

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 113 OF 2021

(Arising from Civil Case No 01 of 2019 of Bagamoyo District Court before Hon. V.P. Mwaria RM, dated 15th April, 2021)

GODSON ROBERT BUSHIRI..... APPELLANT

VERSUS

VALENS LASWAY..... RESPONDENT

RULING

Date of last Order: 05/07/2022

Date of judgment 19/08/2022

E.E. KAKOLAKI J.

This appeal by Godson Robert Bushiri arises from the decision of the District Court of Bagamoyo in Civil Case No.01 of 2019, where the appellant was ordered to pay the respondent the sum of Tsh.44,500,000/= being the principal debt, Tsh.5,000,000/= as general damage sustained by the plaintiff and interest of the decretal sum at the court rate of 12% per annum from the date of Judgment to the date of payment.

For a better appreciation of what transpired, I find it pertinent to narrate, albeit briefly the fact that gave rise to this appeal. As per records, respondent entered into oral contract with the appellant for importation of a motor

vehicle make Toyota Kluger at the cost of 18,000,000 from Japan on behalf of the respondent. The respondent claimed to have been convinced by the appellant on different occasions whereby he advanced money totaling Tsh.46,000,000/- which allegedly were connected to the clearing process of the said motor vehicle, all making a total claim of Tsh.64,000,000. It appears the appellant dishonoured the agreement as he neither delivered the said vehicle nor restored back the money despite of several demands. Having lost hope and trust with the appellant on 07/02/201 he filed Civil Case No. 01 of 2019 before the District Court of Bagamoyo at Bagamoyo claiming a total of Tsh. 64,000,000/=, the plaint being drawn by the respondent himself. It appears after being served with the plaint and when filing his WSD the appellant engaged the services of advocate Jovin R. Manyama, the move which forced the respondent to hire the services of advocate Francis Makoa too who entered appearance in court for the first time on 25/07/2019 and prosecuted the respondent/plaintiff's case. It is learnt further that, after closure of plaintiff's case, on the 21/09/2020 the defence counsel informed the Court that, while preparing to marshal defendant's defence he noted the plaintiff's counsel had not renewed his practicing certificate since February 2020 when grace period for renewal had elapsed. He submitted that was

contravention of the provisions of section 39(1)(b) of the Advocates Act, [Cap. 341 R.E 2019] requiring any person practicing as an advocate to possess a practicing certificate failure of which renders him unqualified person under section 41(1) of the same Act, thus prayed the court to expunge the proceedings conducted by the plaintiff's counsel from February 2020 to the date of closure of plaintiff's case. The incompetence of proceedings was conceded by Mr. Francis Makoa as a result ruling was delivered by the trial court on 24/11/2020 expunging from the record the proceedings from the date when the plaintiff counsel's practicing certificate expired, meaning February 2020 and ordered the case start afresh from the stage of 1st PTC. After hearing both parties afresh the trial court entered judgment in favour of the respondent to the extent proved claims of of Tshs. 18,000,000, general damages of Tshs. 5,000,000/- and interest as stated above. Aggrieved with the decision, appellant preferred the instant appeal fronting seven grounds of grievances which for the purposes of this ruling, I find no use to reproduce them as they do not include the issue which was raised by this Court strangely as it is.

Hearing of the appeal proceeded by way of written submission as both parties were represented. The appellant hired services of Mr. Issa Juma

Mganga while respondent had the services of Mr. George Timothy, both learned advocates. After both parties had filed their submissions in compliance with the court's scheduling order for filing of submissions, while preparing to compose the judgment the Court noted and raised an issue suo mottu whether the trial court had powers to expunge its own proceedings and order for retrial of the case afresh in which parties were summoned to address the Court. Both counsels for the parties appeared and addressed the Court on that issue on 16/08/2022.

