IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 257 OF 2020

(Arising from the Judgment and Decree of the Resident Magistrates Court of Dar es salaam at Kisutu Civil Case No. 147 of 2019 before Hon. J.H. Mtega, **PRM** dated 31/08/2020.)

THE JUBILEE INSURANCE COMPANY LIMITED .... APPELLANT

VERSUS

ELITHA MBABAZI KALEMA .... RESPONDENT

JUDGMENT

29th April & 04th June, 2021.

E. E. KAKOLAKI J

This appeal which is contested by the respondent originates from the decision of the Resident Magistrates Court of Dar es salaam at Kisutu in Civil Case No. 147 of 2019, handed down on 31/08/2020 which dismissed appellant's suit. Discontented the appellant knocked this court's door fronting three grounds of appeal which I shall soon state.

Briefly, before the trial court in Civil Case No. 147 of 2019, the respondent, a co-owner of the motor vehicle with registration No. T811DDM make Toyota Rav 4 insured with comprehensive cover by the appellant (insurance company) had sued the appellant for recovery of Tshs. 15,330,240/= being

costs for repairing, storage charges, supplementary repairs and towing charges, Tshs. 200,000/= as loss of use and Tshs. 15,000,000/=, general damages for breach of insurance contract and considerable inconveniences caused by appellant. The respondent had her motor vehicle involved in accident at African kwa Mwamunyange area in Kinondoni Municipality and extremely damaged, before she subjected it to major repair after the appellant had failed to indemnify her as insurer with satisfactory compensation or repair costs and other charges. It is from that refusal by the appellant the respondent on 30/07/2019 decided to institute the suit in the trial court. Upon institution of the said suit and as per the typed proceedings of the trial court, the appellant was 05/08/2019 served with the plaint and required to file its defence within 21 days that lapsed on 26/08/2019.

The matter was mentioned on 21/08/2019 in absence of the appellant or her advocate before it once again came for mention on 02/10/2019 where the appellant's advocate appeared before the court and prayed for extension of time to file appellant's written statement of defence. The prayer was vehemently resisted by the respondent's advocate and the trial court after hearing both sides on the prayer on 29/10/2019 delivered its ruling sustaining the objection raised by the respondent's advocate, the result of which was to order for ex-parte hearing of the case. Further to that an order was made against the appellant restricting her to appeal against the said ruling until the matter is finally determined by judgment. Following that order the respondent/plaintiff's case was proved ex-parte and judgment handed down on 31/08/2020 in favour of the respondent, condemning the appellant to pay her Tshs. 15,000,000/= being costs for repairing her motor vehicle,

storage charges and supplementary repairs. Aggrieved with the said decision the appellant preferred this appeal equipped with three grounds as follows:

1. That, the Honourable Trial Court erred in law and in fact by failure to give the appellant the right to be heard.
2. That, the Honourable Trial Court erred in law and in fact by making findings that the appellant was properly served while it was not the case.
3. If the Trial Court have availed the appellant the right to be heard it could not have reached to the decision given on the 31st August, 2020.

In view of the afore stated grounds of appeal the appellant prayed this court to quash and set aside the judgment and decree of the Resident Magistrates Court of Dar es salaam at Kisutu and order for trial de novo of the suit, costs of this appeal and any other relief that the court will deem fit and just to grant in his favour.

As alluded to herein above the appeal is contested. Both parties who are represented by consent and with leave of this court proceeded to argue the appeal by way of written statement and complied with the filling schedule. The appellant is represented by Ms. Jadness Jasson while the respondent has the services of Kephas Mayenje both learned advocates but the submissions for the appellant were made by Mr. Philemon Mutakyamirwa learned advocate. In his submission Mr. Mutakyamirwa chose to argue all the grounds together. He prefaced his submission with the fact that having gone through the entire ex-parte judgment he failed to locate anywhere therein the appellant's whereabouts as it is silent as to whether the appellant/defendant was served or not with plaint and court summons so as

