

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO. 24 OF 2022

(Arising from the Ruling of Civil Case No 167 of 2021 from the Resident Magistrate Court of Dar es Salaam at Kisutu, Hon. H.A. Shahidi PRM)

BAGHAYO A. SAQWARE.....APPELLANT

VERSUS

SALAAMAN HEALTH SERVICES.....1ST RESPONDENT

DR. ABDI WARSAME HIRSI.....2ND RESPONDENT

JUDGMENT

Date of last order: 01/06/2022

Date of Judgment: 24/06/2022

E.E. KAKOLAKI J.

At the Resident Magistrate Court of Dar es Salaam at Kisutu, the appellant Baghayo A. Saqware sued the respondents for breach of Management Agreement vide Civil Case No 167 of 2021. For easy appreciation of the sequence of events leading to this appeal, I think it is desirable to outline albeit briefly the historical background of the case as gathered from the documents laid before the trial court during trial. The appellant/plaintiff an insurance and management expert on 11th April, 2020, entered into agreement with 1st Defendant to provide management, consultancy and

advisory services as an independent management consultant for consideration of Tsh. 6,000,000 per month or else 40% of the net profit after statutory deduction, the agreement to start from 11th May 2020 till its termination by parties. Appellant chose to be paid 6,000,000 per month. The contract was signed by the 2nd Respondent, principal officer of the 1st respondent. It appears the appellant dully performed his obligations, but 1st respondent did not in which the appellant kept on insisting on the performance of the contract by the Respondent but in vain. In a bid to pursue his right, the appellant unsuccessfully filed Civil Case No 167 of 2021 before the Resident Magistrate Court of Dar es Salaam at Kisutu as his suit was successfully challenged by the respondents on two grounds. One, that the appellant had not cause of action against the 2nd respondent and secondly that, the trial court had no jurisdiction to entertain the suit.

Upon hearing both parties on the raised preliminary objection the trial Magistrate was satisfied and upheld both preliminary objections, to the effect that, the appellant/plaintiff had no cause of action against 2nd Respondent/defendant and that, the alleged breached management agreement was an employment or labour dispute in which the trial court had no jurisdiction to entertain. It finally ruled that, the preliminary objection

raised are proper and succeed. Unhappy with the findings the appellant has come up with this appeal equipped with four (4) grounds of appeal, which for the reasons to be disclosed soon I don't find it appealing to reproduce them.

Both parties in this appeal were present and by consensus chose to argue it by way of written submission, as the appellant hired the services of Mr. Mlyambelele Abedinego Levi Ng'weli, learned advocate whereas the 1st and 2nd respondent enjoyed the representation of Mr. Juma Nassoro, learned advocate. Submissions were filed in accordance with the scheduled filing orders.

As I was preparing to compose the judgment, after thorough perusal of the impugned ruling of the trial court, it came to my knowledge that, the said ruling was lacking in the final order in which the appellant ought to have appealed against. Following that omission in the impugned ruling on 21/06/2022, parties were summoned by this Court to appear and be heard viva voce on the issue as to whether the appeal before the Court is competent or not, the call which was adhered to.

Addressing the court on that issue raised by the Court suo mottu, it was Mr. Ng'weli who staged his submissions first. The learned counsel informed the

court that upon quick perusal of the impugned ruling came to the conclusion that, both ruling and drawn order, do not meet the qualities of a legal judgment for want of final order disposing of the matter. He argued as per Order XX Rule IV of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC), the judgment among other contents must have the decision and reasons for the said decision. According to him, the last three lines of the ruling do not qualify to be termed as decision of the court something which renders the said ruling defective hence incapable of being appealed against. He therefore beseeched the Court to remit the file to the trial court for correction of the ruling to include the final order. Upon being probed by the Court on the competence of the appeal filed by the appellant, Mr. Ng'weli quickly responded that since the ruling and drawn order sought to be challenged are defective, the appeal is rendered incompetent. He therefore changed his prayer asking the court to strike out the appeal without costs.

