**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**TABORA DISTRICT REGISTRY**

**AT TABORA**

**DC CIVIL APPEAL NO 14 of 2018**

*(Original Civil Case No. 16 of 2015 from District Court)*

1. **ABRAHAM EDWARD KILANGO .....APPELANT**
2. **ESPERANCE RUSAGARA .....APPELLANT**

**VERSUS**

**FREDY FAUSTINE MULYANGO .....RESPONDENT**

**JUDGMENT**

**19/2/2021**

**BAHATI, J.:**

This is the first appeal that is brought against the decision of the Tabora Resident Magistrate's court, in Civil Case No.16/2015. The trial court decision was delivered on 29/01/2018.

Before this Court, the appellant is seeking the following orders:

i. *This appeal be allowed and the trial court's decision and order thereto be quashed,*
ii. *Costs of this appeal and in the trial court be provided for*
iii. *Any other relief that this court may deem just to grant.*

The brief fact of the case is that on 16 January 2012 the plaintiff entered into a written contract with the defendant to supply beans and

maize on credit and then they requested to be supplied with 500 sack of maize as they had an institution namely GOWEKO, the donor and sponsor of the institution was namely Ibrahim Lipumba which was duly supplied to them, but the defendants never paid the debt of TZS 61,900,000/=. The plaintiff has been doing business as a farmer and businessman, he knows the defendants namely Abraham Edward and his wife namely Esperance Kilango as they used to reside at Karagwe and later shifted to Tabora. The plaintiff has been doing business selling crops at Karagwe area and Tabora region. The court upon hearing the matter decided in favor of the plaintiff and ordered the defendants to pay the outstanding amount of TZS 61, 900,000/=, TZS 5,000,000/= as general damages of the breach of contract, 22% interest of the principal amount, and costs of the suit.

The appellants being aggrieved with the decision of the trial court appealed against the whole decision armed with four grounds of appeal;

i. *That, the learned trial magistrate erred in law and in fact to decide in favor of the Respondent herein a case which was not proved against the appellants.*

ii. *That, the learned trial Magistrate erred in law and fact to shift the burden of proof to the appellants.*

iii. *That, the learned trial Magistrate erred in law for failure to consider and take into account the appellant's defence evidence in his judgment.*

iv. *That the learned trial magistrate's judgment is bad and not maintainable in law.*

At the hearing, both parties were allowed to dispose of their appeal by way of written submissions. The parties were represented by Mussa Khasim, learned counsel for the appellant whereas Amos Gahise, learned counsel for the respondent.

In his written submissions, the appellants in support of memorandum of appeal in the first ground *that* the learned trial magistrate erred in law and fact to decide in favor of the respondent in a case which was not proved against the appellants and on the second ground that the learned trial magistrate erred in law and fact to shift the burden of proof to the appellants.

He submitted that the findings of the trial court are based on four issues framed by the court in the course of composing judgment. These four issues are not the same as the one framed before the hearing commenced which issues were six in number. In determining the issues as framed by the trial court in the course of composing judgment, all the issues were determined in favor of the Respondent herein. The first issue is an issue to which the dispute between the parties herein centres. The same reads thus:-

*"Whether the parties had entered into the valid contract".*

He submitted that the findings of the trial court on this crucial issue do not specifically state the contracts the validity of which is being determined presumable his findings refers to exhibits P1 and P2. It is his findings that the contracts are valid ones. But, are the contracts under scrutiny real a valid one in the eyes of law? These are supported by the following facts that under paragraph 5 of the plaint, the Respondent herein pleaded that the terms of their alleged contract were reduced into writings which is annexure "A" to the plaint and stand tendered and admitted as Exhibit "P1" before the trial court. It is surprising as to where and why the trial court believed the said contract to be between the parties herein. Exhibit P1 bears different names from those of the Respondent himself and the appellants, in other words, no names, be of the Respondent or the Appellants, appears in the said exhibit "P1". No deed poll by the names appearing in the said Exhibit P1 and those in the plaint (which are different names) belongs to him.

