IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 359 OF 2021

(Arising from the judgment and Decree of the Resident Magistrate Court of Dar es salaam at Kisutu in Civil Case No. 42 of 2020 dated 4th January, 2021)

THE HEADMASTER ATLAS SECONDARY SCHOOL.....APPELLANT

VERSUS

STEPHEN MATHIAS MAHENDE.....RESPONDENT

Date of last order: 12th July, 2022

Date of Judgement: 19th August, 2022

JUDGEMENT

E.E.KAKOLAKI, J.

The Headmaster Atlas Secondary School, who is an Appellant herein has lodged this appeal to challenge the judgment and decree passed against him by the Resident Magistrates Court of Dar es salaam Region at Kisutu in Civil Case No.42 of 2020 on 04/01/2021.

The background of the matter leading to this appeal as deciphered from the trial court record same goes thus, the the respondent was sometimes on 23/01/2019 through oral contract employed by the appellant to provide transport services to the defendant using his vehicle Nissan Civillian with registration No. T.215 CSV for carrying students from homes to school and vice versa under consideration of Tshs. 100,000/- per day plus the driver

costs. On 23/01/2019 he started the work under oral agreement with the headmaster of Atlas Secondary School. Out of the service rendered he received only Tshs. 3,500,000/=only as per exhibit D1 until on 02/02/2020 when he decided to stop the service, thus was claiming from the appellant Tshs. 31,000,000/ as specific damages, Tshs. 20,000,000/- as general and punitive damages, Tshs. 50,000,000/- as damages for stress, pain torture and harassment resulted from respondent's failure to honour the terms of agreement, interest of the decretal amount at the rate of 21% and costs of the suit. It also transpired that in the course of demanding his money from the appellant on 21/11/2019 he received a letter from the appellant exhibit P1, requesting him to be patient and promising to settle the undisputed claim of Tshs.10,000,000/= by February, 2020, the promise which again was not honoured as a result suit was preferred against him.

In his written Statement of Defence, the appellant did not dispute existence of the contract with respondent but rather challenged the claimed damaged putting it that the respondent was paid through is bank account Tshs. 3,500,000/ as exhibited in exhibit D1, the fact which was not contested by the respondent. Upon full trial, the trial court ruled in favour of the plaintiff by declaring that, there was a valid agreement between the two which was

breached by the appellant hence ordered to pay the respondent Tshs.7,000,000/= as specific damages and Tshs.6,000,000/= as general damages, the two sum which was subjected to the interest of 21% from default to judgment. Apart from that the defendant was condemned to pay costs of the suit. Discontented with the impugned judgment, the appellant lodged this appeal armed with two grounds of complaints that:

1. The trial court erred in law and fact for violating the mandatory statutory requirement regarding non-joinder of necessary party per order 1 Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019.
2. The trial court erred in law for breaching the constitutional right to be heard against the appellant's employer as required by Article 13 of the constitution of the United Republic of Tanzania.

Both parties in this appeal were represent and the hearing proceeded by way of written submission, the appellant and respondent being represented by Mr. Conrad Felix and Mr. Hekima Mwasipu, learned advocates respectively. In this judgment I am intending to address both grounds one after another. To start with the first ground it is contended by Mr. Felix in his submission that, the trial court passed the judgment and decree in contravention of the mandatory requirement of the law of Order I Rule 9 of the CPC, for not

joining Atlas Mark Group Tz Ltd as a necessary party to be tried together with the Headmaster –Atlas Secondary School as his employer so as to enable smooth execution of decree in case the matter is decided against the headmaster. In the alternative he argued, the headmaster ought to have been sued personally without involving the employer's office, hence prayed the Court to quash the proceeding and nullify the impugned judgment. To reinforce his argument he cited to the Court the case of **Abdullatif Mohamed Hamis Vs. Mehboob Yusuph Osman & another**,Civil Revision No.6 of 2017 (unreported) when interpreting the application of the provision of Order I Rule 9 of the CPC, where it held that:

> *"Our Civil Procedure does not have a corresponding proviso but upon reason and prudence, there is no gainsaying the fact that the prudence of a necessary party is imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decree. Viewed from that perspective, we take the position that Rule 9 Order 1 only holds good with respect to misjoinder and nonjoinder of necessary party."*

It is on those premises the Appellant prayed this court to exercise its powers under section 76(1)(a) of Civil Procedure Code, Cap 33 R.E 2019 hence allow the appeal with cost.