Mr. Ng'weli's submissions and prayer in respect of the raised issue were happily welcomed and fully supported by Mr. Nassoro for the Respondent without addition save for the prayer of waiver of costs in which he pressed for the same to be granted. The advanced for such prayer is that the appellant who ought to have appeal against the proper orders of the trial

court as provided under section 70 and Order XXXIX Rule 1 as well as Order XL Rule 1 paragraphs (a) to (v), both of the CPC (whichever is applicable), acted negligently by preferring the appeal against a defective ruling/order of the Court, hence subjected the respondent to unnecessary costs. In his brief rejoinder Mr. Ng'weli implored the Court to dispense with respondents prayer for costs for two reasons. One, the issue has been raised suo mottu by the Court and secondly, the omission that rendered the impugned ruling is attributed to the Court, therefore it will be unfair to condemn the appellant to a wrong which he did not contributed to.

I have accorded the deserving weight both parties' submission. The central issue for determination is whether this appeal is competent before the Court as raised before. Both counsels are in agreement that the appeal is incompetent. As per Order XXXIX of CPC, a competent appeal from original decree is preferred in the form of memorandum duly signed by the appellant or his advocate or officer appointed by him accompanied with a copy of decree appealed from the judgment on which it is founded. Since it is the decree founded on judgment or order of the Court under Order XL Rule 1(a)-(v) of the CPC, which is being appealed then the judgment must carry the contents of a sound judgment. It is the law under Order XX Rule 4 of the

CPC that, a judgment must have the point or points for determination; the decision thereon and the reasons for such a decision. Rule 4 of the said Order XX of the CPC reads:

*4. A judgment shall contain a concise statement of the case, **the points for determination, the decision thereon and the reasons for such decision.** (Emphasis added)*

In my opinion the above mentioned ingredients or contents of a sound judgment are the same both in civil or criminal matters and extends to cover even the ruling. The Court Appeal in the case of **Yusuph Abdallah Ally Vs. DPP**, Criminal Appeal No. 300 of 2009 (CAT unreported) had an opportunity to describe the contents of judgment and said:

*"It is settled law that a judgment should contain inter alia, **the point or points for determination; the decision thereon and the reasons for such a decision.**" (Emphasis supplied)*

A glance of an eye to the impugned ruling has revealed that when deciding on the raised two preliminary points of objection, the learned trial magistrate omitted to indicate the final decision or order of the court. To bring into picture the wording of the trial magistrate, I reproduce the excerpt from the last part of the impugned ruling as I hereby do:

"...the payment at the agreement, Say TZS 6,000,000/= is a salary/remuneration and that is why is written that will be paid at the end of every month. Therefore this qualifies to be Employer and Employee dispute. Therefore the preliminary objection raised are proper and succeed. Each to carry its costs.

Sgd: Hon. H. A. Shaidi – PRM

24/11/2021"

It is noted without doubt from the above excerpt that, the learned trial magistrate when deciding on the raised preliminary objections omitted to give final order entered by the court hence failure of the contested ruling to meet the contents of the judgment for want of the **decision** of the Court, thus the whole ruling is rendered defective. As the ruling which is subject of this appeal is lacking the final order which could have been appealed against as provided under Order XL Rule 1(a)-(v) then, I hold the appeal is incompetent as rightly submitted by Mr. Ng'weli.

Now with the above finding, the next question is what the consequence of an incompetent appeal is. I think this query need not detain me as it is the law that anything incompetent suffers the consequence of being struck out

as there is no proper matter capable of being determined by the Court. This position of the law was stated in the case of **Cyprian Mamboleo Hiza Vs. Eva Kioso and Another**, Civil Application No. 30 of 2010 (CAT unreported) where the Court of Appeal said thus:

*“...This court, accordingly, has no jurisdiction to entertain it, what was before the Court being abortive and not properly constituted appeal at all. **What this court ought strictly to have done in each case was to “strike out” the appeal as being incompetent, rather than to have “dismissed” it; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of.**” (Emphasis added)*

In this matter, since the appeal before the Court is incompetent and guided by the spirit of the above cited case, I proceed to strike out the appeal as I hereby do for want of competence.

As regard to the prayer for costs by the respondent, I refrain from granting the same as the issue disposing of this matter has been raised by the Court suo mottu. In lieu of I order each party to bear own costs.

It is so ordered.

DATED at Dar es Salaam this 24th day of June, 2022.



E. E. KAKOLAKI

JUDGE

24/06/2022.

The Ruling has been delivered at Dar es Salaam today on 24th day of June, 2022 in the presence of Mr. Mlyambebele Ng'weli, advocate for the appellant who is also holding brief for Mr. Juma Nassoro, advocate for the Respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

24/06/2022.