IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

CIVIL APPEAL NO. 12 OF 2021

(Arising from Civil Case No. 47 of 2013 of the District Court of Nyamagana at Mwanza)

ALLIANCE ONE TOBACCO TANZANIA LIMITED .....1ST APPELLANT

ABDALAH SAID.....2ND APPELANT

VERSUS

MARTIN JOHN MWITA .....1ST RESPONDENT

HERITAGE INSURANCE TANZANIA LIMITED .....2ND RESPONDENT

JUDGMENT

Date of Last Order: 17.05.2021

Date of Judgment: 24.05.2021

A. Z. MGEYEKWA, J

At the centre of controversy between the parties to this appeal is a claim of payment in a tune of Tshs. 20,110,350. The appellants have lodged an appeal before this court following their dissatisfaction with the decision of the District Court of Nyamagana at Mwanza in Civil Case No.12 of 2021, which was decided in favor of the 1st respondent.

The material background to the dispute is not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the 1st respondent filed a Civil Case No. 47 of 2013 before the Nyamagana District Court claiming from the appellants jointly and severally the payment of Tshs. 20,110,350 arising from the 1st appellant act of negligent driving that damaged the 1st respondent's vehicle. Before the hearing of the case, Heritage Insurance Tanzania Limited joined the main suit as a third party.

Upon hearing, the trial court entered the judgment in favor of the 1st respondent. The appellant was ordered to pay Tshs 67,725,000/= as specific damage resulting from the loss of income for 8 years and 3 weeks, and he was ordered to return the motor vehicle with registration No. 225 BHD make Toyota Splinter to its original status before the accident, payment of Tshs. 5,000,000/= as general damages and the costs of the suit.

Undeterred, the appellants have come to this Court seeking to assail the decision of the District Court on five grounds of appeal as follows:-

1. *That the trial court erred in law and in fact in copying and pasting ex-parte judgment of Hon. Massesa, SRM dated 26th May 2014 thereby reaching the misguided conclusion.*

2. *That the trial magistrate erred in law and fact in omitting one framed issue concerning third-party thereby reaching a wrong conclusion and omitting the third part completely in his judgment and decree.*
3. *That the trial magistrate erred in law and fact for taking into consideration things that were not pleaded specifically in the 1st respondent plaint thereby awarding him an exorbitant amount of the specific damages and other things that are not specifically pleaded.*
4. *That the trial magistrate erred in law and fact in entertaining the above matter in the name of the 1st respondent while he was just an employee and not the owner of the motor vehicle with registration No. T223 BDH and with no power of attorney from the owner to sue on the above matter.*
5. *That the trial Magistrate erred in law and in fact in not considering the evidence adduced by the 2nd appellant and relying on the 1st respondents' evidence hence reaching a biased decision.*

The matter was conducted through audio teleconference and the appellants afforded the service of Mr. Nyawambura, learned counsel whereas Mr. Nasmire and Mr. Sifael, learned counsels serviced the 1st respondent and 2nd respondents respectively.

In supporting the appeal, Mr. Nyawambura learned counsel for the appellant started his onslaught by seeking to consolidate the first and

second grounds of appeal and argue them together. He opted to argue the rest of the grounds separately in the order they appear.

Submitting on the first and second grounds, he avers that, parties at the trial framed four (4) issues but the trial District Court did not address the 3rd issue which states:- *whether the 3rd part is under a duty to indemnify the 2nd defendant.* He insisted that this was contrary to Order XIV Rule 1 (5) of the Civil Procedure Code Cap 33 [R.E 2019]. He went on that, the judgment of the trial court is copied or compared to the judgment of Hon. Massese which was an expert judgment dated 26th May, 2014 that there were annexures admitted and tendered as exhibits on page 6 of the judgment, last paragraph.

Submitting on the 3rd ground, he avers that the trial magistrate erred in law by taking into consideration things that were not pleaded. He went on that, on 04th October, 2013 the Plaintiff filed a Plaint claiming for compensation in a tune of Tshs. 20,000,000/= being damages. To support his submission he referred this court to paragraph 13 of the Plaint. He went on to state that surprisingly in paragraph 6 of the trial court judgment, he was awarded Tshs 67, 70,000/= which is contrary to order VII Rule & of the Civil Procedure Code Cap.33 [R.E 2019] which requires that relief be specifically stated.

He continued to state that the awarded sum was not pleaded contrary to the requirement of section 112 of the Evidence Act, Cap.6 [R.E 2019] which requires who alleges must prove. Mr. Nyawambura supported his submission by referring this court to the case of **Zubed Agustino v Anicet Mugabe** [1992] TLR 137 & 139 that the specific damages must be specifically pleaded and proved. Insisting, he stated that what was awarded by the trial court a compensation in a tune of Tshs 25,000/= per day for 8 years and 3 weeks was never proved by any document or receipt. Fortifying his submission he referred this court to the case of **Abdallah Abas Najim v Amid Alkam Ally** [2006] TLR 55 that failure to attach an annexure is fatal.

