

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CIVIL APPEAL NO. 13 OF 2020

(Arising From the Decision of the Court of Resident Magistrate of Mbeya, at Mbeya in Civil Case No. 15 of 2015)

ERASTO KAMALA MWAMBUSYE..... APPELLANT

VERSUS

1. JUBILEE INSURANCE CO. LTD.....1ST RESPONDENT

2. CABLE TELEVISION NETWORK.....2ND RESPONDENT

JUDGMENT

Date of last order: 18.08.2021

Date of Ruling: 24 .09.2021

Ebrahim, J.

The appellant, ERASTO KAMALA MWAMBUSYE challenged the decision of the *Court of Resident Magistrate of Mbeya, at Mbeya in Civil Case No. 15 of 2015*, dated at 27/ 03/2020. This matter traces its history from the year 2015 in the Court of Resident Magistrate of Mbeya (the trial Court). For better understanding of the present appeal, the record shows that this is the second time the appellant approaches this court challenging the decision of the trial Court. Previously, the appellant filed an appeal in this

court i.e Civil Appeal No. 08 of 2016. In that appeal the appellant challenged the trial Court judgment dated 11/05/2016. The same was determined on 11/12/2019 by Hon. Utamwa, Judge where he nullified the proceedings, quashed them and set aside the resulted judgment, he also ordered for re-hearing of the case.

Before the trial Court, the Appellant herein was a Plaintiff. He instituted a suit against the Respondents, JUBILEE INSURANCE CO. LTD and CABLE TELEVISION NETWORK (CTV). The 2nd respondent was insured by the 1st respondent in her business. The appellant sued them claiming for a compensation at the tune of Tshs. 100,000,000/= for the injuries sustained from being hit by the pole of the 2nd respondent which broke and dropped on his head. He also claimed for an order of payment of 25% commercial interest on the above claimed compensation, general damages at the tune of Tshs. 10,000,000/=, payment of 5% monthly interest on the decretal sum from the date of decree to the date of full settlement, costs of the suit and any other relief as the court (the trial Court) might deem fit to grant.

Previously, the case was heard *inter-parties* and it was heard following procedures under the **Civil Procedure Code, Cap. 33 R.E**

2002 (Now R.E 2019) henceforth the CPC. However, in the re-trial the same was heard *ex parte* following non-appearance of the respondents despite the fact that they were duly served. The evidence by the plaintiff/appellant was presented by an affidavit sworn by the appellant himself.

Though the case was heard *ex parte*, the appellant lost it, hence the present appeal. He preferred a total of seven grounds of appeal which, however, for the reasons to be apparent hereinafter, I will firstly reproduce and determine the second ground of appeal which states as follow:

2. That the trial court grossly erred in law and facts when disregarded the directives given by the High Court of Tanzania at Mbeya in Civil Appeal No. 8 of 2016.

During hearing of the appeal, the appellant appeared in person, unrepresented. It was heard *ex parte* since the respondents did not appear though they were aware of the matter as their advocate one Dr. Mchomvu had been entering appearance before he absented himself in the later stage without any notice. The appellant had nothing to argue than praying for this court to consider his grounds of appeal.

As hinted before, I will start determining the second ground of appeal as reproduced above. In determining the appeal, this court will resolve the following two issues:

- i. Whether the trial court, during retrial considered the order(s) given by this court.
- ii. If the answer in (i) above will be in negative, then what is the effect of that course.

In answering the first issue, I have to revisit the judgment dated 11/12/2019 in which the order for retrial was made. The same at page 9 last paragraph of the typed judgment, this court made the orders which were couched as follow:

*"I consequently, make the following orders for the sake of justice to both sides: the appeal is allowed to the extent shown above, **the proceedings of the trial court from the date when the hearing of the appellant's (plaintiff) evidence commenced to when the defence case was closed** are hereby nullified and **quashed**. The trial court's impugned judgment is also set aside. In case the appellant still wishes, the suit may be re-heard by another competent magistrate*

and according to the law....." (Emphasis added).

