

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO. 285 OF 2021**

(Originating from Judgment and Decree of the District Court of Kinondoni at Kinondoni in Civil Case No 123 of 2017 before Hon. Jacob RM, dated 25th May 2021)

KLARE KILEO.....APPELLANT

VERSUS

MWANANCHI COMMUNICATION LIMITED..... RESPONDENT

JUDGMENT

Date of last order: 22/06/2022

Date of Judgment: 22/07/2022

E.E. KAKOLAKI J.

In the District Court of Kinondoni at Kinondoni Mwananchi Communication Limited (respondent here in) instituted a civil suit against Klare Rabia Kileo (appellant), claiming for Tsh.40,000,000 arising out of breach of car loan agreement entered 10th October,2011. In its judgment delivered on 25th May, 2021, the trial Court was satisfied that, respondent proved her claim to the tune of Tshs. 11,214,064, the appellant was thus ordered to pay the said amount together with general damage of Tsh. 6,000,000 and interest of 3% of the awarded amount from the date of judgment to the date of full satisfaction of the decree. Aggrieved with that decision, appellant preferred this appeal based on ten (10) grounds of appeal which for the reasons to be

disclosed later I don't find it appealing to reproduce them all except for the first ground which in my profound view, if well addressed has the effect of disposing of the appeal. The first ground going thus; *that the honourable trial magistrate erred in law to proceed with the trial of the suit without having heard, considered and determined the appellants preliminary objection challenging the court's jurisdiction pleaded under her written statement of defence.*

In this appeal, both parties were represented as appellant hired the services of Mr. Michael Ngalo while the respondent enjoyed the services of Mr. Ambrose Nkwera both learned advocate and by consensus, the appeal was disposed by way of written submission.

In his submission, Mr. Ngalo informed the court that, he will not submit on each ground, rather he will address all grounds generally save for the first ground as in his view, all other grounds boil down into one issue as to whether the respondent proved its case to the required standards.

Submitting on the first ground Mr. Ngalo contended that, under paragraph 10 of her defence, the appellant raised the preliminary objection questioning jurisdiction of the court but for no recorded reasons the objection was not heard and determined hence the first ground of appeal. In his view it is

elementary that, before proceeding with any matter, a court of law has to ascertain and satisfy itself whether or not it has jurisdiction over the matter. He added that, in this case though the issue of jurisdiction was raised, it was neither pursued nor determined. In his further view, Mr. Ngalo argued, should it be taken that it was waived or not, the court still had a duty to have it determined in one way or the other because, the jurisdiction of the court to try any case is so fundamental and sacrosanct. He contended that, the trial court had no jurisdiction to entertain this matter since the cause of action arose in Ilala District where the contract was executed and illegally breached. He was of the view that, in absence of the fact pleaded as to where the appellant resided and or worked for gain the proper court with territorial jurisdiction is Ilala District Court. He maintained that, Kinondoni District lacked territorial jurisdiction over the suit thereby rendering the proceedings and the resultant judgment and decree a nullity. He thus pray the court to nullify the proceedings of the suit, the judgment and decree for want of territorial jurisdiction.

Responding to the first ground of appeal, Mr. Nkwera started by quoting the case of **Fabuel Mantiri Ng'unda Vs. Fanuel Mantiri N'gunda and two Others** (1995) TLR 155, which stressed that, jurisdiction is basic as it goes

to the root of the authority of the Court to entertain the matter. He said, in the present matter, the preliminary objection raised by the appellant was determined as both parties being represented were heard orally on 31/08/2018 before honorable Lihamwike SRM, the matter set for ruling on 18/09/2018 before it was adjourned and delivered on 26/09/2018 by dismissing the objection. He concluded that, the appellant's submission that the said preliminary objection was not determined is misconceived and misleading thus should be dismissed. Concerning the issue of territorial jurisdiction Mr. Nkwera submitted that, at the time of instituting the case, the cause of action arose at Mwananchi Communication Limited where the contract was signed and the office was located at Kinondoni District and not within Ilala District. He added that, at that time, the defendant/ appellant was residing within Kinondoni District at Masaki and working at Masaki and under the provisions of section 18 (a) of the CPC the party can institute the case where the defendant resides or works. Therefore, the jurisdiction issue was determined by the court and the trial court was competent to try the suit.

In a short rejoinder, Mr. Ngalo reiterated what he submitted in his submission in chief and added that, the ruling of the preliminary objection is

not found in the court's proceedings thus no evidence that the preliminary objection was overruled. He maintained that, the District Court of Kinondoni had no territorial jurisdiction to entertain the matter before it. He further contended that, for the court to know whether it has jurisdiction or not, it has to look at either plaint or counterclaim. Mr. Ngalo relied on order VII Rule 1(f) of the CPC which requires a plaint to contain among others, facts showing the court's jurisdiction.