He further submitted that, as it can be seen, the said exhibit "P1" is between Abraham. K.E. and Fred Muryango while the parties before the trial court are Fredy Faustin Mulyango (as the plaintiff) versus Abraham Edward Kilango & Esperance Rusagara (as the defendants). Among the parties before the trial court as alluded above, there is no one whose name appears in the said exhibit P1. This is proof that

Exhibit P1 has nothing to do with the parties herein regard being drawn from the position of the law upon any agreement being reduced into writings. He referred this court to the following two cases laws:-***Issa Nyoka @ Abeid Issa Nyoka t/a Issa Nyoka General supply versus Uvinza District Council, Civil Case No. 3/2017 High Court at Tabora (Unreported) at page 2- 5, and.CRDB Bank PLC (Formerly CRDB (1996) LTD) Versus George Methew Kilindu, Civil Appeal No. 110 of 2017 court of Appeal of Tanzania at DSM (Unreported).***The position of the law when terms of the contract are put into writings as per section 100 (1) of the Evidence Act, Cap. 6 [R.E 2019] provided thus:-

> *"Section 100 (1) When the terms of a contract, grant or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence "shall" be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act. "*

He submitted that reading the document itself (exhibit P.1) together with what the above-cited law compels the court to adhere to in a mandatory wording "shall", this court will agree with us that none of the parties in this dispute is the party to the said alleged contract

thus it is against the law for the learned trial magistrate to attribute the same against the appellants as a valid contract between the parties herein. The respondent has no power to enforce it (exhibit P1) against anybody nor can it be enforced against the appellants herein who are not parties to it.

He submitted that, worse enough the Commissioner for oaths the said exhibit P1 to whom it is alleged to have been signed before him the respondent never called in court to testify in proving the allegedly contract as to whether was signed by him and the parties to it are the same as the one herein this dispute and they signed that Exhibit P1 before him. He submitted that failure by the Respondent to bring the key witness the commissioner for oaths before whom the allegedly Exhibit P1 leaves much to be desired as to the reliability of the same to justify the validity of that contract against the appellants herein.

Further, in respect to exhibit P2 the allegedly promissory note falls under the same trap. It is the document the drawer of it is an unknown person contrary to section 44 (2) of the Advocates Act. Cap. 341. The same reads, I quote for ease of reference:-

*"It shall not be lawful for any registered authority to accept or recognize any instrument unless it purports to bear the name of the person who prepared it endorsed thereon".*

Here, the exhibit P2 doesn't show who prepared it neither his address.

He contended further equally so, the advocate before whom the attestation of exhibit P2 is alleged to have been done also was not called in the trial court to testify and give it credence as to whether it was real signed by the parties herein, one Teresia Fabian appearing in that Exhibit P2 she was a material witness who was never called in court to testify and the failure so to call her entitled the trial court to draw an adverse inference, the duty it failed to discharge. The said exhibit P2 is nothing but manufactured documentary evidence to safeguard the Respondent's evil will against the Appellant. **See the case of Magambo, J Masato and 3 others versus Esther Amos Bulaya and 2 others, Civil Appeal No. 199/2016 court of Appeal of Tanzania at Mwanza (Unreported) at Page 17** where quoting the case of **Hemedi Saidi Vs Mohamed Mbilu [1984] TLR 113** it was quoted that,

> *"Where for undisclosed reasons, any party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests.*

It is from the position of law as stated by the Court of Appeal of Tanzania which is now a trite law to be followed by courts below it, that the Respondent's failure to call one H. B. Bally, Resident Magistrate Tabora allegedly to have witnessed the signing of exhibit P1 by the

parties herein, equally so the failure to call Teresia Fabian, the advocate allegedly before whom exhibit P2 was signed, entitled the trial court to draw an adverse inference, which duty it failed to discharge, that if they would have been called then they could have denied those documents to have been signed before them under the guidance of the cited authority.

The appellants who are DW1 and DW2 gave unchallenged evidence as to those exhibits P1 and P2 that are strange documents to them. They denied the signatures thereto neither to be aware of those documents. More so, the appellants notified the trial court as to the bad relationships, the grudges for that matter, which they had with the Respondent. The same is apparent from their testimonies as seen when they were being cross-examined by the Respondent's counsel (see pages 90 & 94 of the typed proceedings in respect of DW1 the 1st Appellant and DW2 the 2nd Appellant respectively). And it is that grudges between them of which the appellants presuppose to be the motive behind the institution by the Respondent of this suit against the appellants herein. Under the circumstances, there is nothing as proof that the appellants ever requested the respondent to supply them the beans consignments as alleged. The law of this country is clear as to whom the burden of proof of claims of any facts lie. The duty is cast to the one who alleges the Respondent for that matter. That duty is

provided under Section 110 (1) & (2) of the Evidence Act, Cap 6, the same read,

> *1) (1). Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. End of quote and emphasis supplied."*

From what was stated above which comes from the evidence on records before this court, he prayed to the court that the first ground of appeal be allowed.

