

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN IN
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

(PC) CIVIL APPEAL NO. 34 OF 2020

CHIYE HOLDINGS CO. LTD APPELLANT

VERSUS

CHUKI MUSSA SIBITALI RESPONDENT

***(Appeal from the decision of the District Court of Musoma at
Musoma in Civil Appeal No. 32 of 2020)***

JUDGMENT

25th March and 17th May, 2021

KISANYA, J.:

The respondent, Chuki Mussa Sibitali sued the appellant, Chiye Holdings Co. Ltd before the Musoma Urban Primary Court in Civil Case No. 812 of 2019. He claimed for a sum of Tshs, 18, 900, 000 borrowed by the late Asheri Mkama. The appellant contested the claim raised by Sibitali. In determining the dispute, the trial court held that Sibitali had failed to prove his claim against Chiye Holdings Co. Ltd.

Aggrieved, Sibitali appealed to the District Court of Musoma at Musoma. He claimed, among others, that the trial court's judgment was not signed by two assessors who sat with the trial magistrate. The appellant's counsel did not dispute that ground. However, he argued that Chuki Holdings Co. Ltd was wrongly sued. In its judgment, the first appellate court was satisfied that there

was mis-joinder and non-joinder of parties. That finding was reached after noticing that the administratrix of the estates of the estate of the late Asheri Mkama was not joined. It went on to nullify the proceedings and set aside the judgment of the trial court. Further to that, the first appellate court ordered that the case be retried before another magistrate with a different set of assessors.

Dissatisfied, Chiye Holdings Co. Ltd has preferred the present appeal. The following grounds are summarized from the petition of appeal:

1. That the first appellate court misdirected itself in nullifying the case for non-joinder of Rahel Asheri Mkama.
2. That the issue of non-joinder was raised at the appellate court.
3. That the respondent wrongly sued the appellant who was not a part to the contract.

When the matter came for hearing on 25th April, 2021, I guided that the appeal be argued by way of written submissions. This order was duly complied with by the parties.

The applicant's submission was filed by Mr. Thomas Makongo, learned advocate who tacked all grounds jointly. He argued that much as evidence adduced before the trial court shows that Sibitali entered into a contract with Asheri Mkama, the suit ought to have been lodged against the said Asheri Mkama. Mr. Makongo's did not dispute that Asheri Mkama was among of the

directors of Chiye Holding Co. Ltd. However, he contended that the appellant was required to sue him personally or sue Rahel Asheri Mkama who is administratrix of the estate of the late Asheri Mkama. The learned counsel contended further that the position of Rahel Asheri Mkama was stated in the plaint filed by the respondent before the trial court. He also faulted the first appellate court for raising the issue of non-rejoinder during appeal and for nullifying the whole court proceedings while there was no illegality. Mr. Makongo concluded his submission by asking the Court to uphold the decision of the trial court. He also prayed for the costs.

The respondent's submission was brief. He commenced his submission by faulting the first trial court for overlooking the ground raised at the hearing of the appeal that, assessors were not actively involved by the trial court because they did not sign the judgment.

As regards the second appeal, the respondent submitted that it was in evidence that he had an agreement with Chiye Holding Co. Ltd. He also contended that Asheri Mkama facilitated the said agreement as director of Chiye Holdings Co. Ltd. His argument was also based on the cheque alleged to have been issued by Chiye Holdings Co. Ltd.

The respondent submitted further that the issue of non-joinder being a legal issue, can be raised on appeal. He was of the view that Rahel Asheri Mkama was a necessary party who ought to have been joined. Citing the case

of **Juma B. Kadala vs Laurenet Mkande** [1983] TLR 103 and **Claude Roman Shikonyi vs Estomy A. Baraka and 4 Others**, Civil Revision No. 4 of 2012, the appellant argued that failure to join the necessary party vitiates the proceedings. Therefore, he urged me to uphold the decision of the first appellate court and dismiss the appeal with costs.

The appellant did not file her rejoinder submissions.

Having considered the submissions made by the parties, I am now set to confront the grounds of contention to determine the merit of this appeal.

Before addressing the appeal at hand, I will consider the issue raised by the respondent that the first appellate court did not determine the grounds of appeal raised before it. The law is settled that, unless the grounds of appeal are compressed and the reasons given, each ground should be considered and determined to its finality by the appellate court. See the case of **Hatari Masharubu @ Babu Ayubu vs R**, Criminal Appeal No. 590 of 2017, CAT at Mwanza (unreported) where this stance was stated.

As alluded herein, one of the grounds before the first appellate court was to the effect that the trial court's judgment and proceedings were vitiated due to failure to reflect participation of assessors. As rightly observed by the respondent, this ground was not addressed at all by the first appellate court and no reason assigned to such effect. The appellant did not respond this issue because she did not file rejoinder submission.