to appear and be heard on her defence. Despite of that fact on the grounds of appeal Mr. Mutakyamira argued that, the right to be heard is fundamental principle of natural justice which every party accessing the court must enjoy unless there are strong grounds for so curtailing it. He said, in this case the appellant submitted herself before the trial court and informed the court that it was not served with the plaint and court summons as there was no affidavit of court process server to so prove. However the trial court based its ruling on the rubber stamp alleged to belong to the appellant without proof as to what time was it served and whether the person who received the summons on behalf of the appellant was a natural person or not something which is contrary to the provisions of Order V Rule 14 of the Civil Procedure Code, [Cap. 33 R.E 2019. He contended the provision requires the serving officer to swear an affidavit containing time and name and address of service while annexing the original summons before it is returned to court, the affidavit which is missing in this case. Failure to render proper service to the party in the case has the effect of rendering the proceedings a nullity as it was held in the case of **Muro Investment Co. Ltd Vs. Alice Andrwe Mlela**, Civil Appeal No. 72 of 2015 (HC-unreported), Mr. Mutakyamirwa stressed.

Had the trial court not violated appellant's constitutional right of the right to be heard, it could not have reached such unfair and unjust decision as the appellant was condemned unheard and had its rights affected, Mr. Mtakyamirwa submitted. He referred the court to the case of **John Morris Mpaki Vs. The NBC Ltd and Another**, Civil Appeal No. 95 of 2013 (CAT-unreported) and prayed for grant of the prayers as stated herein above.

In his reply submission Mr. Mayenje for the respondent pointed out from the outset that, the grounds and submissions in support of this appeal are

misconceived and totally misleading this court. He brought into attention of this court the fact that in this matter the trial court issued two decisions which are, **one**, the ruling dated 29/10/2019 and **second**, ex-parte judgment dated 31/08/2020. It was his argument that, the appellant's submission in support of grounds of appeal are challenging the ruling of 29/10/2019 and not the ex-parte judgment dated 31/08/2020. He said the alleged denial of the right to be heard was addressed in the ruling and not the judgment of 31/08/2020 which is sought to be challenged by the appellant at the moment, thus the appellant's call to this court to act and make a decision on the judgment is totally misleading and confusing. He reasoned, in the present appeal the grounds of appeal do not challenge the points which were argued and decided by the trial court in its ex-parte judgment dated 31/08/2020, therefore there is no material upon which this court can act to make decision thereon. To reinforce his stance Mr. Mayenje cited to this court the Court of Appeal decision in the case of **Intergrated Property Investment (T) Limited and 2 Others Vs. The Company for Habitat and Housing in Africa**, Civil Appeal No. 107 of 2015 (CAT-unreported).

With that authority in hand he submitted this Court cannot decide on the issues which were not argued and decided by the trial Court in the judgment. The appellant should have challenged the ruling dated 29/12/2019 because the grounds of appeal challenges the points which were argued and decided in that ruling, Mr. Mayenje contended. With regard to the case of **John Morris Mpaki** (supra) cited and relied upon by the appellant he countered the same is distinguishable, thus not applicable in the circumstances of this case since in that case the court raised suo motu the issue of expiry of the

speed truck without giving parties the right to be heard, while in this matter parties were given the right to be heard which resulted into the said ruling. As to the case of **Muro Investment** (supra) he stated, the same is also distinguishable as in that case the appellant was challenging the ruling and order arising from Civil Case No. 182 of 2013, while in our case the appellant is challenging the judgment. And secondly the facts are different. In his view of the above submissions he stated this appeal is devoid of merit, thus should be dismissed with costs.

In the alternative Mr. Mayenje argued, assuming the appellant is challenging the ruling of 29/10/2019, which is not the case, still there was a proof to the trial court's satisfaction that, the summons for filling the written statement of defence was properly served to the appellant thus the trial court rightly arrived at ex-parte hearing order against her. He said, the manner of effecting services in the Court of Appeal is the same as in the High Court and subordinate courts thereto as it was held in the case of **Tito Shumo & 49 Others Vs. Kiteto District Council**, Civil Application No. 140 of 2012, (CAT-unreported) where the Court commented at page 3 of its judgment thus:

> *"The procedure and practice of the High Court under the provisions of the Civil Procedure Code, Cap. 33 R.E 2002 (the Code) is complete when it is endorsed by putting a signature by a person who receive it."*

In the present case where there is not only evidence that the signature of the officer was endorsed but also rubber stamp of the appellant affixed on the summons, he argued, is enough evidence to prove that the service was

properly effected to the appellant. With all that proof and submissions made Mr. Mayenje submitted this appeal is meritless and should be dismissed with costs.

