

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA DISTRICT REGISTRY)
AT MWANZA**

CIVIL APPEAL No. 44 OF 2021

(Originating from the Decision of Misungwi District Court at Misungwi in Civil Case No. 02 of 2021

dated 16th August 2021)

BETWEEN

1. LEONARD ERASTO SHELEBI

2. MARIAM HASSAN NANDA APPELLANTS

AND

ISAMILO SUPPLIERS LIMITED RESPONDENT

JUDGMENT

21st September & 04th October 2022

OTARU, J.:

The Appellants in this Appeal filed a civil suit before Misungwi District Court claiming for compensation against the Respondent for losses they incurred in an accident in which the Respondent's bus was involved.

The facts of the case as narrated by the parties indicate that on the fateful day, the Appellants hired a truck to transport cabbages from Geita to Mwanza. While carrying the Plaintiffs as well as the cabbage load, the truck was involved in an accident with a bus belonging to the Respondent. The drivers of both vehicles died instantly. The Plaintiffs survived but sustained multiple injuries. The cabbage load was destroyed. The Plaintiffs sued the Respondent for injuries they sustained and the loss of the cabbage load. The case did not

see the light of day because it was dismissed when the Respondent raised a preliminary objection that the Plaintiff did not disclose a cause of action against the Respondent.

Dissatisfied, the Appellants filed this Appeal. Originally, the Appellants filed six Grounds of Appeal but at the hearing, they consolidated them as follows: -

- 1. That the trial magistrate erred in law and in fact by dismissing the case on the ground that the Plaintiff did not disclose the cause of action. In any case, the available remedy where the Plaintiff does not disclose a cause of action is to reject the Plaintiff and not to dismiss it, the fact that was erroneously done by the trial court.*
- 2. That the trial magistrate erred both in law and in fact by assessing evidence not tendered in assessing the cause of action at the Preliminary stage; and*
- 3. That the trial court erred both in law and fact by failure to consider that the Appellant sued the necessary party against whom the decree will be executed.*

At the hearing, Mr. Arsein Molland, learned counsel, appeared for the Appellants while the Respondents enjoyed the services of Mr. Bernard Msalaba, learned counsel. Both counsel submitted ably and extensively on all grounds.

On the 1st Ground of Appeal, Mr. Molland argued that since both drivers died in the accident, no traffic case could be instituted by virtue of Section 224A

of the **Criminal Procedure Act** (Cap. 20 of the Laws). As such, to discover who among the deceased drivers was negligent, evidence needs to be adduced during the hearing of the case. To amplify his argument, the learned counsel cited the cases of **Intimate Places Ltd & Another v Peter Gwaydes Gorwa**, (HC) Civil Appeal No. 37 of 2018 (Arusha) and **Khalfan A. Hemed v Juma Mahende Wang'anyi**, Civil Case No. 25 of 2017 (HC-Mwanza).

The learned counsel further insisted that since the cause of action in the Complaint was established under paragraphs 4 and 5 of the Complaint and in Annexes A2 (the sketch plan) and A3 (motor vehicle registration card), the trial court erred in dismissing the Complaint at the preliminary stage. Citing the decision of the Court of Appeal in **John N. Byombalirwa v Agency Maritime Internationale (Tz) Ltd**, TLR [1983] 1, the learned counsel continued to argue that, in any case, even if the Complaint does not disclose a cause of action, the remedy under Order VII Rule 11 of the **Civil Procedure Code** (Cap. 33 of the Laws) is to reject it and not dismiss. That the suit is only dismissed when it is heard on merits (**Cyprian Mamboleo Hiza v Eva Kilpso & Another**, Civil Application No. 3 of 2010 (CA) (unreported)).

On the 2nd Ground that the trial magistrate erred both in law and in fact by assessing evidence not tendered in assessing the cause of action at the

preliminary stage, the learned counsel referred to Pg.4 of the Ruling where the trial magistrate when dismissing the Plaintiff stated;-

'Where the plaintiff has no evidence on the matter in issue, the court has to analyse the evidence of the Defendant and make a finding in one way or the other and then decide the case on the merits of the evidence available.'