*On the third ground, the learned trial Magistrate's judgment is bad and not maintainable in law.*

He submitted that, the Civil Case No. 16/2016 before the trial court being a civil case its trial was guided by the Civil Procedure Code, Cap.33 [R. E 2019] as such the judgment is to be guided by the statute. Order XX Rule 4 of the CPC provides what a judgment of the court must contain.-

> *"A judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reason for the decision"*

He submitted that the judgment does not take into account and evaluate the appellant's evidence instead the court considered only the evidence of the Respondent. It is a biased judgment Two, while six (6) issues are the ones framed by the court for parties to adduce evidence for determination of the dispute between parties there is none which was ever considered by the trial court in its judgment when determining the fate of the case.

There is no correlation at all between the framed issue before the trial commences and what is in the judgment of the trial court. This is contrary to bullet # 3 to item No. 5 of form No. E/1 read together with Order XX R. 5 of the CPC which provides:-

> *"In a suit in which issues have been framed, the court shall state its findings or decision, with the reasons thereof, upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the court"*

This court once had dealt with a scenario similar to this in **ABDUL RAHIM SHADHILI AS A GUARDIAN OF MISS FATUMA A. R SHADHILI VERSUS MANDHAR GOVIND BAYKAR, CIVL APPEAL NO. 296 OF 2004 HIGH COURT AT DSM REGISTRY (UNREPORTED)** at page 24 to paragraph 1 & 2 page 25 the court had this to state,

> *"That decision represents the correct position in the form of judgments. What is at stake here, however, is not the form but*

*the contents of the judgment. The trial court orders the suit to be proved exparte by affidavit and recorded such proof as ordered. The trial court was, therefore, duty-bound to consider the evidence presented, assess the evidence, and make a decision and give the reasons for its decision."*

The court went further, at paragraph 2 of page 25 to state thus:-

> *"As the judgment did not contain the statement of the case or points of determination and the reasons for the decisions, it was not judgment".*

Also, he referred this court to the following decided cases *of* ***IKINDA Wigae Vs Republic, Criminal Appeal no. 60/2000 Court Of Appeal Of Tanzania At Mwanza (Unreported)*** *on page 5-8,* ***John Mnyeti Vs. Mhoja Saba, Misc. Land appeal no. 32/2015 High Court At Tabora(*** *Unreported) Pg. 3*

In line with the cited provisions of the law and the case law, he submitted that the trial court judgment is not a judgment worth its name, it be nullified in its entirety.

He contended that he wished to point out the gray areas which left much to be desired against the Respondent's case. Why didn't he call the transporters and the owners of the alleged godown (See clause 2 of exhibit P.2) to prove that for sure the beans and maize consignments were transported to Tabora and stored in the godown

per the above clause in the alleged contract, exhibit P1 which clause reads thus:- ***Mnunuzi atachagua ghala ambapo mzigo utawekwa". Failure to call these material witnesses create a lot of doubts about the alleged supply of beans and maize.***

In reply, the counsel for the respondent submitted that regarding the first ground of appeal and contrary to what is in the appellant's learned counsel's written submission, that the appellant and respondent entered into the valid contract and exhibit P1 on record validly reflects the valid contract between the same parties to this case.