Submitting in response to the issue raised by the Court suo mottu, Mr. Mganga was brief and straight to the point that, the proceedings obtained after expiry of the respondent/plaintiff counsel's practicing certificate were a nullity as correctly found by the trial Court. He said, trial Court having found the said proceedings were a nullity had no powers to expunge its own proceedings from the record and start afresh the case but rather amend them under section 97 of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) and proceed with hearing of the case. Since the same were expunged all the subsequent proceedings, judgment and orders were rendered a nullity hence ought to be quashed and judgment and orders thereto set aside, therefor he prayed this Court to so do. Mr. Mganga invited this Court to be

persuaded by its own decision in **Islam Ally Saleh Vs. Akbar Hameer and Another**, Civil Case No. 156 of 2016 (HC-unreported) where the Court having satisfied the plaint and other subsequent pleadings of the plaintiff were prepared by unqualified person who had not renewed his practicing certificate at the time of preparing and filing them went on to reject them summarily hence there case ended up there, which was not the case in the matter under discussion.

Mr. Timothy for the respondent, joined hands with the appellant's submission that the trial court had no powers to expunge its own proceedings and start afresh the prosecution case. He however held a sight different view to that of Mr. Mganga in that, the trial court having found the proceedings were conducted by unqualified person ought not to have expunged them from the record but rather consider them none existing or nullity and proceed with hearing of the matter. And when prompted by the Court as to whether the Court proceed with hearing of the suit after declaring the former proceedings none existing or nullity he conceded that it could not. As to whether the court could invoke the provisions of section 97 of the CPC as suggested by Mr. Mganga to amend the proceedings and proceed with hearing of the case, Mr. Timothy was of the contrary view that, the section was inapplicable as

same is invoked only for the purpose of determining a real question or any issue raised or depending in such proceeding which was not the case in this matter. Otherwise he invited the Court to quash the proceedings before the trial court for originating from the nullity and set aside the judgment and its subsequent orders. He rested his submission by imploring the Court to order the costs if any, be paid by the unqualified advocate who prosecuted the matter before the trial court at the respondent's detriment with full knowledge that he was unqualified. In his rejoinder submission Mr. Maganga had nothing useful to add apart from reiterating his submission in chief and the prayers thereto.

I had and ample time to consider both parties' submissions, the cited authorities as well as peruse the entire record. It is uncontroverted fact that, in this matter the proceedings in respect of the plaintiff's case from the start were conducted by unqualified person in which the trial Court having considered the provision of sections 39(1)(b) and 41(1) of the Advocate Act, [Cap. 141 R.E 2019], found the same were rendered a nullity hence proceeded to expunge them as prayed by both sides and started the case afresh. The only issue for determination by this Court as framed above is whether the trial court was seized with jurisdiction to expunge its own

proceedings and start afresh the case. I am in agreement with both counsels' submission on the query that, the trial court was not possessed with such powers as I know no any provision of the law nor case law providing for such powers. The case of **Islam Ally Saleh** (supra) relied on by Mr. Mganga though persuasive to this Court, in my profound view is inapplicable to the circumstances of this case where the plaint was drafted and filed in court by the respondent/plaintiff himself and not the advocate who was engaged in later stages. Unlike the situation in the present matter in **Islam Ally Saleh** (supra) both pleadings and proceedings were conducted by the unqualified advocate for failure to renew his practicing certificate hence guilty of the offences under Advocate's Act and in contempt of court. Having found the pleading and entire proceedings were a nullity this Court speaking through my learned sister B.R. Mutungi J (as she then was) held thus:

"For the purposes of this case, the pleadings and proceedings which had been prepared and conducted by Mr. Mwakajinga respectively are hereby nullified hence summarily rejected. The end result being that the plaintiff has no case before this court."

Now since the trial court was not seized with powers to expunge its own proceedings and start afresh hearing of the case, the follow up question is

what appropriate course to be taken was under the circumstances. Mr. Maganga suggests the trial court ought to have invoked the provision of section 97 of the CPC, amend the proceedings and proceed to rehear the case to its finality instead of expunging the proceedings while Mr. Timothy says the section is inapplicable as it only applies to amendment with the purposes of determination of the real question or issue raised or depending on such proceedings.