In his rebuttal submission Mr. Mwasipu resisted the assertion by Mr. James that, the trial court was enjoined to join Atlas Mark Group Tz Ltd as a necessary party to the suit terming it as an afterthought. He said, the appellant is the one who entered into agreement with the respondent and that, during the trial that fact was not denied by DW1 who responded to the respondent's demand for payment of due amount through a letter exhibit P1. According to him in the present appeal the judgment and decree was properly passed against the appellant whose presence was indispensable for determination of the suit and not his employer as Mr. James would want this Court to believe. To cement his position that the alleged presence of Atlas Mark Group Tz Ltd was not indispensable in this matter he relied on the case of **Musa Chande Jape Vs. Moza Mohamed Salim**, Civil Appeal No.141 of 2018 where the Court of appeal had the following to say on necessary party:

> *Therefore the necessary party is the one whose presence is indispensable to the constitution of the suit and whose absence no effective decree or order can be passed.*

Basing on the above position of the law it was Mr. Mwasipu's submission therefore that, if the appellant wanted the said Atlas Mark Group Tz Ltd to

be joined as necessary party in the suit she should have disclosed his presence and pleaded the trial Court to so do but she waived that right, hence she is estopped from bring such claim at this stage. He thus invited the Court to dismiss the appeal for want of merit. In his rejoinder submission Mr. James reiterated his earlier submission in chief while adding that, Mr. Mwasipu's submission that, it is the appellant who entered into contract with the respondent is misleading the Court as it is clearly stated at page 4 of the judgment that, DW1 said he wrote exhibit P1 on behalf of the institution. He went on submitting that, to sue the appellant and not his employer is wrong and stands to be a bad precedent for violating the provisions of Order I rule 9 of the CPC as interpreted in the case of **Abdulatif Mohamed** (supra), since he could not be sued for the acts committed in the course of his employment. Attaching to his reply submission the letter of employment of the new headmistress by the Manager of Atlas Schools he added that, none joinder of Atlas Mark Group Tz Ltd as appellant's employer was in violation of the principle of legal personality stating that, once the company is registered is entitled to sue or be sued in its own name. So to him suing the appellant without joining his employer was a grave mistake, which act this

Court was prayed not to condone, hence the appeal be allowed on that ground by quashing the proceedings and setting aside the judgment.

I have dispassionately considered and accorded both parties submission the weight it deserves as well as perused the entire record in establishing the genuineness of the appellant's complaint in the first ground of appeal. The issue for determination by this Court is whether the trial court was in violation of the mandatory requirement of the law regarding non-joinder of necessary party. It is the appellant's contention through Mr. James that, the trial court violated the provision of Order I Rule 9 of the Civil Procedure Code, [Cap. 33 R.E 2019] for not joining Atlas Mark Group Tz Ltd as necessary party to suit so as to be tried jointly with the appellant for the purposes of effecting execution of the decree should the judgment be entered in favour of the respondent/defendant. Reliance was placed on the case of **Abdulatif Mohamed** (supra) on the interpretation of the alleged violated provision. The provision of Order I Rule 9 of the CPC reads:

> *9. A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.*

My interpretation of the above provision is that, a suit shall not be defeated only because there is misjoinder or non-joinder of parties as court can deal with subject matter in controversy for the purposes of determining the rights and interest of the parties before it. As regard to the non-joinder of parties the necessity of joining parties was discussed by the Court of Appeal in the case of **Abdulatif Mohamed** (supra), after defining the necessary party to mean *one whose presence is indispensable to the constitution of the suit and whose absence no effective decree or order can be passed* when the Court went on state under what circumstances the court would decide who is the necessary party. The Court said and I quote:

> *"…the determination as to who is a necessary party to a suit would vary from as case to case depending upon facts and circumstances of each particular case.* ***Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, as executable decree may be passed.****" (Emphasis added)*

As regard to the effect of misjoinder or non-joinder of either parties, the general rule is as discussed above under Order I Rule 9 of the CPC, is that a suit shall not be defeated by reason of misjoinder or non-joinder of parties.

Nonetheless, the Court of Appeal in the same case of **Abdulatif Mohamed** (supra), went further to deliberate on the exception to that general rule when said:

> *"On the contrary, in the absence of necessary parties, the court may fail to deal with the suit, as it shall, eventually, not be able to pass an effective decree. It would be idle for a court, so to say, pass a decree which would be of no practical utility to the plaintiff."*

From the above position of the Court of Appeal the importance of the court to determine the position of the necessary party if any is raised in the suit is underscored for the purposes of enabling the court to establish whether the decree likely to be issued to the plaintiff in the absence of such necessary party will be rendered idle or not executable at all during execution. It is worth noting also that, in so determining the necessity of such necessary party each case has to be determined in accordance with is its peculiar circumstances as there are non-joinders which may render a suit unmaintainable and those which do not. It was held by the Court of Appeal in the case of **Stanslaus Kalokola Vs. Tanzania Building Agency and Another**, Civil Appeal No. 45 of 2018 (CAT-unreported) as cited by the

same Court in the case of **Godfrey Nzowa Vs. Selemani Kova and Another**, Civil Appeal No. 183 of 2019 (CAT-unreported) that:

