

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 14 OF 2020

(Arising from the decision of the Resident Magistrate Court of Dar es salaam at Kisutu in Civil Case No. 130 of 2018, dated 20/11/2019 before Hon. A.K. Rwizile, SRM)

NATIONAL INSURANCE CORPORATION

OF TANZANIA LIMITED APPELLANT

VERSUS

JASDEEP SINGH BABHRA RESPONDENT

JUDGMENT

30th Sept & 30th Oct, 2020.

E. E. KAKOLAKI J

This appeal is against the decision of the Resident Magistrate Court of Dar es salaam at Kisutu in Civil Case No. 130 of 2018, dated 20/11/2019 which was entered in favour of the respondent. In the year 2014 the respondent's company JP Group leased an apartment in the appellant's Investment House Plot No. 764/33-765/33 located at Samora Avenue/Mirambo Street, within Ilala District in Dar es salaam Region for two years term from 1st of January 2014 to 31st December, 2015, with access to some services. Among other

services provided by the lessor was security services of the demised premises that covered the car parking lot by the private security company employed by lessor going by name of Solar Security. On the 24/04/2014 the respondent's car with Registration No. T 582 BSQ, make Toyota Hilux Double Cabin was stolen from the parking lot of leased premises. The matter was reported at police, criminal proceedings initiated against suspects, one of them being the security guard who was on duty on the fateful day and who was later found guilty of the offences charged with, convicted and sentenced accordingly. On 03/07/2018 the respondent sued the appellant for tortious conduct of his employee (guard). After a full trial the trial court entered judgment in favour of the respondent and ordered the appellant to pay the Respondent Tshs. 35,000,000/= being the value of the stolen motor vehicle, interest on the decretal amount at the court rate of 7% till the date of full payment and costs of the suit. Discontented the appellant is before this court to register her dissatisfaction by way of appeal canvassed with six (6) grounds of appeal going thus:

- (1) That, the trial Magistrate erred in law and facts by entertaining the matter which the court has no jurisdiction.
- (2) That, the trial Magistrate erred in law and facts by holding that the respondent was the tenant of the appellant.
- (3) That, the trial Magistrate erred in law and facts by failure to frame issues as per the law.
- (4) That, the trial Magistrate erred in law and facts by entertaining the matter with non-joinder of the necessary parties.

- (5) That, the trial Magistrate erred in law and facts by entertaining the matter which was time barred.
- (6) That, the trial Magistrate erred in law and facts by holding the appellant liable.

For the foregoing grounds the appellant is inviting this Court to allow the appeal by setting aside the judgment and decree of the trial court with costs. Hearing of the appeal proceeded by written submissions in which the appellant enjoyed the services of Mr. Christopher Bulendu, counsel from the appellant's Office of Chief Legal Counsel while the respondent hired the services of Mr. Shundu Mrutu, learned advocate. In determining this appeal I have opted to consider and determine the grounds of appeal one by another in seriatim as argued by parties.

Submitting in support of the appeal on the first ground, Mr. Bulendu contended that the trial Magistrate erred in law when entertained the matter which the trial court had no jurisdiction to try. He said the appellant is a Specified Public Corporation duly declared by the Public Corporations (Declaration of Specified Corporations) Order, 1998 published in the Government Notice No. 330A dated 12/06/1998 and appears as number 6 in the list of the first scheduled to the Order. He told the Court that, section 3 of the Order also declared the Public Corporation Act, 1992 now [Cap. 257 R.E 2002], applicable to the Specified Public Corporations in which under section 43(1) of the said Act, once a receiver is appointed he/she becomes responsible for all affairs of the Specified Public Corporation and for that matter the provisions of the Bankruptcy Act [Cap. 25 R.E 2002] applies to him/her. To support his stance he referred the court to the cases of **Mathias**

Eusebi Soka (as personal representative of the late Eusebi M. Soka Vs. The Registered Trustee of Mama Clementina Foundation, John Amos Udumbe and National Insurance Corporation of Tanzania, Civil Appeal No. 40 of 2001(Unreported) and **General Manager National Milling Corporation Vs. Mwaisanila and Others** [1995-1998]1EA 68. He contended that, the appellant after being declared Specified Public Corporation was under Section 43(1)(a) of the Public Corporation Act, the appellant was placed under the Parastatal Sector Reform Commission (PSRC) which was replaced by the Consolidated Holding Corporation (CHC) and later on the Treasury Registrar (TR) as official receivers for restructuring it.