The provision of section 97 of the CPC reads:

S.97. The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

In consideration of both parties' fighting arguments regarding application of the above cited section in as far as the situation under discussion is concerned, I was unable to come with any authority in our jurisdiction covering it, since both learned counsels submitted without supporting authorities. My further research landed me to the commentaries on section 135 of the India Code of Civil Procedure, Act V of 1908 by Mulla, Sixteenth Ed at page 1462, which section is in parimateria to section 97 of the CPC,

[Cap. 33 R.E 2019]. In his commentaries concerned application of the said section the learned author observed that:

"...The present section confers a general power on the court to amend defects and error in 'any proceeding in a suit' and to make 'all necessary amendments' for the purpose of determining the real question at issue between the parties to the suit. The section was referred in the case where an incorrect description of a property in a mortgage deed was repeated in the plaint, judgment and decree and the court allowed an amendment of the decree and connected proceedings. This power is vested in the original as well as appellate court. Where the appellant desires to implead the legal representative of the respondent who was dead at the time of filing the appeal, the appellate court can permit him to amend the appeal. But as regards limitation, the appeal (as against the parties) will be deemed to have been filed on the date of application."

Mulla goes further to clarify that:

"An omission of the Vakil's name in the Vakalathama can be supplemented under this section, as also an incorrect description of the plaintiff in a plaint. An ambiguity in a direction given in the decree as to the procedure to be adopted by the parties, can be clarified under this section. When a petition to bring the legal representative of the deceased party

on record had remained undisposed of and the decree had been drafted without adverting to it, it can be amended so as to substitute them in the record. If an appeal is presented against a person, who is dead at the date of presentation, under section 135 of the Code of Civil Procedure, permit appellant to amend the cause title by filing appropriate petition. Where the suit has been instituted in the name of a foreign firm, the court can permit an amendment of the cause title by substituting the names of the partners of that of the firm. An amendment of pleadings can be allowed under this section, even though a preliminary decree has been passed."

What is gleaned from Mulla's commentaries on when an amendment can be effected under section 135 of the Indian Code of Civil Procedure which is in parimateria to section 97 of the CPC, is that the same can be effected in both original and appellate court proceedings but restricted to pleadings, judgment, orders and decree and the connected proceedings only. The section in my firm view does not apply to the circumstances of the present matter to cover the proceedings which by its nature were a nullity for being conducted by the unqualified person. Similarly the trial magistrate after nullifying the proceedings could not have reject the plaint as the same was not tainted by the advocate's impunity of conducting proceedings while unqualified for being self-prepared and filed in court. The only remedy

available to the trial magistrate having been confronted with such scenario was for him to invoke the provision of section 77 of the CPC by stating the case or issue he was confronted with and refer the same to the High Court for its opinion and/or directive where revisionary powers could have been invoked by this Court to quash the proceedings and order retrial of the matter.

As the trial magistrate was unable to so do and as already found above that, the trial court's act of expunging its own proceedings from the record and rehear the suit the entire proceedings before and after as well as its subsequent judgment and orders were rendered a nullity. In the circumstances, I invoke the revisionary powers bestowed to this Court under section 44(1)(b) of the Magistrates Courts Act, [Cap. 11 R.E 2019] and proceed to nullify the entire proceedings of the District Court of Bagamoyo in Civil Case No. 01 of 2019, set aside the judgment and subsequent orders and order for retrial of the matter before another competent magistrate.

In the circumstances, since the decision sought to be impugned before this court is produced from a nullity which has already been set aside, I declare the appeal before this Court is incompetent and the same is struck out.

As the issue disposing this appeal has been raised by the court suo mottu, I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 19th August, 2022.



E. E. KAKOLAKI

JUDGE

19/08/2022.

The Ruling has been delivered at Dar es Salaam today 19th day of August, 2022 in the presence of Mr. Issa J. Mganga, advocate for the appellant, Mr. George Timothy, advocate for the Respondent, the Respondent in person and Mr. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

19/08/2022.