> *"... there are non-joinder that may render a suit unmaintainable and those that do not affect the substance of the matter, therefore inconsequential."*

The Court in **Stanslaus Kalokola** (supra) went further to draw a distinction between non-joinder of parties who ought to have been joined as party and those whose joinder is only a matter of convenience or expediency when quoted a commentary from Mulla Code of Civil Procedure, 13th edition Volume 1 page 620 stating thus:

> *"As regard non-joinder of parties, a distinction has to be drawn between non-joinder of a person who ought to have been joined as a party and the non-joinder of a person whose joinder is only a matter of convenience or expediency. This is because O. 1 r.9 is a rule of procedure which does not affect the substantive law, if the decree cannot be effective without the absent parties, the suit is liable to be dismissed."*

In light of the above settled legal stances the next question is what are the criteria for determining whether absence of the claimed necessary party the suit is unmaintainable or not. The Court of Appeal provides an answer in case of **Adullatif Mohamed Hamis** (supra) when inspired and adopted

decision from India by the full bench of the High Court of Allahabad in the case of **Benares Bank Ltd Vs. Bhagwandas**, A.I.R (1947) All 18 that provided the criteria or tests to be two. **One**, there has to be a right of relief against a party in respect of matters involved in the suit and **second**, the court must not be in a position to pass an effective decree in the absence of such party.

Applying the above cited test to the facts of this case where Mr. James contends that Atlas Mark Group Tz Ltd ought to be joined as a necessary party to the suit for the purposes of enabling smooth execution of the decree without any evidence proving that the reliefs sought by the respondent directly or indirectly involved her, I find the assertion is an afterthought hence unfounded claim. I so find as **first**, the appellant never pleaded or raised this concern as a preliminary point of objection when filing his WSD nor prayed the trial court to join her as necessary party by supplying her descriptions to the trial Court before hearing could take off. **Secondly**, while aware that the said issue was never raised and determined by the trial court, the appellant illegally raised it as one ground of appeal. It is trite law that, appeal Court cannot deal with issues not raised before the trial court or the first appellate court. See the case of **Farida and Another v. Domina**

Kagaruki, Civil Appeal No. 136 of 2006 (CAT Unreported). **Thirdly**, even though illegally raised at this appellate stage, still the appellant failed to supply the Court with sufficient materials to enable it determine whether the reliefs sought by the respondent directly or indirectly involved the alleged necessary party and that, the appellant could not sue or be sued without the joining of the alleged employer. The letter attached to the reply submission indicating the employer of the new and current headmaster/headmistress to be the Atlas School Manager, in my opinion is not a proof that Atlas Mark Group Tz is a necessary party for one good reason that, submission by the advocate and its attached documents being **summary of argument *is not evidence and cannot be used to introduce evidence*** save for *extracts of judicial decisions or textbooks*. See the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Versus Mbeya Cement Company Ltd and National Insurance Corporation (T) Ltd** [2005] TLR 41. Even if the same was to be believed and acted upon by the Court which is not the case still, I would hold, it was insufficient evidence to prove the said Atlas Mark Group Tz was a necessary party to this case. While Mr. James claims Atlas Mark Group Tz to be the employer and the institution represented by the appellant when

writing the letter (exh.P1) to the respondent in response to his claim, the letter attached to the submission contradict her own version for stating that, the employer of headmaster is the Atlas School Manager and not Atlas Mark Group Tz as claimed before by Mr. James.

As submitted by Mr. Mwasipu, in this matter before the trial court the respondent tendered a letter by the appellant (exhibit P1) acknowledging the debt the respondent owed him. Glancing at it, it is revealed that the same was written by the appellant who no dispute entered into agreement with the respondent for provision of transport services to the school. And that, the appellant was coming himself with a promise to make good the said debt by January 2020 when schools are opened. There is nothing therein disclosing the alleged fact by Mr. James that, he was writing the letter for and on behalf of the claimed necessary party, Atlas Mark Group Tz Ltd.

As regard to the second test, in absence of any evidence to prove that the appellant is incapable of suing and/or being sued on its own, I find there is nothing to convince this Court that, the appellant is incapable of executing a decree which was passed by the lower Court against him, hence no need of joining any other party as a necessary party as his/her non-joinder does not affect the matter in anyway. It is form that premises and the above

deliberated reasons, I am satisfied that the trial court committed no error to proceed without joining the alleged necessary party, hence the issue is answered in negative.