The counsel contended that since it was a preliminary objection, there was no need for ascertainment of evidence as it had to be a pure point of law as established in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** (1969) 1 EA 10.

On the last Ground of Appeal, the learned counsel submitted that the Respondent was sued as a necessary party in executing the vicarious liability claim. Citing the case of **Abdullatif Mohamed Hamisi vs Mehboob Yusuf Osman & Another**, Civil Revision No. 6 of 2017 (CA) he maintained that the trial court erred both in law and fact by failing to consider that the Appellant sued the necessary party against whom the decree will be executed.

The Appellants invited the Court to revisit the Plaintiff under paragraphs 4 and 5 together with its Annexes so as to satisfy itself of the existence of the cause of action against the Respondent.

Mr. Msalaba on the other hand submitted that the Complaint was rightfully dismissed and that the Appeal had no merits and thus should be dismissed with costs. Further, on the 1st Ground, the learned counsel submitted that indeed the Complaint did not disclose a cause of action against the Respondent, as negligence on the part of the driver needed to be established first. That, for a case to be dismissed it does not necessarily have to be decided on merits. Coming to the 2nd Ground, the learned counsel contended that what the trial magistrate did was to consider Pleadings and Annexures thereto without assessing any evidence. On the last Ground, the learned counsel stated that, the wrongful act of the servant needed to be established first. But then it is something that cannot be done due to the death of both drivers. As such, the Respondent was not the only necessary party.

Distinguishing all the cases cited by the Appellants side, the learned counsel for the Respondent prayed for the Appeal to be dismissed and the decision of Misungwi District Court upheld.

Having scrutinized the Memorandum of Appeal as well as the oral submissions by the parties, I had to consolidate the extensive arguments by both sides into the main issue that would eventually determine the fate of this Appeal. I put all focus on the issue of **whether the Complaint did disclose a cause of action**. In so doing first and foremost, I pondered on what is a

course of action. I considered the definition submitted by the counsel for the Respondent in the trial court, from the case of **Mukhesh Gaurishanker Josh v. Gintey Suppliers Ltd and 2 Others** Civil Case No. 201 of 1997 HC (Dsm), that;-

'the question whether the plaint discloses the cause of action must be determined upon perusal of the plaint alone, together with anything attached so as to form part of it and upon assumption that any express or implied allegation in it is true'

In view of this definition, the trial court was of the view that negligence on the part of the Respondent's driver should have been established in the Plaint. The court was therefore looking for evidence in the Plaint.

Basing on the above comment by the trial court, I looked for further clarifications. I considered the explanation given by B.D. Chipeta (J) as he then was, in his book **the Magistrates' Manual**, where at page 161, his Lordship referred to **Mulla's Code of Civil Procedure**, that;-

*'... everything which if not proved would give the defendant a right to an immediate judgment must be part of the cause of action. It is, in other words, **a bundle of essential facts which is necessary for the plaintiff to prove before he can succeed in the suit.** (emphasis is mine)*

From the above explanation, what is needed is for the Plaintiff to disclose essential facts which will require to be proved during trial. The Appellant strongly argued that paragraphs 4 and 5 of the Plaintiff together with Annexures A2 and A3 disclosed a cause of action against the Respondent.

I thoroughly read the Plaintiff and particularly paragraphs 4 and 5 asserted by the Appellant. Paragraph 4 provides for details of events that took place on the fateful day. It reads:-

'on 20th July 2020 at 12:20 AM the Plaintiffs while along Kigongo Ferry Road at Mayolwa Village, at Misungwi District in Mwanza City and Region, the Defendant's Bus with Registration No. T 596 DFX Make HIGER, Body type Bus, which was recklessly/carelessly driven by Msafiri Charles @Butu (deceased), without considering other road users failed to slow down and/or stay on its roadside, moved to the other roadside and knocked the truck with Registration number T 168 BVJ, Make Mitsubishi Canter driven by one Abdallah Juma @Ninga (deceased) who at the time driving on his right-hand roadside - see the attached PF No. 90 and Photocopy of the Road Accident Map herein attached collectively as Annex A-2.'