The counsel for the respondent before embarking on arguing against the first ground of appeal, subscribed to the appellant's learned counsel's observation that the issues which were framed for determination of the case by the trial court are as they are contained on page 24 of the typed proceedings of the trial court, being:-

1. *Whether the defendants jointly requested to be supplied beans on credit by the plaintiff.*
2. *If issue No. 1 is answered affirmatively, whether the plaintiff supplied the requested beans.*
3. *If issue No. 2 answered affirmatively, whether the defendant jointly owes the plaintiff Tshs 61,900,000/= for the beans supplied.*
4. *Whether the transaction was lawful between the parties.*
5. *Whether Defendant breached the agreements.*
6. *To what relief are parties entitled.*

However, as it is reflected in the impugned judgment after scrutinizing the evidence of both sides, the Resident Magistrate, basing on the evidence of both sides on records, framed the issues which he recorded as follows:-

i. *Whether the parties had entered into the valid contract.*
ii. *If issue number one is affirmatively answered what were the duties of each party.*
iii. *Whether there was a breach of contract.*
iv. *What are the remedies the parties are entitled to?*

He submitted that variance of issues as they were framed by the parties' Counsel and recorded as per page 24 of the typed proceedings on record and the said issues as they were framed by the Resident Magistrate for determination of the case between the parties hereto after receiving the evidence of both sides augurs well in terms of Order XIV Rule 5 (1) and (2) of the Civil Procedure Code- cap.33 which gives power to the trial magistrate to amend and strikeout issues for determination of the matters in controversy between the parties.

*In respect to the first ground of appeal*, as it has been argued by the Appellant's learned counsel in his written submission, Exhibit P1 on record indicates that the relevant agreement was entered as between Abraham K.E and Fred Muryango while, indeed, the parties to the case are Fredy Faustin Mulyango while, indeed, the parties to the case are Fredy Faustin Mulyango (as Plaintiff) versus Abraham Edward Kilango

and Esperance Rusagara. The said variations are very fine and the same do not legally vitiate the substantive justice and the ultimate findings of the trial court considering the evidence of both sides on record.

This is well backed up with the proceedings of the trial court in which it is well discernable at the said pages of proceedings that on 06/10/2015 the 2nd Appellant and the appellant's learned (**one Miss Stella**) and the Respondent and his counsel when they appeared before E. Ngigwana, Resident Magistrate had agreed to have the matters in controversy settled through mediation upon the 2nd Appellant undertaking to pay Tshs. 61,900,000/= as principal debt sum and TZS 5,000,000/= to cover all other claims, which were to be effected through three instalments. Thereafter the settlement order was recorded on proceedings of the trial court.

He submitted that the parties' settlement order was duly signed by the 2nd Appellant (the 1st Appellant's wife), respondent, and their respective counsel and the case was hence marked as settled accordingly.

He submitted that such a reflection in the relevant proceedings does not enhance the appellants' learned counsel's intimations that the appellants are not concerned with exhibit P1 on record regarding the Respondents' claims against them in this matter.

The proceedings subsequent to page 12 do not thoroughly reflect what transpired thereafter. However, it was during the execution of the Trial Court's said decree/settlement order that the 1st Appellant through his new counsel filed an application for setting aside the relevant settlement order alleging that the said settlement order had been made in his absence notwithstanding the fact that the same had the said counsel appearing before the trial court for him.

He contended that, much as we are aware that all that was done during the mediation process, we are enjoined to portray such apparent facts in the proceedings of the trial court so that this appellate court can make its proper findings regarding exhibit P1 on record.

He submitted that, in addition to those apparent facts as they are reflected in the record of proceedings of the trial court, the testimonies of the Respondent (PW1- Fredy Faustine Mulyango) and his witness (PW2- Erasto Bigabo) of the typed proceedings of the trial court impeccably demonstrate that exhibit P1 was signed by the 1st Appellant while also acting for his wife (the 2nd Appellant) on one side, and the Respondent, on the other side and in the presence of an advocate. Hence even without the respondent calling other alleged witnesses who had witnessed the transaction between the parties, such impeccable evidence was legally enough for the determination of the case in favor of the respondent.

As it is also reflected by the record of proceedings of the trial court when the respondent prayed to tender the said exhibit in his evidence the 2nd Appellant had no objections but the 1st Appellants learned counsel objected to the tendering of the same merely on the allegations that the same had not been stamped in terms of Section 47 of the Stamp Duty Act- Chapter 189.

On account of the foregoing demonstrations, it follows therefore that the appellant's learned counsel's intimations that exhibit P1 on record do not concern the Appellants and Respondent regarding the agreements between the same are just an afterthought intended to defeat the respondents' justice in the matter. To that extent, he submitted further that all authorities as they are cited in the appellant's written submission are legally distinguishable from the facts of this case.

