

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO.7 OF 2021

(Original Civil Case No. 17 of 2016 Resident Magistrate Court of Moshi)

UAP INSURANCE TANZANIA LTD.....APPELLANT

VERSUS

ZAKARIA INNOCENT LYIMO.....1ST RESPONDENT

EMMANUEL A. MAKATA.....2ND RESPONDENT

GOODLUCK JOSEPH MBOYA.....3RD RESPONDENT

PANONE & COMPANY LIMITED.....4TH RESPONDENT

Last Order: 12th July, 2022

Date of Judgment: 7th September, 2022

JUDGMENT

MWENEMPAZI, J.

The Appellant, UAP Insurance Tanzania Ltd was successfully sued as a 3rd party in a Civil Case No. 17 of 2016 at the Resident Magistrate Court of Moshi. At the trial court the 1st and 2nd respondents were the 1st and 2nd plaintiffs respectively. The 1st Respondent claimed Tshs. 22,275,000 being

the cost for repair of his Motor Vehicle and the 2nd Respondent claimed Tshs. 2,000,000/= being the purchase price of a new motor cycle to replace his motor cycle which was damaged beyond repair. Other claims included Tshs. 50,000/= per day from 26th September 2015 to the date of judgment as loss of profit for the motor vehicle, Tshs. 30,000/= per day from 26th September 2015 to the date of judgment as loss of profit for the motor cycle. Also the two respondents claimed for general damages to the tune of Tshs. 50,000,000/= for mental distress and life suffering, interest amount per commercial rate of 35% per annum and cost of the suit. The trial court decided in favour of the plaintiffs and ordered the 3rd party who is the appellant herein to pay Tshs. 15,000,000/= to the 1st plaintiff being specific damage for the repair of his motor vehicle, Tshs. 2,000,000/= to the 2nd Plaintiff being specific damage for the loss of his motor cycle and general damages to the tune of Tshs. 5,000,000/= to the 1st Plaintiff and Tshs. 2,500,000/= for the 2nd Plaintiff. The appellant was aggrieved by that decision hence preferred the present appeal on five grounds as follows;

1. That the trial Magistrate erred in law and fact for denying Appellant's right to be heard.
2. That the trial Magistrate erred both in law and in fact by awarding special damages basing on the inadmissible sale agreement contrary to Sections 45(1), 47(1) and 48(1) of the Stamp Duty Act.
3. That the trial Magistrate erred both in fact and in law for holding that the 3rd party is liable to pay specific and general damages to the Plaintiff while 3rd party is not party to the Decree and Proceedings in the Civil Case No. 17 of 2016.

4. That the trial Magistrate erred both in law and fact by conducting ex-parte hearing without an order to that effect.
5. That the trial magistrate erred in law and in fact by holding that the 2nd Plaintiff is the lawful owner of the damaged property, Motorcycle with Registration. No. T 815 BRA without any proof.

On the basis of the above grounds of appeal, the Appellant prayed for the judgment and decree of the Resident Magistrate Court of Moishi in Civil Case No. 17 of 2016 be quashed and set aside with cost.

The hearing of the appeal was agreed to proceed by way of written submission. The appellant was represented by Mr. Thomas Mathias learned counsel, the 1st and 2nd respondents were present in person and unrepresented while the 4th Respondent was represented by Mr. Engelberth Boniphace learned counsel. With respect to the 3rd party, the Appellant prayed for an ex-parte order against him which was accordingly granted.

Brief facts giving rise to the dispute between parties can be summarized as follows: On 26th September 2015 the 3rd Respondent being the employee of the 4th Respondent while driving a motor vehicle with registration No. T.632 ATS make Scania along Moshi Arusha road, he drove carelessly and failed to control it. Consequently he collided with another Motor Vehicle with Registration No. T. 161 BLH make Toyota Hiace belonging to the 1st Respondent and a motor cycle with registration No.T 815 BRA make SRM belonging to the 2nd Respondent. Following the accident the 3rd Respondent who was the driver of the 4th Respondent's motor vehicle was