According to the record of the first appellate court, the appellant did not dispute that the trial's judgment was not signed by the assessors. The said omission contravened rule 3(2) of the Magistrates' Court (Primary Courts) (Judgment of Court) Rules, G.N. No. 2 of 1988. In terms of rule 3(2) (*supra*), the trial magistrate is required to consult with assessors who heard the case and compose the judgment which shall be signed by all members if a unanimous decision is reached or majority where the decision is not unanimous. Therefore, in view of the position in the cases **Anna Agness Maloda vs Richard Mhando** [1995] TLR 137, **Anna Kanugha vs Andrea Kanungha** [1996] TLR 195, the fact that the trial court's judgement was not signed by the assessors was a sufficient reason for quashing the judgment and order that the case be heard *denovo*.

However, there is yet another defect in the proceedings of the trial court which suggest that this was not a fit case for retrial. That issues is in relation to misjoinder and non-joinder of the parties. Reading from the record of the first appellate court, I find that the issue of mis-joinder and non-joinder of parties was raised by the appellant in her reply submissions. Thus, it is was not raised, *suo motu*, by the first appellate court as stated in the petition of appeal before this Court. I am also at one with the respondent that this being a legal issue, it can be raised even at appellate stage.

In order to address this issue, I have examined the pleadings lodged before the trial court. The respondent clearly stated in the plaint that the lending agreement was between him and one, Asheri Mkama. This is reflected in paragraph 3 of the plaint where Sibitali averred:

"4. Kwamba mnamo tarehe 4/06/2016 mdaiwa ambaye kwa sasa ni marehemu Asheria Mkama nilimkopesha kiasi cha tsh. 6, 400,00 milioni sita laki nne pia mnamo tarehe 5/05/2017 mdaiwa nilimkopesha kiasi cha Tsh. 12. 500,000= milioni kumi na mbili laki tano jumla ya fedha yote ni Tsh 18, 900,00= Milioni kumi na nane na laki tisa."

Now, although Asheri Mkama is the one who borrowed money from Sibitali, the suit was brought against Chiye Holdings Co. Limited. The reason for such recourse is to the effect that Rahel Asheri Mkama, administratrix of the estate Asheri Mkama is director of the said company. See paragraph 2 of the plaint where the respondent stated:

"2. Kwamba nimeamua kumdai mdaiwa Chiye Holding Co. Ltd c/o Rahel Asheri Mkama ambaye kwa sasa ni msimamizi wa mirathi ya marehemu Asheri Mkama ambaye alikuwa Mkurugenzi wa Kampuni ya Chiye Holdings Co. Ltd."

But, paragraph 6 of the plaint suggest that the suit was against the administratrix of the estate of the late Asheri Mkama. That paragraph is reproduced hereunder:

"6. Hivyo basi nimeamua kumdai Rahel Asheri Mkama aweze kunilipa kwa sababu ndiye msimamizi wa mirathi pia ndiye anayemiliki Company hiyo ya Chiye Holdings Co. Ltd kwa sasa."

In the light of the above, I am satisfied that Chiye Holdings. Co. Limited was wrongly sued in this case. In terms of section 100 of the Probate and Administration Act [Cap. 352, R.E. 2002], the proper party was Rahel Asheri Mkama as administratrix of the estates of the late Asheri Mkama who borrowed the money from Sibitali. The fact that Rahel Asheri Mkama is director of Chuki Holdings Co. Ltd does not warrant to file the suit against the latter. However, if at one point in time Chiye Holdings Co. Ltd issued a cheque to pay the debt subject to this case as averred in paragraph 5, the respondent was entitled to sue both, Rahel Asheri Mkama as administratrix of the estates of the late Asheri Mkama and Chiye Holding Co. Ltd.

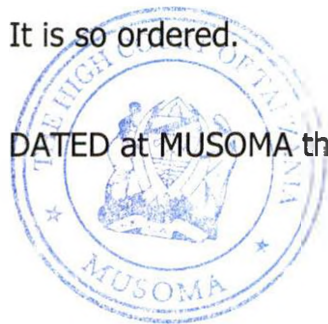
Therefore, since the proper party was not sued, the respondent's plaint ought to have been struck out as held by the first appellate court. In the circumstances of this case, I am of the view that, the first appellate court was right in nullifying the proceedings and setting aside the judgment of the trial court for failure to join the proper party.

Upon being satisfied that the proper recourse was to strike out the plaint, I find that this was not a fit case for the first appellate to order retrial. The respondent was then at liberty to institute a fresh suit against the proper party or parties. In other words, an order for retrial cannot be made if the matter is liable to be struck out.

In the final analysis, the appeal is partly allowed for the foresaid reasons. Thus, the first appellate court's order that the case be heard *denovo* before another magistrate is hereby quashed and set aside. The respondent may, subject to the law of limitation, institute a fresh suit against the proper party (ies) in a competent court. Having considered the circumstances of this case, I make no order as to costs.

It is so ordered.

DATED at MUSOMA this 17th May, 2021.



E. S. Kisanya
JUDGE

Order: Judgment to be delivered by the Deputy Registrar

E.S. Kisanya.
JUDGE
17/05/2021

Court: Judgment delivered this 17th day of May, 2021 in the presence of the respondent and absence of the appellant.

M.A. Moyo
Deputy Registrar
17/05/2021

Court: Right of appeal properly explained.

M.A. Moyo
Deputy Registrar
17/05/2021