Since it is trite law that an objection that had not been preferred during the trial cannot be raised during the appeal, he prayed to submit that the Appellant's appeal in the first ground be entirely dismissed with costs.

Although the appellant's learned counsel's written submission on record does not specifically touch the second ground of appeal, the same is on the allegations that the learned Resident Magistrate allegedly shifted the burden of proof to the Appellants.

He submitted that such allegations are misconceived and are devoid of merits. The case was decided in favor of the Respondent by the Resident Magistrate basing on such impeccable evidence as it was adduced by the Respondent (PW1) as it was duly corroborated by the evidence of PW2- Erasto Bigabo on record (at pages 25 to 81 of the typed proceedings of the trial court).

He also contended that what is submitted by the appellants learned counsel, there is nowhere in the relevant judgment where the burden of proof was ever shifted to the appellants but it is the evidence as it was adduced by the Respondent on record which proved that the appellants owed the Respondent the claimed balance of debt and the same had breached the relevant contract as they were adjudged by the trial court.

In the premises, he submitted that the Appellant's learned counsel's all intimations on record regarding the second ground of appeal are entirely based on a misconception. Hence the second ground of appeal be also dismissed with costs.

The appellants' complaint regarding the 3rd ground of appeal is on allegations that the impugned judgment is legally bad in law, in terms of Order XX Rule 4 of the Civil Procedure Code, Cap. 33 and Civil Procedure Code (Approved forms) Notice, 2017 GN. 388 of 2017.

He submitted that such lengthy arguments by the appellants learned counsel in his submission, the impugned judgment in his substantively proper since the same has analysis regarding the respondent's claims against the appellants, the actual and material issues for determination of the matters in controversy between the parties along with the law applicable (the Law of Contract Act, Chapter 345 and the same ultimately determines the relief to be granted on the strength of the evidence on record. On account of the foregoing, he submitted that the alleged omissions in the impugned judgment are very trivial since no failure of justice was ever occasioned to the appellants by the impugned judgment.

He prayed to this court be well guided by the provisions of Section 3A of the Civil procedure Code to dismiss the appellants' third ground of appeal with cost to enhance the overriding objectives in the matter at hand. He prayed to this court the entire appeal be dismissed with costs.

In his rejoinder, the appellant submitted that there is no dispute from both sides of the case that the trial magistrate framed new issues in the course of judgment composition and based his findings on those new framed issues which are different from those issues framed before the trial commenced. As pointed out earlier that, the anomaly is reflected in paragraph 3 of page 5 of the typed judgment and the last paragraph of page 24 of the typed proceedings respectively. It is the

stance of the law that, once the court frames new issues it must afford the parties their right to be heard before the issue become the basis of its findings. Failure to afford the parties such right to be heard renders the judgment reached to be nothing but nullity judgment. The Court of Appeal of Tanzania confronted with a similar scenario once had an opportunity to address the effect of framing new issue by the court without affording the parties their right to be heard in the case **of M/S Darsh Industries limited Vs M/S Mount Meru Milers Limited, Civil Appeal No. 78/2012 Scan – Tan Tours Ltd Vs the Registered Trustees of the Catholic Diocese of Mbulu (unreported)** thus:-

> *"It is not disputed that under Order XIV Rule 5 (1) and (2) the trial judge has the power to amend, and or strike out an issue. However, when an issue being introduced is so pivotal to the whole case and would form a basis for the decision of the trial court, it is pertinent that the parties should be given a chance to address the court on the new issue."*

In the **M/S Darsh Industries Limited (supra**) the Court of appeal went further to state at last paragraph of page 10 to page 11:-

> *"Thus, consistent with settled law, we are of the firm view that the decision of the High Court rise to this appeal can not be allowed to stand on account of being arrived at in violation of the constitutional right to be heard. That would suffice to nullify and put to rest the impugned decision and, for that*

*matter, we need not decide this appeal more than is necessary for its disposal."*

Being guided by the above-settled law as expounded by the court of appeal of Tanzania it is obvious that the trial court violated that very cardinal principle of the right to be heard when it framed new issues in the cause of composing the judgment which formed the basis of its findings thus the judgment reached is nothing but a nullity one.