In his rejoinder submission Mr. Mutakyamirwa assailed Mr. Mayenje's submission arguing that he missed a point to contend the appellant was supposed to appeal against the Ruling given on 29/10/2019. He said, the said ruling is an interlocutory one barred by the law from being appealed against under section 74(2) of the Civil Procedure Code, [Cap. 33 R.E 2019]. As such there was an order of the trial court of 29/10/2019 restricting the appellant from appealing against the said ruling, he stressed.

Mr. Mutakyamirwa was categorical that the right to be heard complained of by the appellant is not with regard to appellant's failure to file the written statement of defence but of the court denying her the right to file the defence on allegation that she was properly served, thus curtailing its right to be heard on the main case. On the case cited by the respondent in support of his submission on the above point he said, the same is distinguishable as in that case the appellant who was supposed to file an application for setting aside ex-parte judgment had referred in his appeal grounds for his denial to set aside ex-parte judgment which was not even argued and decided upon by the trial court. Unlike in that case, in this case he submitted, the appellant was denied of his right to file the defence, meaning could not be heard on main case. He therefore contended the proper forum for the appellant was to appeal on main case (ex-parte Judgment) as it was well captured by the trial court in its ruling dated 29/10/2019 and section 74(2) of CPC that the appellant could not appeal against the said ruling. He relied on the case of **Amani Uweza Nuru Vs. S.H. Amon Enterprises Company Ltd and**

Another, Land Appeal No. 33 of 2018 (HC-unreported) where this Court held, an appeal on interlocutory in that case was filed prematurely in contravention of section 74(2) of CPC. On the procedure for service of summons as submitted by Mr. Mayenje, he faulted the learned counsel's submission stating that, it was not true the procedure was the same in the Court of Appeal and subordinate courts. He said, in the Court of Appeal the procedure is governed by Court of Appeal Rules as amended in 2019 while in the subordinate courts it is regulated by the CPC which provides for need to have affidavit of the process server to prove service, something which is missing in the present case. To him the provisions of Order V rule 14 of the CPC were not complied with, thus the appellant's submission were not shaken at all. He therefore reiterated the rest of his submission and prayers made earlier on.

I have carefully gone through the trial court record and fighting submissions from both parties. It is uncontroverted fact that two decisions were made by the trial court in Civil Case No. 147 of 2019 that affected the appellant, which are ruling dated 29/10/2019 that denied the her the right to file her defence through written statement of defence and ex-parte judgment dated 31/08/2020 entered in favour of the respondent, as it was entered without her being heard. What is discerned from the submissions is that parties are loggerheads on which decision between the two decisions this appeal should have been preferred from. Now on that basis the issues for determination by the court are **one**, what decision between the two was the appellant supposed to appeal against? **Secondly**, whether the appeal is competent before this court. Mr. Muyenje says it the ruling of 29/10/2019 as the three grounds of appeal and submissions by the appellant are all centred at

challenging what was decided therein, which is appellant's denial of the right to file her defence, hence ex-parte judgment against her. Mr. Mutakyamirwa is of the contrary view submitting, **firstly**, that the ruling being interlocutory one under section 74(2) of CPC and as per the case of **Amani Uweza Nuru** (supra) is unappellable. **Secondly**, the appellant being denied of her right to file the defence under pretext that she was properly served, thus curtailing its right to be heard on the main case, the only remedy for her was to appeal against the judgment only.

It is true as submitted by Mr. Mutakyamirwa the ruling of the trial court dated 29/10/2019 in Civil Case No. 147 of 2019 is an interlocutory decision. It is also true under section 74(2) of CPC and as rightly stated in **Amani Uweza Nuru** (supra) the said decision is not appealable. Section 74(2) of the CPC reads:

> *(2) Notwithstanding the provisions of subsection (1), and subject to subsection (3), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other tribunal, unless such decision or order has effect of finally determining the suit.*

With the above cited provision of the law, the question comes, does that mean that the decision in the ruling of 29/10/2019 is not appealable at all as asserted by Mr. Mutakyamirwa? It is my conviction that answer to this question is no. I will tell why? Interlocutory orders though might be affecting the case of the aggrieved party in my opinion were prevented from being appealed against for two reasons. **One**, to prevent abuse of court process

by referring to the appellate court even trivial issues that do not dispose the matter to its finality which could have been addressed during the appeal after completion of the case. **Secondly**, to speed up disposal of matters as appeals if preferred on interlocutory every orders/decisions could suspend the proceedings for so long time, thus affect timely disposal of cases. The denial of appeal on interlocutory orders/rulings in the mid of the proceedings therefore does not mean the decision made therein cannot be appealed against after the case is fully heard and determined on merits.