Form the above quoted paragraph this court nullified the proceedings of the trial court only from the date when the hearing of the appellant's (plaintiff) evidence commenced to when the defence case was closed. This means that, all proceedings which were conducted before the case started to be heard on the parties' evidence were to remain intact. The proceedings before the date of hearing includes the issues which were framed by the trial court in agreement with the parties. It follows therefore, that, in the re-hearing of the parties, the trial court was supposed to confine itself on the issues that were framed during the second Pre-Trial Conference as it was conducted on 26/02/2016 shown at page 12 of the typed proceedings.

Indeed, the trial court observed the order of this court to the extent that it directly started hearing the parties, though *ex parte*. However, in its judgment which is the subject of this appeal it raised and considered new issues. Those issues which were framed before and agreed by the parties were not considered.

For easy reference and better appreciation of the appellant's concern I reproduce the issues framed by the trial court as follows:

1. *Whether the plaintiff sustained injuries as a result of accident.*
2. *Whether the second defendant is responsible for plaintiff's injuries sustained.*
3. *Whether the second defendant was insured by the 1st defendant.*
4. *What are the relief(s) do the parties entitled to.*

Nevertheless, in the judgment after the re-hearing, the learned trial Magistrate raised new issues at page 3 of the typed judgment as follows:

*"..... The issues to be determined at this juncture are mainly two, firstly, **whether the parties have been properly sued** and secondly, **whether the plaintiff stand to be awarded the claims he has prayed for...."***

As clear as a broad day, I hold that since this court did not nullify the proceedings under which the issues for determination by

the trial court were framed, in the re-hearing of the case, the trial court did not consider the order given by this court. The first issue is thus answered negatively.

As for the second issue, I am guided by the decision of the Court of Appeal of Tanzania in the case of **Jamali Ahmed v. The CRDB Bank Ltd, Civil Appeal No. 52 of 2010, CAT at Dar es Salaam** (unreported). In that case, the trial court decided on the issues neither framed by the parties nor accorded opportunity to be heard on the same. The Court held that the case must be decided on the issue on record and where new issues not founded on the pleadings are raised, the parties should be given the opportunity to address the court.

In the matter under consideration, the trial court did not decide on the issues which were framed in agreement of the parties as I have indicated above. Also, when it raised new issues, the court did not accord the opportunity to the parties, specifically the appellant who appeared to address it. That was a serious irregularity which vitiated the proceedings in the re-hearing of the case. This is also due to the reason that the trial court dismissed the suit basing on the new raised issues.

In the circumstances, it is my considered views that, the appellant was denied his fundamental right to be heard which is to be safeguarded in the course of administration of justice. See the cases of **Transport Equipment vs Devram Valambhia [1998] TLR 89** and **Mbeya Rukwa Autoparts and Transport Limited vs Jestina Mwakyoma [2003] T.L.R 253**. In the latter case the CAT observed that:

*"In this country, natural justice is not merely a principle of common law, it has become a fundamental constitutional right Article 13 (6) (a) **includes the right to be heard** amongst the attributes of equality before the law,"* (bold emphasis added).

That being the case, the effect of the course of non-resolving the issues framed by the parties renders the proceedings and the resulted judgment a nullity.

In the upshot the appeal is allowed. The proceedings of the trial court in the re-hearing of the case are hereby nullified and quashed. The Judgment dated 27/03/2020 is also quashed and the decree is set aside. I remit the file to the trial court for re-hearing the suit again. It is also ordered that, the re-hearing of the

suit shall be confined on the issues framed on 26/02/2016 or in case there is any additional issue(s) parties shall be accorded an opportunity to be heard thereon. I make no order as to cost. I further order that the case be heard expediently by another magistrate with competent jurisdiction.

Ordered accordingly.



R.A. Ebrahim
Judge

Mbeya

24.09.2021

Date: 24.09.2021.

Coram: Hon. P. D. Ntumo – PRM, Ag-DR.

Appellant: Present.

1st Respondent:

2nd Respondent:

} Absent.

For the Respondents:

B/C: P. Nundwe.

Court: Judgement delivered in open chambers in the presence of the appellant only this 24th day of September 2021.

P.D. Ntumo

P.D. Ntumo - PRM

Ag- Deputy Registrar

24/09/2021