It is also undisputed that exhibit P1 allegedly to be the contract the same is between Abraham K.E. and Fred Muryango while the parties to the suit are Fredy Faustin Mulyango versus Abraham Edward Kilango and Another. These names to Exhibit P1 and the suit at all intent and design cannot be said to be the same as those in exhibit P1 and in the suit as they are completely different names. The cases of Issa Nyoka and that of CRDB PLC cited in the submission in chief fortifies are arguments to that effect.

He submitted that the respondent is trying to refer to the settlement which is no longer part of the court record as the same was set aside which setting aside allowed the case to go for a full trial. The counsel for the respondent acknowledges the said setting aside of the same as depicted on pages 14- 16 of the typed proceedings. He further submitted that the allegations by the counsel for the Respondent that exhibit P1 was not objected to when it was being tendered before the

trial court are a lame argument as the trial court proceedings speak to the contrary of which I quote ;

> "I strongly object the said exhibit not to be admitted as an exhibit before this court on the following grounds that the said agreement goes contrary to section 47 of the Stamp Duty Act. Secondly, the plaintiff is not the author or addressee of the said document which was written by Fred Mlyango. That addressee and maker of that document should tender it there is no deed poll to show out and clear that the said name belonged to the plaintiff. That agreement does not disclose where it has been made at all it goes contrary to section 8 of Judicial Oaths Commission and Declaration Act. It shows very clearly that, the said agreement was being attested by the unknown and identified by the attester. He prayed to tender the agreement dated 16/012012 but also included other aspects in 2013. It lost the meaning of agreement in 2012. That agreement disclosed another new event in the 2013 year".

From the above, it is apparent that the names and authenticity of Exhibit P1 were objected.

Section 101 (2) of the Civil Procedure Code, Cap 33 provides thus:-

> *"Section 101 (2) where any form is prescribed or approved for use by the Chief Justice it shall be followed in all such cases to*

*which it applies with such variations as the circumstances of the case requires".*

The wording of the parent statute as above quoted imposes the compliance of the requirement not to be discretion but compulsory one. We cited Order XX Rule 4 of the COC which provides what a judgment of the court must contain, the same reads, I quote:-

*"Rule 4. A judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reason for the decision".*

Also, we cited the Civil Procedure Code (Approved forms) Notice, 2017 GN No. 388 of 2017 came into force. Form No. E/1 which provides a sample judgment outline in the original suit (Order XX, r.4 & 5 of the Civil Procedure code).

He submitted that reading the trial court judgment the same is in an obvious total violation of such mandatory requirement of the law. It is not a judgment worth the name. Guided by the **ABDUL RAHIM SHADHILI** case he prayed the judgment to be declared to be a nullity judgment and this appeal be allowed as prayed with costs.

Having carefully considered the rival submissions of the parties, the issue for determination is whether the grounds of appeal raised by the appellants are meritorious.

To commence with the first ground of appeal *that, the learned trial magistrate erred in law and in fact to decide in favor of the Respondent herein a case which was not proved against the appellants.*

Generally, the trial court is mandated to amend the issue or frame additional issues at any time. These powers are provided for under Order XIV, Rule 5(1) and (2) of the Civil Procedure Code, Cap. 33 as follows;

1. *"The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made and framed.*
2. *The court may also, at any time before passing a decree, strike out any issues that may appear to it to be wrongly framed or introduced.*

This court has noted from records, the issues which were framed on 9/11/2016 are different from those delivered in the decision on 29/1/2017 and the trial magistrate did not state the reasons for framing new issues. Although the issues are not different from the issues framed on 9/11/2016, the trial court was required to state the reason to that effect as a result; the tribunal condemned the parties unheard on the issue that finally determined their rights.

It is my considered view that the trial court's power of amending the issues or framing additional issues is discretional. Therefore such powers should be exercised judiciously to avoid abuse of the legal and judicial process. In this regard, the trial court or tribunal should assign reasons for amending the issues or framing additional issues. The object of framing issues is to focus upon the questions on which evidence has to be led to prove and also to indicate on which party the burden of proof lies. Issues may be of fact or law but in any case, the determination of the case shall be based on those issues framed.. I find this ground has merit.

In respect of the issue of names that there is no one whose name appears in the said exhibit P1, between Abraham. K.E. and Fred Muryango while the parties before the trial court are Fredy Faustin Mulyango (as the plaintiff) versus Abraham Edward Kilango & Esperance Rusagara (as the defendants). This is proof that Exhibit P1 has nothing to do with the parties herein regard being drawn from the position of the law upon any agreement being reduced into writings.