arrested and charged with the offence of careless driving where he pleaded guilty to the charge and was convicted. After the Criminal Case was over the 1st and 2nd Respondents filed a civil case No. 17 of 2016 at the Resident Magistrate Court of Moshi against the 3rd and 4th Respondents claiming specific damages amounting to Tshs. 24,275,000/= and general damages to the tune of Tsh. 50,000,000/= each for mental distress and life suffering. The 3rd respondent never showed up in court while the 4th Respondent disputed the claim by contending that the motor vehicle with registration number T 161 BLH make Toyota Hiace was not the property of the 1st Respondent but was the property of one Innocent V. Mdawa and that a motorcycle with registration number T 815 BRA was not the property of the 2nd Respondent. She also argued that the cost for repair and purchase price for the motorcycle had been seriously exaggerated and not real. The 4th respondent also stated that her motor vehicle with registration No. T 632 ATS make Scania and the trailer with registration No. T 192 BUG make BHACHU were duly insured. For that reason the 4th Respondent issued a third party notice to the Appellant here in under Order 1 Rule 14(1) and (2) of the Civil Procedure Code [Cap 33 R.E 2002] (CPC). The appellant being the third party disputed the claims and stated that the accident was a result of negligence and carelessness of the 1st and 2nd respondents. The appellant was also not ready to pay the amount claimed as damages contending that the same had been exaggerated and highly excessive.

Now, coming to the submissions for and against the appeal all parties submitted lengthily but for purposes of this judgment I will not reproduce

the submissions but I am going to give a brief summary of the submissions.

Submitting in support of the grounds of appeal Mr. Thomas prayed to include an additional ground of appeal which was to the effect that the Proceedings, Judgment and Decree were fatally defective as the case was heard with two different magistrates without assigning reasons.

In his submission in support of the grounds of appeal Mr. Thomas submitted on grounds of appeal no. 1 and 4 together. The 1st ground was related to the issue of the Appellant being denied the right to be heard and the 4th ground was with respect to the complaint that the trial magistrate conducted ex-parte hearing without an order to that effect. The learned counsel submitted by referring to page 27 of the trial court typed proceeding that on 1st April 2019 the trial magistrate improperly and contrary to the law proceeded with hearing of the matter assuming the 3rd party was present in court. Submitting further the learned counsel stated that 27th May 2019 the case was supposed to proceed with defence hearing however the counsel for the 3rd Party notified the trial court that the witness of the 3rd Party had been arrested by PCCB and the matter was adjourned until 14th June 2019. That on such date while Advocate Ngole held brief of the counsel for the 3rd Party the trial magistrate proceeded to schedule the date of judgment and on 20th June 2019 pronounced the judgment in favour of the Plaintiff while subjecting the 3rd Party into liability. The learned counsel argued that the act of the trial magistrate deciding matters affecting the right of the 3rd party without giving them an opportunity to express their views was unconstitutional and should be

rendered void and of no effect. Reference was made to unreported case of **Oysterbay Villas Limited vs. Kinondoni Municipal Council and Another**, Civil Appeal No. 110 of 2019.

Submitting further the learned counsel while arguing the 4th ground stated that the law is clear regarding the procedure where the defendant is absent and the remedy is provided under Order IX Rule 6 and 7 of the CPC to wit the consequence would be either to proceed with the matter ex-parte or to issue summons. He then argued that the act of the trial magistrate to proceed with hearing of the case on 1st April 2019 in absence of the 3rd party and further proceed with hearing ex-parte on 2nd and 3rd April 2019 was illegality which was fatal. He thus prayed for the two grounds of appeal to be allowed.

With respect to the 2nd ground of appeal the learned counsel submitted that the trial magistrate erred by admitting into evidence a sale agreement that was tendered by PW1 as it was not stamped with stamp duty hence contravened the provision of Section 45(1), 47(1) and 48 of the Stamp Duty Act. He referred to the case of **Zakaria Barie Bura Vs. Theresia Maria John Mubiru [1995] TLR 211** where it was held that document bears no stamp duty renders the same to be inadmissible. He thus prayed for the ground of appeal to be allowed.

On the 3rd ground of appeal the learned counsel submitted that the trial magistrate erred in law and in fact for holding that the 3rd Party was liable to pay specific and general damages while the 3rd Party was not a party to the Decree and Proceeding in Civil Case No. 17 of 2016.

Submitting on the 5th ground of appeal Mr. Thomas stated that the sale agreement that allegedly conferred ownership of the damaged motor cycle to the 2nd Plaintiff was first of all inadmissible and secondly the motorcycle registration card was in the name of another person who was not party to the suit and was not called to collaborate the evidence that he indeed sold the same to the 2nd Plaintiff. He argued that since ownership to the damaged motorcycle was not proved then the court erred by awarding damages to a stranger.