Arguing for the 4th ground, the learned counsel for the appellant avers that the trial court erred in law for entering the matter in the name of the 1st respondent. He insisted that the motor vehicle registration No. T223 BDH card bears the name of one Chacha Mwita Mosechi as the owner and the 1st respondent Chacha Mwita is the stranger in the case and has no *locus standi* therefore not entitled to claim any benefit or relief. He went on that, he could only be entitled if he in the process was injured but not to claim from the property which he does not have an interest.

On the fifth ground, he submitted that the trial court erred for not considering the evidence adduced by the 2nd appellant but relying entirely

on the 1st respondents' evidence that resulted in a biased decision contrary to Order XX Rule 4 of the Civil Procedure Code Cap.33 [R.E 2019]. Insisting, the learned counsel for the appellants stated that the trial court did not discuss and analysed the 3rd issue and the thirty party was not mentioned at all in his judgment.

On the strength of the above submission, the learned counsel for the appellants beckoned upon this court to quash the decision of the trial court and allow the appeal.

Mr. Nasimire, learned advocate representing the 1st respondent resisted the appeal with some force. On the 1st and 2nd grounds, Mr. Nasmire disputed that the trial court judgment is a replica of Hon. Massesa in Civil Case No. 47 of 2013 dated 26th May, 2014. He valiantly argued that there is no resemblance and did not see how the appellant was prejudiced. On the thirty party claim, he submitted that the appellant did not tender any document to show that the motor vehicle which was droved by DW1 was insured by the 2nd respondent when the accident occurred. He went on to state that, DW2 on page 47 of the typed trial court proceedings shows that the cover was issued after the occurrence of the accident therefore he insisted that the 3rd issue of thirty party liability was not there because the car was not issued by the thirty party.

With respect to the 3rd ground, that the magistrate considered matters which were not pleaded, he insisted that this ground is baseless. Refereeing to paragraph 11 (b) of the plaint, the respondent stated that he was making Tshs. 50,000/= for driving a commercial vehicle (Exh. PE1). He insisted that the Magistrate ordered the appellant to pay only Tshs. 25,000/= instead of Tshs. 50,000/=, the same was not exorbitant. He went on to state that the 1st respondent was awarded Tshs. 5,000,000/= thus, the appellate court is not in a position to interfere with the general damage awards issued by the trial court. To support his assertion, Mr. Nasimire seeks refuge in the case of **Cooper Motors Cooperation Ltd v Moshi and Arusha Occupational Health Services** (1990) TLR 96.

Replying to the 4th ground that the 1st respondent is a stranger, Mr. Nasimire avers that, PW1 testified that he was the one who drove the car and was mandated by the actual owner of the vehicle one Chacha Mwita. To bolster his submission, Mr. Nasimire refereed this court to pages 34 and 35 of the trial court typed proceedings, he avers that PW1 testified to the effect that he was a driver and custodian of the vehicle given authority by the owner PW2 who also testified on pages 37 and 38 that PW1 is his relative and he gave him power over the vehicle. Insisting, Mr. Nasmire contended that PW1 was a special owner of the vehicle with a mandate to do anything in regards to the said vehicle. He insisted that PW2 is a

public servant thus he entrusted PW1 with the business in terms of Order III Rule 2 (b) of the Civil Procedure Code Cap. 33 [R.E 2019], who needs no power of attorney to do what he did regarding the vehicle in question.

Submitting on the 5th ground that the appellant evidence was not considered, the learned counsel for the 1st respondent avers that reading the court records, it is revealed that the evidence was considered. He went further to state that, it is not disputed that DW1 was driving a motor vehicle with registration No. T741 CCA and negligently hit PW1 vehicle with registration No. T223 BDH. He referred this court to DW1 testimony; who testified to the effect that he was employed by the appellant. He added that the trial court considered the respondents' evidence. Mr. Nasimire stated that the trial Court was not required to determine the third issue which was related to the 3rd party because it found that the appellants' claims against the 2nd respondent was not proved.

On the strength of the above submission, the learned counsel for the 1st respondent urged this court to disregard the grounds of appeal and dismiss the appeal with costs.

In his reply, Mr. Sifael, learned counsel for the 2nd respondent claims that the 2nd respondent is erroneously included in this appeal because he does not feature anywhere in the trial court judgment. He went on to state

that the evidence reveals that the 1st appellant during the hearing did not prove that he has liability against the 2nd defendant.