Paragraph 5 on the other hand shows that the Respondent was the owner of the truck, a fact that is not denied by the Respondent. When reading the two paragraphs together, basically one sees an assertion of a bus belonging to the Respondent being driven negligently. Do these facts suffice to show *vicarious*

liability in respect of the Respondent? Are they the only essential and necessary facts for the Plaintiff to prove the Respondent's liability? Can the Plaintiff succeed in the suit?

In order to come up with answers, I asked myself a question that the Court asked itself when faced with a similar situation, in the case of **J.B. Shirima and Others Express Bus Service v. Humphrey Meena t/a Comfort Bus Service** [1992] TLR 290, *what is the wrong which is being complained of in these pleadings?* The answer to it would constitute the cause of action.

From the facts in the Complaint and Annexures thereto, I honestly, fail to see what wrong is the Plaintiff complaining of without trying to give it a guess. What would the Plaintiff prove against the Respondent? That the deceased driver was negligent? And then what? It is not clear.

The Court in **Shirima's** case stated and I quote, that;-

'It is not for the defendant to figure out from the complaint the possible wrong complained of. It is for the plaintiff to make it absolutely clear in the complaint what the cause of action is, so as to enable the defendant to file a proper defence'.

Although for a different reason, I am in agreement with the trial court that the Complaint did not disclose a cause of action against the Respondent. As

such, the issue **whether the Plaintiff disclosed a cause of action** is answered in the negative and the trial Magistrate cannot be faulted on this ground.

The second issue for determination is **whether the trial magistrate assessed the evidence not tendered in assessing the cause of action**, if yes, **was it wrong to do so?** The learned counsel for the Respondent submitted that indeed the Plaintiff did not disclose a cause of action against the Respondent, as negligence against the employee needed to be established first. This in my view this was a misdirection because while trying to establish negligence, the trial court went beyond the Plaintiff and Annexures as per the **Mukhesh** case (supra). The court started analyzing the evidence or lack of it, something that should have been left for determination during the trial.

Since pleadings include facts and not evidence, the question whether the Plaintiff had sufficient evidence to prove his assertions or otherwise is not a question that should have troubled the mind of the trial magistrate at the preliminary stage. I am therefore in agreement with the Appellant's learned counsel that the trial court had assessed the evidence prematurely and therefore the issue **whether the trial magistrate assessed the evidence not tendered in assessing the cause of action** is answered positively.

Having analyzed the two grounds of Appeal, I shall not dwell on the third ground but address the question **whether the trial court erred when it dismissed the Plaintiff.**

After finding that the Plaintiff did not disclose a cause of action what was the trial court required to do? The court in **Shirima's** case (supra) held that where the Plaintiff does not disclose a cause of action, the Court has two options, either to order amendment of the Plaintiff or to strike it out. Further, as rightly submitted by the Appellants counsel, the court in **John M Byombalirwa v. Agency Maritime Internationale** (Tanzania) Ltd [1983] TLR1 went further to state that, where the Plaintiff discloses no cause of action under the **Civil Procedure Code**, the court is to reject it and not dismiss it. Therefore, as rightly submitted by Mr. Molland, the trial court had no mandate of dismissing the Plaintiff. Subsequently, the decision of the District Court of Misungwi at Misungwi of dismissing the Plaintiff in Civil Case No. 2 of 2021 is quashed and replaced with an order of setting aside the Plaintiff instead.

The Appeal is hereby allowed to the extent stated. Costs to follow the event.

It is so ordered.

DATED at MWANZA this 04th day of October 2022.



M. P. Otaru
M.P. OTARU
JUDGE

Judgment delivered in Court, in the presence of Mr. Arsein Mollard (Adv.) for the Appellants together with the 2nd Appellant and Mr. Bernard Msalaba (Adv.) for the Respondent.

A handwritten signature in blue ink, appearing to read 'M. Otaru'.

M.P. OTARU

JUDGE

04/10/2022