I have accorded the deserving weight both parties' submissions. Notably, it is a common fact amongst parties that, the appellant raised a preliminary objection concerning jurisdiction. The point of controversy between them is whether the same was heard and determined. On my thorough perusal of the trial courts records, it came to my attention that, on 31/08/2018 parties addressed the court on the said Preliminary Objection and the ruling was set to be delivered on 18/09/2018. However, on that date the same was adjourned to 26/09/2018, then further adjourned to 30/10/2019, 2/11/2018 and 19/11/2018 before it was lastly adjourned to 10/12/2018 where plaintiffs advocate addressed the court that the matter was fixed for first PTC. In light of the foregone records in the trial Court's proceedings, it is apparent that the ruling was not delivered.

To make the matter worse on 19/11/2018 ruling was not read instead the Court fixed the matter for Mention on 10/12/2018 and both parties were absent. On my further scrutiny of the trial courts records, I came across a ruling dated 19/11/2018, in which the proceedings do not reveal as to how the same found its way in the record and whether the same was delivered to parties or not. It should be noted that, as per the sanctity of records, the courts records are presumed to accurately represent what actually transpired in court. See the case of **Alex Ndendy vs Republic**, Criminal Appeal No 207 of 2018 CAT at Iringa.

Guided by the above authority, it is apparent that, the ruling was not delivered to the parties.

It is my profound view that, since the parties were dully heard for and against the Preliminary Objection orally, the trial Magistrate had no alternative but to determine the same and come into conclusion before he could proceed to determine the case on merit. Since that was not done, it is apparent that the trial magistrate failed to adhere to the mandatory provisions of order XX Rule 1 of the CPC, that a judgment when prepared should be pronounced in open court, in the presence of the parties and parties must be notified. The said Order XX Rule 1 of the CPC states that:

1. The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocates.

Though the order applies to judgment, the same covers ruling too, as per the meaning of the word Judgment ascribed in section 3 of the CPC.

"judgment" means the statement given by a judge or a magistrate of the grounds for a decree or order;

Applying the said provisions of Order XX Rule 1 above to the facts of the present appeal, no doubt the trial magistrate was expected to pronounce the ruling in open Court for the parties to know the decision. A glance of an eye to the typed ruling found in the record though not supported with the court proceedings of 19/11/2018, the same purports to indicate that it was read in the presence of both parties something which is strongly disputed by the appellant throughout the submissions. Worse still, Mr. Nkwera submits that the same was delivered on 26/09/2018, the date which does not even exist in the court proceedings, something which brings in question the credibility of the said ruling and its existence. The hand scripted trial court proceedings of 19/11/2018 which I consider to be more authentic reads and I quote:

Date: 19/11/2018

Coram: Hon L. Lihamwike-RM

Plaintiff: Absent.

Defendant: Absent.

CC: Kayombo.

Order: Mention 10/12/2018.

Sgd:

Lihamwike - RM

19/11/2018

And the last part of page 3 of the ruling reads:

Ruling delivered in Open Court today this 19th day of November, 2018, in the presence of both parties.

Sgd: Hon. Lihamwike – RM.

19/11/2018

Much as the records reveals that, the ruling was not delivered either on 19/11/2018 as shown in the ruling or on 26/11/2018 as submitted by Mr. Nkwera, I am satisfied that the ruling having no pronounced in open court, the Preliminary Objection was not determined something which is against the spirit of the principle of law as underpinned in the case of **Salimin Ali Jaffari Vs. Fatuma Tangawizi Ngura and Another**, Civil Appeal No 299 of 2019, (CAT-unreported), that whenever there is a raised Preliminary Objection, the same should be disposed first. In the above case, when the court was faced with a situation akin to the present appeal, that the

Preliminary Objection was not determined, the Court of Appeal had the following to say:

*In the light of our deliberations and findings above, with respect, we hold that the first appellate judge made a fatal error in failing to make a specific determination and finding relating to the preliminary objection which was placed before her. In the result, we allow the sole ground of appeal in its entirety. **Ultimately, we nullify the judgment of the High Court and set aside the decree. Consequently, we order that the file concerning Civil Appeal No.51 of 2017 be remitted to the High Court of Zanzibar for it to proceed with the determination of the preliminary objection and the fate of the appeal in accordance with the law. (Emphasis added)***

Guided by the above positions of the law, I am convinced without iota of doubt that, the appeal before this court is in competent. Thus, I nullify the proceedings dated from 19/11/2018 onwards and judgment of the District Court and set aside the decree. The file is remitted back to the trial court for it to proceed with the determination of the Preliminary Objection before a competent magistrate. The appeal is therefore allowed on the first ground.

I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 22nd day of July, 2022.



E. E. KAKOLAKI

JUDGE

22/07/2022.

The Judgment has been delivered at Dar es Salaam today 22nd day of July, 2022 in the presence of Mr. David Mwakipesile holding brief for advocate Maiko Ngaro for the Appellant, Ms. Mariam Mabina, advocate for the Respondent and Mr. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

22/07/2022.