Mr. Sifael did not end there he stated that DW2 testified to the effect that the accident occurred on 03rd October, 2012 while he joined the 1st appellant cover note on 01st April, 2013 which means that the 1st appellant was not covered by the 2nd defendant. For that reason, it was his view that when the accident occurred the 1st appellant had no right to raise any claim against the 2nd defendant. Fortifying his submission Mr. Sifael, the learned counsel for the 2nd respondent cited the case of **The Heritage Insurance Tanzania Limited & 2 Others v Mwajuma Hamisi (the Administrator of the Estate of Philemon Kilenyi)**, Civil Appeal No. 70 and 77 of 2013 HC at Dar es Salaam.

In view of the above submission, the learned counsel for the 2nd respondent urged this court to dismiss the appeal.

In his rejoinder submission, Mr. Nyawambura reiterated what he submitted in chief and maintained that what happened with respect to the 3rd issue which was not determined by the trial court. He complained that the 1st respondent stated that he was earning Tshs. 50,000/= per day, however, the same was not proved. Insisting, he asserted that even the award in a tune of Tshs. 25,000/= was not proved.

Mr. Nyawambura spiritedly contended that the 1st respondent was required to prove his allegations. He valiantly argued that in the 1st respondent in his Plaint pleaded Tshs. 20,110,302/= but the court awarded more than pleaded. The amount pleaded was in tune of Tshs. 67,730,000/=. The learned counsel for the appellants contended that the award of the trial court contravened Order XX Rule 21(1) of the Civil Procedure Code Cap.33 [R.E 2019], therefore the trial court was wrong to award more than what was pleaded. He went on to state that, the owner of the vehicle being a public servant is not restricted to file a suit in his own name.

Having summarized the facts of the case and submissions of all learned counsels, I now turn to confront the grounds of appeal in the determination of the appeal before me. The appellant has advanced five grounds which he expected to convince this Court to allow his appeal. I have opted to start with the second ground which relates to the third framed issue concerning the third party.

On the second ground, the appellant's Advocate complaints that the trial Magistrate erred in law and fact in omitting one framed issue concerning third party as a result he reached a wrong conclusion. Records reveal that parties before the commencement of trial framed four (4) issues but the trial court did not address the 3rd issue; *whether the 3rd party*

is under a duty to indemnify the 2nd defendant. The appellant's learned counsel insisted that this was contrary to Order XIV Rule 1 (5) of the Civil Procedure Code Cap. 33 [R.E 2019].

I had time to go through the trial court proceedings to find out what transpired at the trial court. I have noted that on page 29 of the typed proceedings parties on 30th January, 2020 framed the following four issues as follows:-

i. *Whether the 1st defendant negligently knocked and damaged the vehicle with registration No. 223 BDH make Toyota Splinter driven by the plaintiff.*
ii. *Whether the 2nd defendant is vicariously liable for the above act of the 1st defendant.*
iii. *Whether the 3rd defendant is vicariously liable for the above act of the 1st defendant.*
iv. *To what reliefs are the parties entitled to.*

When composing its Judgment, the trial court accidentally or purposely produced 3 issues dropping out the 3rd framed issue and renumbered the issues as it appears hereunder.

i. *Whether the 1st defendant negligently knocked and damaged the vehicle with registration No. 223 BDH make Toyota Splinter driven by the plaintiff.*

ii. Whether the 2nd defendant is vicariously liable for the above act of the 1st defendant.

iii. To what reliefs are the parties entitled to.

Reading the above excerpt, it is crystal clear that the trial Magistrate dropped out the 3rd issue which was improper. Going through the records, all issues were well-argued by parties to include the 3rd party who was added to the suit during the trial. It is evident on pages 47 to 50 of the trial court typed proceedings that the 3rd party had an opportunity to argue his case, he entered his defense. This alone required the trial court to make its determination before entering its verdict against the 1st and 2nd defendant. The law under Order XIV Rule 5 of the Civil Procedure Code Cap. 33 [R.E 2019] state that:-

> *"At the first hearing of the suit the court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance,* ***and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend****." [Emphasis added].*

Likewise, Order XX Rule 5 of the Civil Procedure Code Cap. 33 [R.E 2019] state as follows:-

"In suits in which issues has been framed, the court shall state its finding or decision, with the reason, therefore, upon each separate issue unless the finding upon any on or more of the issues is sufficient for the decision of the suit."

It is trite law that the court is placed under obligation to determine the framed issues to make its findings and reasons for the decision. This position was accentuated in the case of **Alnoor Shariff Jamal v Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 the Court of Appeal of Tanzania being faced with a similar situation, cited with approval the decision of the Court of Appeal of Kenya in the case of **Kukal Properties Development Ltd v Maloo & Others** [1990 - 1994] E.A 281 where it was held that:-

*" **A judge is obliged to decide on each and every issue framed. Failure to do so constituted a serious breach of procedure**."*

[Emphasis added].