Next for determination is the second ground where Mr. Felix submits that, there was a breach of the constitutional right to be heard against Atlas Mark Group Tz Ltd as stipulated under articles 13(6)(a) of the Constitution of the United Republic of Tanzania of 1977, for not joining her as the necessary party being a Company and employer of the appellant. Relying on the famous case of **Salomon Vs. Salomon & Co Ltd (1897)** on the principle of legal personality of the Company Mr. Felix submitted that, it is a settled principle of law that once the Company is incorporated acquires a legal personality, thus it can sue or be sued in its own name. He argued that, Atlas Mark Group Tz Ltd being a company ought to have been joined as necessary party, summoned and heard through its managing directors or principal officer in Civil case No.42 Of 2020, failure of which denying her of the constitutional right to be heard. To cement his arguments he cited the cases **Hussein Khanbhai vs Kodi Ralph Siara**, Civil Revision No.25 of 2014 and **Abbas Sherally and Another Vs. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 133 of 2002 (both CAT- unreported) on the need of the Court

to hear the party before any adverse action/decision is taken against her/him.

In his response Mr. Mwasipu submitted the ground is baseless and the claims therein are uncalled for since the appellant was aware of the suit in court and yet did not see the importance of notifying her employer if any to be joined in the suit. Mr. Mwasipu argued that since the name of Atlas Mark Group Tz Limited never appeared before the trial court and in this appeal as the party the same is not entitled to right to be heard. He prayed to have this ground dismissed. In his rejoinder submission Mr. Felix reiterated his submission in chief while insisting that, since Atlas Mark Group Tz Ltd not joined as necessary party, the same was never afforded the constitutional right of being heard before the matter adversely affecting her is determined. Hence the Court was invited to allow the appeal.

Having taken time to consider both parties fighting argument in this ground it is the firm view of this Court that, it is not supposed to be detained by this ground. It is uncontroverted fact that, the right of the party to the suit to be heard before adverse action/decision is taken against her/him is of utmost importance as such right has been stated and emphasised by this courts and Court of Appeal in number of decision. See the case of **Hussein Khanbhai**,

(supra) and **Abbas Sherally & Another** (supra), **Mbeya-Rukwa Auto Parts and Transport Vs. Jestina Mwakyoma** [2003] TLR 251 and **M/S Flycather Safaris Limited Vs. Hon. Minister for Land and Human Settlement Development and AG**, Civil Appeal No. 142 of 2017 (CAT-unreported). In **Mbeya-Rukwa Auto Parts and Transport** (supra) insisting on the need of the party to be heard before an adverse action/decision is entered against him/her the Court of Appeal had this to say:

> *"It is a cardinal principle of natural justice that a person should be condemned unheard but fair procedure demands that both sides should be heard: audi alterm partem. In* ***Ridge Vs. Baldwin*** *[1964] AC 40, the leading English case on the subject it was held that a power which affects rights must be exercised judicially, i.e. fairly. We agree and therefore hold that it is not a negation of justice, where a party is denied a hearing before its rights are taken away. As similarly stated by Lord Moris in* ***Furnell Vs. Whangarel High School Board*** *[1973] AC 660,*
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> *"Natural justice is but fairness writ large and judicially."*

From the above deliberation and the cited authorities it is a condition precedent that for one to be entitled to such natural and constitution right of being heard before any adverse action or decision is entered against

him/her is that he/she must be a party to such suit, matter or cause before the body, tribunal or court making executing such action or pronouncing the decision. In this matter as stated above the said Atlas Mark Group Tz Ltd was not a party to this matter to be entitled to such right. Additionally the appellant in this matter has no locus to advocate for her rights for two reasons, one, she is not her advocate and second, the said Atlas Mark Group Tz Ltd is not a party to this case. Had it been that her rights had been affected or are likely to so be she would have been applied before the trial court to be joined as a necessary party or come to this Court by way of revision so as to challenge the decision, in which she failed to do. Alternatively, the appellant had a right to apply for third party procedure under Order I Rule 14 of the CPC and join her so as to satisfy the decree in case entered against the appellant, which right he failed to exercise. In light of the above reasoning I am satisfied that the said Atlas Mark Group Tz Ltd, was not entitled to right to be heard as alleged hence the second ground of appeal crumbles too as the cited cases by Mr. Felix do not apply to the circumstances of this case.

In the premises and for the foregoing this appeal is devoid of merit and the same is hereby dismissed with costs.

It is so ordered.

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

E. E. KAKOLAKI

JUDGE

19/08/2022.

The Judgment has been delivered at Dar es Salaam today 19th day of August, 2022 in the presence of Mr. Conrad Felix, advocate for the appellant and Mr. Asha Livanga, Court clerk and in the absence of the Respondent.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

19/08/2022.