Finally on the 6th ground the learned counsel submitted that on 2nd April 2019 and on 3rd April 2019 the proceedings show that the matter was presided by Hon. N.E. Mwerinde RM but it was signed by Hon. J. G. Mawole RM. He argued that the error was fatal as it is contrary to law. Thus the learned counsel prayed for the appeal to be allowed on this ground.

The 1st and 2nd Respondents jointly filed their written submission in reply to the appellant's submission. With respect to the 1st and 4th grounds of appeal they replied that the right to be heard was never denied to the Appellant as the record clearly show on page 38 and 39 of the proceedings the court gave room to recall the witnesses who had already testify. That having been given the chance to appear and defend the appellant did not exercise that right even when there was an order for last adjournment. The appellant failed to appear or even send someone to hold brief. That is why the court proceeded with hearing. They further submitted that the trial court exercised its mandate given by Order XVII Rule 3 of the CPC which allowed it to proceed with decision when party to the suit to whom

time has been granted fails to produce his evidence or to cause the attendance of his witness. Based on their submission they prayed for these grounds to be dismissed.

Replying to the 2nd ground of appeal they submitted that the contract was valid and legal as it had all the essential elements of a valid contract. Therefore it was their view that the mere missing of a stamp duty on the valid contract could not term it otherwise.

In response to the 3rd ground of appeal they submitted that Decree is extracted from the judgment and the judgment in which the said decree was extracted from did contain the 3rd Party it was their submission therefore that the claim by the appellant that the 3rd party was not part of the proceedings and decree was baseless. They further submitted that the fact that the 3rd party was not seen to appear in the Decree and Proceedings was a typo error which has room to be rectified by the trial court which caused it. They contended that the typo error should not be the base for denying the applicants the awards granted as it was not an error done by them.

On the 5th ground they submitted that the 2nd respondent had legally bought the said motorcycle and was still the owner on the fateful day. They argued that the contract was valid under the law and that while the accident occurred the 2nd respondent was on the process of transferring the ownership of the motorcycle to his name. It was their submission that the 2nd Respondent did prove his ownership by the contract which was tendered in court.

Finally on the 6th ground it was their submission that the name of Hon. N.E. Mwerinde is only seen on the Coram but the said magistrate never conducted hearing on the said dates. They were of the view that the names of a different magistrate appearing on the said dates was a typing error of which the respondents are not to be held liable for and hinder justice. Thus they prayed for the appeal to be dismissed with cost.

On the other hand Mr. Engelberth Boniphace learned counsel for the 4th Respondent submitted in reply to the issue of the appellant being denied the right to be heard that if that was true then the present appeal would lack merit as the proper procedure was to seek orders of the court to set aside an ex-parte judgment as provided for under Order IX Rule 9 of the CPC. Submitting further Mr. Engelberth stated that the provision of Order IX Rule 6 and 7 of the CPC as employed by the appellant are not applicable in the present case because they provide for a completely different scenario. He contended that incase where the 3rd party does not appear in suit during hearing the law has provided under Order 1 Rule 19(1) (a) of the CPC that a defendant may make an ex-parte application to the court for judgment against the 3rd party in respect of any contribution, indemnity or relief claimed. He thus argued that it was proper for the trial court to proceed ex- parte against the appellant.

Regarding the second ground, the learned counsel submitted that the appellant's counsel never objected to the admission of the sale agreement during trial. He thus argued that it was the duty of the appellant to prove that the sale agreement did not have a stamp duty as far as the provision

of section 47(1) (c) is concerned. For that reason he argued that the ground lacked merit and that the same should be disallowed with cost.

Responding to the 3rd ground of appeal Mr. Engelberth submitted that non-inclusion of the 3rd party in the title of the decree does not affect the liability of the 3rd party to the case. The learned counsel argued further that with the introduction of the overriding objective under the provision of section 3A of the CPC, one finds that the rights of parties in the said decree were defined and in the contents of the said decree the 3rd Party was mentioned and his obligations and rights were defined therefore he was of the view that non-inclusion of the 3rd party's name in the title is not at all bar for parties' rights and does not miscarry any justice.