It was Mr. Bulendu further submission that, under section 97 of the Bankruptcy Act the court having jurisdiction to entertain bankruptcy matters is the High Court only unless the Chief Justice delegates all or any part of the jurisdiction to any subordinate court. To his contention, the trial court in this matter was not such delegate. He supported this position of the law with the decision of this court in the cases of **National Insurance Corporation of Tanzania Vs. Thomas Charles**, Civil Appeal No. 45 of 2017 (unreported) and **National Insurance Corporation of Tanzania Vs. Abdallah Rashid Seif**, Civil Appeal No. 4 of 2017(unreported). He went on citing the case of **National Milling Corporation and Presidential Sector Reform Commission Vs. John Paul**, Civil Appeal No. 71 of 2002 (unreported) and stating that, all suits against specified public corporations are taken as bankruptcy matters and are to be adjudicated by a competent court which is the High Court. And added that, in so doing leave of the Court has to be sought and obtained first before suing as per the mandatory

requirement of section 9 of the Bankruptcy Act. In support of his argument on the requirement of the leave he cited the case of **Chama cha Walimu Tanzania Vs. The Attorney General**, Civil Application No. 151 of 2008 (CAT-unreported). With all these authorities Mr. Bulendu was of the strong submission that, the trial court entertained the matter without jurisdiction as the competent court is the High Court and further that neither High Court powers were delegated to the trial court nor leave of the Court was obtained prior to the institution and determination of the suit. He therefore prayed this court to find the trial court proceedings and decision thereto a nullity and quash them.

Mr. Mrutu for the respondent in response to the appellant's submission prefaced his submission with lamentation on what he termed to be unprecedented practice of the appellant to raise grounds on matters not canvassed during the trial in her 1st, 4th and 5th grounds of appeal submitting that, the trial court cannot be condemned on issues it did not have an opportunity to hear and determine or enter judgment upon. He therefore invited the court to disregard them. He referred the court to the case of **Tanzania Cotton Marketing Board Vs. Gogecot Coton Company S.A** [2004] TLR 132 to support his position. That submission notwithstanding, he continued to submit against the grounds of appeal as canvassed in Mr. Bulendu's submission. On the first ground he said, the issue of jurisdiction raised by the appellant at this stage is misplaced as during the trial the appellant sought and was granted with leave of the court to amend her written statement of defence but she never raised the issue of jurisdiction despite of being aware of her status as specified public corporation way back

1998, thus waiving her rights to raise it at this stage. That apart he added, section 4(2) of the Public Corporation Act, [Cap. 257 R.E 2002] provides every public corporation established under the order made under that section has capacity to sue and be sued in its own as it acquires a corporate personality. For that reason the appellant cannot shield itself from liabilities against the respondent by taking hide under Public Corporation Act and Bankruptcy Act, thus the ground is bound to fail, Mr. Mrutu submitted. He invited the court to dismiss the ground. In rejoinder submission Mr. Bulendu almost reiterated what he had submitted in submission in chief but citing the case of **M/S Tanzania China Friendship Textile Co. Ltd Vs. Our Lady of the Usambara Sisters** [2006] TLR 70, he added that the respondent's argument that the issue of jurisdiction cannot be raised now for not being raised at the trial stage lacks merit. To him as per the case of **Our Lady of the Usambara Sisters** (supra) jurisdictional issue can be raised at any time. And further that, the respondent concentrated on challenging the capacity of the appellant as legal entity to sue or be sued which is not the central issue while forgetting the main issue which is the jurisdiction of the trial court to entertain the suit against a specified public corporation, which he argued was not responded to by the respondent. Otherwise he maintained his earlier prayers.

I have taken time to travel through the entire trial court records, proceedings and judgment as well as submissions from both parties. To start with let me address the lamentations prefaced by the respondent in his submission and the prayers thereto. Firstly, is on whether it is right for the appellant to raise a point of objection on jurisdiction issue which was not canvassed during the

trial. Mr. Bulendu says it is right. It is true and I agree with Mr. Bulendu's submission that the position is settled in the case of **Our Lady of the Usambara Sisters** (supra) that a jurisdiction question can be raised at any stage of the proceedings even at the appeal stage notwithstanding the fact that the same was not raised in the trial court. In the said case the Court of Appeal said:

*"On the question **whether the Trial Court had jurisdiction to adjudicate upon the matter**, the issue was not raised before the High Court, **but since it was about jurisdiction of the Court, it could be raised at any stage, even on appeal.**"* (emphasis supplied)

The purpose of sanctioning the issue of jurisdiction to be raised at any stage of the case in my firm view is to avoid the risk of the Court to proceed with hearing of any matter before it on assumption of being clothed with jurisdiction which in fact it does not have. This position was adumbrated in the case of **Fanuel Mantiri Ng'unda Vs. Herman M. Ng'unda**, Civil Appeal No. 8 of 1995 (CAT-unreported) when said:

*"The jurisdiction of any court is basic, it goes to the very authority of the court to adjudicate upon cases of different nature... the question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. **It is risky and unsafe for the court to proceed on***

assumption that the court has jurisdiction to adjudicate upon case.”(emphasis supplied)

With the above guidance of the highest court in this land, I distance myself from the respondent’s prayer that this court should disallow the appellant to raise a jurisdiction issue at this stage and therefore reject it.

Secondly and in the same vein, with regard to the respondent’s insistency on the appellant’s capacity to sue and be sued, I think Mr. Bulendu is right to submit that, that is not an issue in this matter, the central issue for discussion in this ground is whether the trial court had jurisdiction to entertain the suit as it did and not whether the appellant has legal capacity to sue or be sued as canvassed by the respondent in his submission. Having so found let me turn to consider and determine the merits and demerits of the first ground as submitted by both counsels on whether the trial magistrate erred to entertain the matter which the court had no jurisdiction.