This court is the first appellate court has to re-evaluate the entire evidence on record by reading it together and subjecting it to critical scrutiny and if warranted arrive at its conclusions of fact. **See D. R. PANDYA v REPUBLIC (1957) EA 336 and IDDI SHABAN @ AMASI vs. REPUBLIC, Criminal Appeal No. 111 of 2006 (unreported).**

Having gone through the proceedings of the court, I have noted that the evidence adduced by PW2 (name), the "Mkataba wa Biashara ya Maharage" has both parties' signatures and names to which makes the contract to be enforceable. Also during my perusals, I noted that on the exhibit P2 promissory note being signed by both parties under the Commissioner for Oath Teresia Fabiani now fail to understand why the appellant is denying to be responsible for his signatures. I find this has no merit.

Regarding the difference in the names of the parties in exhibit, P1 is between Abraham K.E and Fredy Mrango while the parties before the trial court are Fredy Faustin Mulyango as the Plaintiff versus Abraham Edward Kilango and Esperance Rusagara as defendants. I have keenly observed that there is such a difference in the contract. However, I find that this anomaly is not serious enough to defeat justice. In the case of **Chang Qing International Investment Limited V Tol Gas Limited, Civil Application No. 292 OF 2016, CAT at DSM (Unreported)** stated that though the Court of Appeal found the name for the respondent in the said case was put as TOL Gas Limited but it found the error was not fatal.

The court has noted that while DW1 claims that the name and signature is not his but he failed to prove to court as to what are his names. Therefore under this stance, the appellants entered into a lawful contract. It is also a well-settled principle of law that Section 3A

(1) of the Civil Procedure Code, Cap.33 covers the overriding principle such that, a misspelling of the name, cannot jeopardize justice. This question of name difference is, in my considered view, curable under this principle. This ground has no merit.

On the third ground of appeal, *that the learned trial magistrate's judgment is bad and not maintainable in law.*

The appellant submitted that the judgment does not take into account and evaluate the appellant's evidence instead the court considered only the evidence of the Respondent. Hence it is a biased judgment.

Also, I noted from the proceedings that, during the mediation, the parties appeared before E. Ngigwana – RM and agreed through their legal representatives Stella Nyaki without objection to paying the plaintiff TZS 61,900,000 being the principal sum and TZS 5,000,000/= to cover all claims. The partis settlement order was duly signed by the 1st appellant's wife on 22/10/2015, respondent, and their respective counsel, and the case was hence marked as settled accordingly.

Also, it is the view of this court that the trial magistrate evaluated well the evidence from both sides and found worth adduced on the part of the respondent as it was duly corroborated by the evidence of PW2, Erasto Bigabo that the appellant was owed by the respondent the claimed balance of debt contrary to what was submitted by the

appellant Therefore in my view I can not see why under this stage the appellants are disregarding exhibit P1 in this matter

Upon considering the records and submissions, I agree with the respondent submission that the impugned judgment is substantially proper since the same has analyzed regarding the respondent's claims against the appellants, the actual and material issues for determination of the matters in controversy between the parties along with the law applicable and the same ultimately determines the relief to be granted on the strengths of the evidence on record while having gone through the judgment on the evidence adduced by the appellant, I have found that since the appellant could not adduce tangible evidence, the trial court had to rely on the plaintiff's exhibits. As stated in the case of **Hemed Said Versus Mohamed Mbilu [1984] TLR 113** that the party whose evidence is stronger than the other must win. In that regard, this ground has no merit.

Therefore from the aforesaid reasons, the appeal is partly allowed on the 1st ground, I further order for retrial. No order as to costs.

Right of appeal explained fully.

Order accordingly.

**A.A.BAHATI**

**JUDGE**

**19/2/2021**

Judgment delivered under my hand and seal of the court in the chamber, this 19th day February, 2021 in the presence of Mr. Musa Kassimu Advocate for Appellant and Mr. Amos Gahise for Respondent.

**A. A. BAHATI**

**JUDGE**

**19/02/2021**

The right of appeal is explained.

**A. A. BAHATI**

**JUDGE**

**19/02/2021**