On the fifth ground Mr. Engelberth submitted that the ownership of the damaged motorcycle was well determined by the trial court as seen on page 7 of the judgment. He argued that the issue of stamp duty whether present or not does not at all hinder the existence of the essentials of a valid contract. He contended that the provisions of section 45, 47 and 48 of the Stamp Duty Act did not invalidate the sale agreement.

Lastly on the 6th ground, the learned counsel submitted that the civil case No. 7 of 2016 had never been tried by two different magistrates instead it was only one magistrate who presided over the matter to its finality. Furthering his submission the learned counsel argued that the appellant did not demonstrate how the act of two magistrates presiding over the same matter hindered justice of the parties in the case. He thus contended that the ground was baseless and prayed for it to be dismissed.

In the rejoinder submission Mr. Thomas reiterated his submission in chief and added that the trial magistrate ought to have ordered the matter to proceed ex-parte instead of assuming the presence of the appellant in court and violate the cardinal principle of fairness. He also submitted that the judgment and decree must tally to each other as provided under Order XX Rule 6(1) of the CPC. Rejoining the 6th ground of appeal he submitted that the act of a matter being heard by a different magistrate without adducing reasons was contrary to Order XVIII Rule 10(1) of the CPC. Following the submission the learned counsel prayed for the appeal to be allowed.

Having gone through the record of the proceedings and the submissions by the parties for and against the appeal, I will proceed to determine the appeal beginning with the 1st ground where the appellant complained that he was denied a right to be heard when the trial magistrate proceeded with hearing of the matter on 1st of April 2019 in his absence. It was clear to me as the records depicts on page 26 and 27 of the trial court's typed proceedings that on 1st April 2019 when the matter was scheduled for hearing, the defendants and the 3rd party who is the appellant here in were absent. The court is recorded to have said:

"... Having considered that this case is a backlog (2016) and having in mind that there are some delay tactics done by the defendants and third party. Also having in mind that the Defendants are aware on the existence of this case in this court only that they don't bother to make

follow-up, the court will proceed with hearing as if the defendants are present in court. It is so ordered".

After noting as above quoted, the trial court proceeded with hearing of the case. Now, having examined the above order of the trial court, it is quite clear that the case was certainly heard in absence of the defendants and the appellant as the learned counsel alleged. This order of the trial court although was supported with reasons it was not backed up with any authority whatsoever. The conduct of any trial is governed by the law and there is a procedure provided by the law to be followed with regards to proceedings in court. For this matter being a civil matter the law applicable is the **Civil Procedure Code, Cap 33 R.E 2019**. This legislation has under **Order IX** provided for procedures on appearance of parties and consequences of non- appearance. The procedure adopted by the honorable trial magistrate as noted above is not supported by the law and for that purpose I agree with the learned counsel for the appellant that it was unlawful. The law does allow the court to proceed ex-parte in case where the defendant does not appear but in the present case there was no order to that effect. In-fact it is on record that on the following date on 2nd April 2019 as seen on page 32 of the trial court's proceedings the defendants and the 3rd party all appeared and the court proceeded with hearing without inquiring from the appellant or the defendants on the reasons for their absence on the previous day. This is what made matters worse because if the case was proceeding ex- parte the court would not have allowed the defendants and the 3rd party to be present. Otherwise if the court had allowed the presence of the defendants and the 3rd party during the hearing, the matter should have started afresh and not proceeding with hearing of another witness (PW2). By proceeding with hearing of another witnesses it meant that the appellant and other defendants were denied the right to hear the first witness who was heard on the previous day. A

right to be heard is fundamental as it is a rule of natural justice that requires the court, before deciding any matter, to give the parties an opportunity to be heard on the matter. Therefore denial thereof is fatal as the parties would be prejudiced by the decision if they were not involved during the hearing. On this regard I subscribe to the cited case by the learned counsel of the appellant on this regard as it is indeed relevant. Also relevant in at this juncture is the unreported case of **Abbas Sherally and Another Vs. Abdul Fazalboy**, Civil Application No. 33 of 2002. In this case it was held that:

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

In light of the above it is my considered view that the act of the trial court in this regard was a violation of natural justice. It denied the appellant right to be heard. For this reasons, the proceedings of the trial court have been blemished by the act and they are therefore hereby nullified and the case is ordered to be heard denovo before another Competent Magistrate.

It is so ordered.




T. MWENEMPAZI

JUDGE
7th SEPTEMBER 2022