire proceedings and judgment null and void.

Replying on the submissions relating to the failure to comply with the procedure under Order VIIIA of the CPC, the learned counsel for the respondents advanced two points. One, the failure to comply with the procedure was a result of non-appearance of the appellant and her counsel when the matter was set for the pre-trial conference. And two, the omission if any was not fatal to the extent of rendering the proceedings and judgment null and void.

On the third ground of appeal, the counsel attacked the trial court for admitting photocopies of documents in evidence without following proper procedures established under section 67 of the Evidence Act, cap.

6. They were tendered on a prayer by the counsel for the respondent and not by the relevant witness, the trial court was not told where the original documents were and why they were not brought before the court. Having been admitted, the said photocopies were relied on by the trial court to arrive at its decision. The documents so admitted included Exhibit P.2 (inspection report) and Exhibit P.4 (proformer invoice) certified on 8/07/2016 whilst their originals were allegedly not in the custody of the respondents having been tendered in a traffic case No. 8 of 2012 finalised on 17/07/2012. I was thus called upon to expunge the exhibits and find merits on the appeal.

Replying on the submissions on the third ground of appeal, it was contended that all documents were properly tendered and admitted in evidence. Referring to page 3 of the trial court's judgment to support his submissions, the learned counsel for the respondents stated that the judgment was clear that the relevant laws were complied with when the documents were tendered and admitted. It was also stated that reasons why the documents should be admitted were given by PW.1.

As to the fourth ground of appeal on the alleged failure to evaluate the evidence and thereby failing to find that the appellant was not

vicariously liable and that the respondents did not establish their case on balance of probability, the following submissions were made. That, there was no evidence in relation to the first respondent although the decision was surprisingly made in her favour; that no proof was shown that the second respondent had authority to institute the suit; that no evidence adduced showing that the appellant was vicariously liable for the negligence of first defendant in the trial court; and it was not proved that the second defendant was actually in the course of employment when the accident occurred.

It was added that the driver was not authorized to drive the vehicle at the material night and being at the place where the accident occurred at the material time. He was therefore not in the course of his employment when the accident occurred. The court was thus asked to find that the suit before the trial court was incompetent for being instituted by a person who did not have such authority.

Replying on the submissions of the counsel for the appellant on the fourth ground, the counsel for the respondents denied that there were no proof establishing the respondents' claim within a balance of probability. The learned counsel also recounted on the procedures that

were taken leading to the payment that was effected to the insurer. Given the nature of the respondents' claim in the trial court, the learned counsel likewise stated that the issue whether the appellant allowed the vehicle to be at the place where the accident occurred is not relevant. Rather, what is relevant is the ownership of the vehicle which caused the accident and the fact that the driver pleaded guilty in the traffic case.

A quick rejoinder from the counsel for the appellant drew the attention of the court to what needed to be established for one to succeed in a tortious action as is in the present matter. The first is whether the involved employee was in the course of employment of the appellant when the accident occurred. And the second is whether the employee was authorized by the appellant to drive the vehicle which caused the accident.

It was further contended that as long as such elements were not proved and the appellant was not the one who caused the accident, the suit was not proved within a balance of probability. Discrepancies in the identities of the vehicles involved in the accident and mentioned in the evidence were also highlighted. The court was thus invited to find merit on the appeal.

I have considered the submissions of both counsel on the above grounds of appeal. I have also examined the proceedings, the evidence on the record and the judgment in relation to the rival submissions. The preliminary question that I asked myself is whether the grounds are meritorious.

It was not in dispute that the appellant's vehicle which was then being driven by one, Sued Bachumi, a driver then employed by the appellant was responsible for an accident on 07/05/2012 at *Mwanzomgumu* Road Barrier, Kagera region. The appellant's vehicle knocked and damaged a vehicle belonging to the second respondent. It is also not in dispute that the second respondent was compensated by the appellant's insurer to the tune of Tshs 39,950,000/- for the damage caused. It was similarly not disputed that the appellant's driver was held responsible for causing the accident and was accordingly sentenced in Traffic Case No. 8 of 2012.

The gist of the respondents' claim at the trial court was for damages caused by the appellant's vehicle which was being driven by her employee. The damage caused was allegedly assessed on costs of repair

of the damaged vehicle at Tshs 67,029,496.44. Since the respondents was paid Tshs 39,950,000/- out of 67,029,496.44, the respondent claimed and was accordingly granted by the trial court the difference, namely, 27,074,496.44 as specific damages, as well as a reduced amount of general damages and interests as specified in the trial court's

In resolving this appeal, I started with the third and fourth ground of appeal. I thereafter considered the first and second ground. With the exception of the first and second grounds of appeal which were purely on matters of procedure, the third and fourth grounds were on matters of evidence.

The record is clear that all exhibits were photocopies. It is on the record that the exhibits were all objected by the appellant's counsel during the trial. Among other things, they were objected for being photocopies and for failure to comply with conditions for tendering secondary evidence. It is also on the record that the trial court was shown at the trial on 13/08/2016 that some of the documents (inspection report and

proformer invoice) were undisputedly certified on 08/07/2016 as true copies of the originals which meant that the witness (PW.1) had the originals and he should have tendered them on 08/07/2016.