It is uncontroverted fact by the respondent that the appellant was declared a specified public corporation by virtue of section 3 of the Public Corporations (Declaration of Specified Corporations) Order, 1998, GN No. 330A of 12/06/1998. And that under section 43(1) of the Public Corporations Act, [Cap. 257 R.E 2002] when it became the specified public corporation and its receiver appointed, the Bankruptcy Act became applicable to the receiver. Section 43 (1) of the Act provides:

“Notwithstanding any law to the contrary; with effect from the date of publication of an Order declaring a public corporation to be a specified public corporation the commission shall:-

- (a) Without further assurance on appointment, have the power to act as the official receiver of the specified public corporation; and*
- (b) Have the power and all the rights of a receiver appointed in accordance with or pursuant to the Bankruptcy Act.”*

It is also evident that, appellant being the specified public corporation was placed under the Parastatal Sector Reform Commission (PSRC) which was replaced by the Consolidated Holding Corporation (CHC) and later on the Treasury Registrar (TR) as official receivers for restructuring it. With that status, I therefore hold that, the applicant is covered by the provisions of the Public Corporations Act and the Bankruptcy Act and no suit can be preferred against her in violation of the mandatory provisions of the two enactments.

It is also not disputed by the respondent and I agree with Mr. Bulendu’s submission that, under section 97 of Bankruptcy Act, High Court is the only court clothed with jurisdiction to entertain bankruptcy matters unless the jurisdiction is delegated to the subordinate court by Chief Justice. The section reads:

97. The court having jurisdiction in bankruptcy shall be the High Court; save that the Chief Justice may by order delegate all or any part of the jurisdiction of the High Court in bankruptcy to any subordinate court, either generally or for the purpose of any particular case or class of cases.

My brother Mtulya J in the case of **Abdallah Rashid Seif** (supra) when faced with a similar situation and when discussing the application of section 97 of the Bankruptcy Act, made the following findings which I subscribe to:

"In my reading of this provision, it is plainly that the mandate to determine bankruptcy cases is vested in this Court. Nothing in this enactment suggests that subordinate courts can hear and determine bankruptcy cases, unless they are delegated by an order of the Chief Justice. I therefore hold that the District Court in Ngara is incompetent to hear and determine bankruptcy cases."

Similarly, it is in understanding of both parties and this Court that under section 9 of the Bankruptcy Act, no suit shall be instituted against the receiver unless the leave is obtained from this court. To come to line with this point it is instructive that I quote the provision of section 9(1) of the Act which reads thus:

9.-(1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose.

This position of the law under section 9 of the Bankruptcy Act also finds its interpretation in the case of **Mathias Eusebi Soka** (supra) where the Court of Appeal struck out a notice of appeal against the National Insurance Corporation of Tanzania, a specified public corporation, which had been sued without prior leave of the High Court in terms of the Bankruptcy "Ordinance" now the "Act".

Applying the same principles and positions of the law discussed above in this case it is uncontroverted fact that the respondent when instituting the case, the trial court was not a delegate of High Court jurisdiction by the Chief Justice to hear and determine a bankruptcy matter as provided under section 97(1) of Bankruptcy Act nor was there leave of this Court sought before as per the requirement of section 9 of the same Act. Since there was non-compliance of the law by the trial court, I am inclined hold that, the Resident Magistrates Court of Dar es salaam at Kisutu had no jurisdiction to entertain the case involving the appellant which is a specified public corporation. I therefore shoulder up with Mr. Bulendu's submission and hold further that, the trial court's act of entertaining the suit against the appellant in blatant violation of the mandatory provisions of Bankruptcy Act rendered its whole proceedings and the decision thereof nothing but a nullity. It is therefore the finding of this court in the first ground that the trial Magistrate erred in law to entertain the matter which the court had no jurisdiction. The ground having the effect of disposing of the appeal, I will not consider other grounds, as doing so will amount into keeping swimming in a pool of a nullity.

In view of the above finding, I hold that this appeal has merit and is hereby allowed. Since the proceedings and judgment have been found to be a

nullity, I would invoke the revisionary powers bestowed to this Court under the provisions of section 44(1)(b) of the Magistrates Court's Act, [Cap. 11 R.E 2019] which I hereby do and proceed to quash the proceedings of the trial court and set aside both judgment and orders thereto.

Finally the appellant prayed this court to allow the appeal with costs. I have keenly considered this prayer. It appears to me the respondent when instituting this case had no knowledge of the requirements of the law under the Public Corporations Act and the Bankruptcy Act. To condemn him to pay costs in my opinion will not be in the interest of justice. For that reason, I order no costs to the respondent.

It is so ordered.

DATED at DAR ES SALAAM this 30th day of October, 2020.


E. E. KAKOLAKI

JUDGE

30/10/2020

Delivered at Dar es Salaam this 30th day of October, 2020 in the presence of the Mr. David Chillo advocate holding brief for Mr. Christopher Bulendu Legal Counsel for the appellant, and Ms. Lulu Masasi, Court clerk and in the absence of the respondent.

Right of appeal explained.



E. E. Kakolaki

JUDGE

30/10/2020