Subsequently, this position of the law has made giant treads and applied in countless decisions. In the case of **People's Bank of Zanzibar v Suleiman Haji Suleman** [2000] TLR 347 where the Court of Appeal of Tanzania held that:-

"It is necessary for a trial court to make a specific finding on each and every issue framed in a case even where some of the issues cover the same aspect."

Equally, in the case of **N.I.C. & Another v Sekulu Construction Company- (1986) TLR 157**, the Court of Appeal of Tanzania observed that the trial Judge did not make any finding on the issue on which he had adjudicated. The requirement of making specific findings is the principle which finds expression in Order XX Rule 4 of the Civil Procedure Code, Cap.33 [R.E 2019] with regards to regard to contents of a judgment the rule states:-

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

Likewise, in the case of **Sheikh Ahmed Said b The Registered Trustees of Manyema Masjid** [2005] TLR 61, it was held that:-

> *" It is an elementary principle of pleadings that each issue framed should be definitely resolved one way or the other.* ***It is necessary for a trial court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect****." [Emphasis added].*

Applying the above authorities to this instant appeal, it is clear that this is a mandatory requirement for the trial court to determine all framed issues. The court was duty-bound to determine as to whether the 3rd party was under a duty to indemnify the 2nd defendant and give reasons for its findings. This was a must as the third party, being the insurer of the 1st

appellant was to effect the payments if at all was required to do the same. In case the trial Magistrate thought that there was no need to determine the 3rd framed issue then he was required to state reasons thereto as to why he did not determine and analysed the 3rd issue. Failure for the trial court to determine the 3rd framed issue did not only violates the procedural requirement but also has an impact on the realization of the decree.

For the aforesaid reasons, as alluded above there has been an error material to the merits of the case involving injustice. The consequence of that omission is to render that impugned award fatal defective as it was held in the case of **Barclays Bank (T) Ltd v Ayyam Matesa**, Civil Appeal No. 255 of 2017.

Since the determination of this ground suffices to dispose of the appeal, I refrain from deciding on the remaining grounds of appeal the same will be an academic endeavour. I am in accord with the learned counsel for the appellant that the entire appeal has merit and hereby allowed.

Under the circumstances, what has this court to do? I ask that question because to allow the appeal will mean to justify the trial court procedural irregularities. In **Joseph Ndyamukama (Administrator of the Estate of the Late Gratian Ndyamukama) v N. I. C Bank Tanzania Ltd** Civil Appeal No. 239 of 2017 CAT, it was stated that:-

"It is our considered view that, by omitting to consider the framed issues, the learned High Court Judge strayed into an error which has rendered the judgment defective."

Similarly, in the case of **Kashaga v Ernest Kahoya** (1976) LRT No.10 the court held that:-

" The proper thing for the appellate Court to do where it is satisfied that in the case before it, there was a failure by the trial court to try the issues framed in the suit is to remit the case to the trial Magistrate and direct him to write a proper judgment which decides all questions of fact arising from the issue framed."

Applying the above authority, I have to exercise the powers bestowed upon this Court under section 44 (1) (b) of the Magistrates' Court Act, Cap.11 [R.E 2019] which empowers this court to revise the proceedings before the District Court or Court of a Resident Magistrate.

Since the determination of this ground alone suffice to dispose of the appeal, therefore, I restrain myself to discuss the remaining grounds of appeal. I am in accord with the learned counsel for the appellant that the entire appeal has merit and hereby allowed.

In the upshot, I proceed to revise the whole trial court proceedings. In the process, I nullify the judgment entered and remit the case file to the District Court of Nyamagana to render a new judgment as per Order XX Rule 4 of the Civil Procedure Code Cap.33 [R.E 2019] which will consider

and determine all the framed issues before the commencement of the trial. I make this order while taking judicial notice that the trial Magistrate is still stationed at Nyamagana. However, if for any reason the trial Magistrate will not be available, I order another Magistrate with jurisdiction to step into his shoes. I order the matter be given priority, the trial Magistrate to compose the judgment within 6 months from today. Appeal allowed without costs.

Order accordingly.

Dated at Mwanza this 24th May, 2021.

A.Z.MGEYEKWA

JUDGE

24.05.2021

Judgment delivered on this 24th May, 2021, via audio teleconference whereby Mr. Nyawamburwa, learned counsel for the appellant, Mr. Nasimire, learned counsel for the 1st respondent and Mr. Sifael, learned counsel for the 2nd respondent were remotely present.

A.Z.MGEYEKWA

JUDGE

24.05.2021

Right to appeal fully explained.