Although the judgment of the trial court had it that the exhiblts were admitted under section 67(1), (b), (c), & (d) of the Evidence Act (supra), the submissions of the counsel for the respondents in relation to the respective objections as to the tendering of the exhibits were silent on the provisions of law under which the exhibits were sought to be tendered and admitted. The trial court's orders which overruled the objections did not also make reference to any of the provisions of section 67(1), (b), (c), & (d) of the Evidence Act (supra) when admitting the exhibits.

In relation to the failure to specify the law under which the photocopies were sought to be tendered and admitted, the only exception is when the learned counsel was responding to the objection in respect of tendering the inspection report (Exhibit P.2). It is in this respect that section 67(1) & (2) of the Evidence Act which sets out several conditions on the basis of which a photocopy of a document may be used was invoked by the counsel for the respondents. There is however nothing on

the record and in particular from the testimonies of PW.1 showing how a particular condition(s) for giving secondary evidence stipulated under the relevant provisions was/were met.

As earlier mentioned, the trial court was shown on 13/07/2016 at the trial that the inspection report (Exhibit P.2) and the proformer invoice (Exhibit P.4) were certified on 08/7/2016 as true copies of the originals. This point was not considered by the trial court although it is inconsistent with the assertion that the relevant original documents could not be tendered on 13/07/2016 as they were not in the custody of the respondents.

With regard to my findings in relation to the admission of exhibits P.1, P.2, and P.4 which were photocopies, I am constrained to hold that all the said exhibits were improperly admitted and must, as I hereby do so, be expunged from the record. I therefore uphold the third ground of appeal.

Consequently, the only evidence left on the record is mainly featured by the oral testimony of PW.1 who is also the second respondent, Exhibit P.3(Court proceedings in the traffic case) and Exhibit P.5 (Insurer's fund

transfer). The question which links with, and drives home, the fourth ground of appeal is whether the remaining evidence when properly evaluated can sustain the claim for specific damage and general damages found by the trial court.

Regard is in respect of the above had on specific issues, whether the appellant was vicariously liable for the accident caused by Sued Bachumi (the driver); whether the said driver was in the course of his employment when the accident occurred; and whether there was evidence to prove the claim against the appellant on the balance of probability.

The only evidence which sought to establish that the respondents were entitled to a specific damage of Tshs 27,074,496.44 over and above the amount of 39,950,000/- already paid to the respondents by the appellant's insurer was the Exhibit P.4 which has herein been expunged; and the only testimony of the second respondent at the trial to relating to the amount claimed.

The evidence of PW.1 had it that the assessment of the costs of repair reflected in the proformer invoice was carried out by one, Mr Katunzi

who bought genuine parts from Naushad Autoworks, an authorized dealer for Toyota Tanzania. Apparently, neither the said Mr Katunzi, nor any responsible officer from Naushad Autoparts was called to testify in relation to the total damage assessed. In similar vein, the insurer was also not called to testify as to their alleged limit of compensation and the actual damage assessed.

The evidence from such persons who were not called for unknown reasons was glaringly needed as they were involved in the technical aspects of assessing the extent of damage, the repair needed and the costing. The absence of such evidence and with the proformer invoice having been expunged meant that the evidence of PW.1 remains hearsay. Consequently, there is no basis for a finding that the respondents were indeed entitled to the amount of Tshs 27,074,496.44 over and above the amount of 39,950,000/- recovered from the appellant's insurer.

It is on the record that the appellant denied the respondents' pleading that she is vicariously liable for the damage caused by the first defendant (the appellant's driver) who was her employed driver when the accident happened. The reason given was that the driver was not

authorized to drive the vehicle when the accident occurred although he was then in the appellant's employment.

The foregoing is clear from the evidence of DW.1 who told the court that the first defendant was not authorized to drive the vehicle at the material night and to be at the place where the accident occurred. Despite the pleadings, there was nothing in terms of the evidence supporting the allegation that the first defendant was authorized to drive the vehicle and that he was in the course of employment when the accident occurred.

The finding of the trial court that the appellant was vicariously liable because the driver was her employee when the accident happened and was therefore in the course of employment was not consistent at all with the evidence on the record. It is no wonder that the trial court just relied on selected portions of the appellant's evidence without considering that the appellant's testimony that the driver was authorized to drive the vehicle at the time when the accident occurred.

Even if it were argued that the driver was in the course of employment, I would still not be inclined to find in favour of the respondents for amount

of Tshs 27,074,496.44 for want of a proof of entitlement to total damage caused of Tshs 67,029,496.44 of which they recovered Tshs 39,950,000/- by the insurance. I am of the similar finding for the claim of general damages for the first and second respondent which was not established either when regard is had to the amount already paid. I am also mindful that the only witness was PW.1 who was also the second respondent/second plaintiff. In so far as his evidence is considered it was clear that he was testifying for his case only although at some other instances there was confusion as to whether his testimony was meant for both.