Having so found let me come back to the matter at hand where the complaint by the appellant is that by the ruling of 29/10/2019 which denied her of the right to file her defence, applicant was denied of her right to be heard on the main case, hence unjust decision on ex-parte judgment dated 31/08/2020. After delivery of the said ruling the trial court went further to restrict the appellant to appeal against the said ruling. For easy of reference I quote it order:

> *"**Court**: No right to appeal which has been given to the parties until the matter will be finally determined by the Court."*
>
> *Sdg: H.J. Mtega*
>
> ***29/10/2019**.*

What is deciphered from the trial magistrate's order is that the order was made by him fully aware that parties could only appeal against his ruling after conclusion of the case by the trial court. That brings home the point as held herein above that interlocutory orders/decisions are subject of appeal after determination of the matter to its finality. As alluded to herein above

the main complaint by the appellant is on denial by the trial court of its right to file the defence on allegation that she was properly served, thus curtailing its right to be heard on the main case. There is no dispute that the appellant's right to file written statement of defence or not was argued and decided by the trial court in its ruling of 29/10/2019. As rightly submitted by Mr. Mayenje all three grounds of appeal as well submissions by the appellant are centred on the decision in the said ruling and not the judgment. That being the position the first issue is answered in that the appellant was supposed to appeal against the ruling dated 29/10/2019 and not the judgment dated 31/08/2020. However, in the appellant's memorandum of appeal which is accompanied by the ex-parte judgment, it is the said judgment and not the ruling of 29/10/2019 which is being assailed. As the ruling which decided on the right of the appellant to file its WSD that resulted into ex-parte hearing and later on ex-parte judgment is not a subject of this appeal, I am in agreement with Mr. Mayeje that, there is no material before this court for determination of the filed appeal as it was held in the case of **Intergrated Property Investment (T) Limited and 2 Others** (supra). In that case the Court when faced with more or less similar situation to this one where the appellant had filed grounds of appeal which were not challenging the points decided in the trial court, Court of Appeal said:

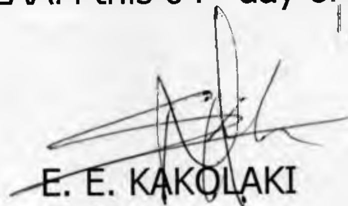
> *'There is no dispute that the points raised in these grounds of appeal were not decided by the trial court. That court merely entered a summary judgment. In the circumstances therefore, since these grounds do not challenge the points which were argued and decided by the trial court, there is no material upon which this Court can act to make a decision thereon."*

Like in the above case, in this case, there is no dispute that the points of appeal raised were decided by the trial court in the ruling of 29/10/2019 and not in the judgement. However the said ruling is not a subject of this appeal. It follows therefore that this court cannot venture into determination of the decision which is not before it. This appeal therefore is improperly before this court. Having so held then what is the remedy available to the appellant. Mr. Muyenje invited this court to dismiss the appeal. However, I refrain from attending his invitation on the reason that the appeal has not been determined on the merits of the grounds of appeal raised.

In the premises and for the fore stated reasons it is my finding that this appeal is incompetent and the same is struck out with costs. If the appellant still maintains his grounds of appeal, she is at liberty to file a fresh appeal on the ruling dated 29/10/2019 subject Law of Limitation Act.

It is so ordered.

DATED at DAR ES SALAAM this 04th day of June, 2021.



E. E. KAKOLAKI

JUDGE

04/06/2021

Delivered at Dar es Salaam in chambers this 04th day of June, 2021 in the presence of Ms. Jedness Jasson advocate for the appellant, Mr. Kefas Muyenje advocate for the respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.

E. E. Kakolaki

JUDGE

04/06/2021