In relation to the first grounds and the respective rival submissions, I was minded to look at the trial court's record. I easily found that the plaint which instituted the matter in the trial court was titled "*In the Resident Magistrates Court of Kagera Region at BUkoba*". As argued by the counsel for the appellant, the Magistrates' Courts (Courts of A Resident Magistrate) (Re-Designation) Order, GN No. 68 of 1981 is the relevant instrument as to the establishment of Courts of a Resident Magistrate. I am herein mindful of order 2 of the relevant instrument which reads and I quote:

"There is hereby established Courts of a Resident Magistrate whose designations are specified in the first column of the schedule to this Order which shall exercise jurisdiction in the areas specified respectively opposite those designations in the second column of that schedule."

SCHEDULE

Designation of Courts	***Area of Jurisdiction***
.....	.....
The Court of Resident Magistrate of Bukoba	*The Kagera Region*

Indeed, the court indicated in the plaint as the court in which the matter was instituted is none existed as per the courts designated under the above provision. Although the point was raised as a preliminary point, it was dismissed for want of prosecution. Although the counsel for the respondents contended that the point was determined in the trial court's judgment, it was not determined in the way he alleged in his replying submission.

The issue which was determined by the trial court was whether the resident magistrate court of Kagera region has jurisdiction to try the matter. Addressing the issue, the trial court stated that:

Analysing issue number 1, it is undisputed fact that ..this court has jurisdiction to entertain this suit so long as the cause of action arose at Mwanzo Mgumu in Misenyi district which is within Kagera Region, and by the time of hearing the suit, the

Resident Magistrates' court for kagera region sat at Bukoba. That being the case, the first issue is affirmatively answered.

Clearly, the trial court did not consider the titling of the court in the plaint and whether it was consistent with the name reflected in the designation order. Neither was it considered, as the counsel for the respondents wanted us to belief, that the titling was not fatal as Kagera could simply be replaced with Bukoba.

Considering the manner in which the issue was framed and the court's reasoning, it is clear that it never occurred to the trial court the resident magistrate court for Kagera at Bukoba was non-existent, but the resident magistrate court of Bukoba at Bukoba duly designated by the above mentioned order. My considered view is very well supported by the judgment of the trial court which is also titled thus "*In the Resident Magistrate's Court of Kagera at Bukoba*" as opposed to "*In the Resident Magistrates' Court of Bukoba at Bukoba.*"

The question which I had to ask myself is whether the irregularity was fatal. I agree that in the case of **Lukulile M. A vs Ladha Industries Ltd** (supra) a more or less similar irregularity was treated as being fatal. Nonetheless, with the introduction of the overriding objective principle

whereby the court is required to essentially focus on substantive justice, the question which I had to ask myself here, is whether the failure to properly title the pleading and consequently the judgment with the proper name of the trial court although the matter was actually tried by the relevant court occasioned the appellant any injustice.

Regard having been heard to the fact that the court was actually tried by the appropriate court despite the incorrect titling in the plaint and the fact that the parties herein were all along duly represented in throughout the trial of the case, I would entertain no doubt that no injustice was occasioned. In fact, none was pointed out by the counsel for the appellant. I therefore find no merit on the first ground. I will not herein sustain it.

My treatment of the first ground of appeal in relation to the overriding objective principle would equally apply to the second ground of appeal which was on the failure of the trial court to comply with rules relating to Pre-trial Settlement and Scheduling Conference. While it is true that the procedures were not strictly complied with, it is a fact that the mediation which is normally scheduled at the first PTC was scheduled when the

preliminary objections were dismissed for non-appearance of the appellant.

Actually, it is on the record that the appellant appeared for mediation which however failed and she did not at any stage of the trial court's proceedings complain about the alleged non-compliance with the rules and procedures for conducting PTC. As there was no injustice occasioned to the appellant and none was brought to my attention, I would not sustain this ground either. It must equally fail as was the first ground.

All said and done, the cumulative effect of the foregoing findings is in the favour of the appellant. I have in this regard have had regard to my findings in relation to the third and fourth grounds of appeal as amended during the hearing. With this outcome, it is academic exercise to consider other issues arising from the grounds which I did not directly resolve.

In the result, and for the foregoing reasons, the appeal is hereby allowed with costs. It is so ordered.

B. S. Masoud
Judge

Date: 20/03/2020

Coram: Hon. J. M. Minde - DR

Applicant: Absent

Respondent: Absent

B/Clerk: Lilian Paulo

Mr. Bengesi **(Advocate)** for Respondent and Ms. Pili Hussein for the Applicant.

Court:

This matter was scheduled for judgment today and it is delivered today 20th day of March, 2020 in the presence of Mr. Bingesi (Advocate) for the Respondent and Ms. Pili Hussein (Advocate) for the Applicant.

Sgd: J. M. Minde - DR

20/03/2020