

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL APPEAL NO. 314 OF 2021

(Originating from Civil Case No. 203 of 2019 District Court of Kinondoni at Kinondoni)

BARNABAS THOMAS 1ST APPELLANT
MWIRA KATIHIRO 2ND APPELLANT
DAVID MAIBA 3RD APPELLANT

VERSUS

**THE REGISTERED TRUSTEES OF 7TH DAY
ADVENTIST CHURCH 1ST RESPONDENT**
**THE PRESIDENT OF EAST CENTRAL TANZANIA
CONFERENCE 2ND RESPONDENT**
**THE PASTOR OF KINONDONI 7TH DAY
ADVENTIST CHURCH 3RD RESPONDENT**

JUDGMENT

Last Order: 25th August, 2022

Judgment: 7th October, 2022

MASABO, J.:-

The Appellants have jointly filed this appeal contesting the decision of Kinondoni District Court (the trial court) in Civil Case No. 203 of 2019 delivered on 21st August, 2021. According to the trial court's records, the appellants were choir members and worshippers of the Seventh Day Adventist Church, 1st respondent herein. In 2017, together with other church choir members, they participated in singing 20 songs which were recorded in an audio CD. In 2018 they were excommunicated from church due to misconducts. According to the appellants, in 2019 the 1st respondent proceeded to record an audio-visual DVD comprising of 20 songs titled

"WANADAMU" by using among others, the appellants' voice recordings without their consent. In the circumstances, they claimed that their rights were infringed hence prayed for an injunction restraining the respondents from publishing, distributing and selling the said audio-visual recordings. They also prayed that, the video recording done without the appellant's consent be declared null and void and they be paid Tshs, 150,000,000/= as general damages with 20% interest for the mental trauma sustained.

The respondents acknowledged the fact that the appellants were excommunicated from the church through their Annual General Meeting for failing to abide by the church regulations. That, members for the choir are regularly reviewed and the review which ended the appellant's membership in the choir was not an alien exercise. Besides, songs sung in church are property of the church and not personal properties of choir members. The 2nd and 3rd Respondent claimed they were wrongly sued and were not in a position to say anything about the choir apart from the fact that they were aware of the appellants excommunication through their meetings. They added that, if the appellants had grievances, they ought to have challenged their excommunication within the church machineries.

After trial, the trial magistrate dismissed the suit after it found out that the appellants had no any claim of right in respect of the said songs. Disgruntled with the decision, the appellants have preferred this appeal armed with three grounds that;

1. That, the trial magistrate erred in law and fact in holding that no legal rights for the appellants were infringed by the respondents without determining all issues raised during trial;
2. That, the trial magistrate erred in law and fact in framing his new/sub issues without according the parties the right to address him on these issues/sub issues hence denied their legal right to be heard.
3. That, the trial magistrate erred in law and fact in outweighing the electronic exhibits of CD and DVD which were properly tendered by appellants.

Hearing of this appeal proceeded in writing. The appellants appeared in person, unrepresented, whereas the respondents were jointly represented by Mr. Isaac Nasoor Tasinga, learned advocate.

Supporting the first ground of appeal, the appellants jointly submitted that, the trial magistrate did not exhaust all the framed issues as provided under. They argued that, at the trial three issues were framed. However, in the judgment the trial court magistrate raised other three issues without availing the parties the right to address him an omission which culminated into a biased judgment. They referred the court to the case of **Rugaba Kasusura and Attorney General Vs. Phares Kabuye** [1982] TLR 338 where the court declared a judgment defective for leaving out material issues of facts unresolved.

On the second ground, the appellants faulted the trial court's magistrate for raising new issues without availing the parties the right to address them. They averred that, Order XIV Rule 5 (1) and (2) of the Civil Procedure Code gives a trial judge or magistrate the power to amend, add or strike out issues but when such issue(s) is pivotal to the case and would form a basis of decision, parties should be given a chance to address the court on the new issue. They referred the court to Article 13 (6) (a) of the **Constitution of the United Republic of Tanzania**, 1977 and the case of **Andrew Katea Vs. Simon Ngalapa**, PC Civil Appeal No. 99 of 2019 where the court nullified subordinate court's decisions for being based on the issues raised *suo motto* by the court without affording the parties the right to be heard.

As to the third ground, the appellants submitted that the trial magistrate ignored electronic exhibits i.e. CD and DVD which were properly tendered by relying on improper requirements for admission of electronic exhibits. They argued that the appellants duly complied with section 18 of the Electronic Transaction Act, No. 13 of 2015 and section 64A of the Evidence Act, [Cap 6 R.E. 2019] which provides procedural requirements for admissibility of electronic evidence. Thus, the trial court lucidly erred in holding that the CD the DVD were devoid of any weight as they were not played so that the voices can be compared to theirs which is contrary to the requirements of the above cited provisions. They argued that, admissibility and weight of electronic evidence shall be determined by its reliability of the manner in which the message is stored, generated, communicated and the integrity of maintenance not otherwise. Based on this they summed up that, the trial

court lucidly misdirected itself as comparing and playing the CD and DVD are not factors provided in the above provisions.

In his reply submission, Mr. Tasinga, learned counsel, opposed the appeal. On the first ground of appeal he submitted that the appellants did not point out the issues which were determined and which were not. Their complaint is thus with no merit. He proceeded that in the trial court the following three issues were raised to wit:

- 1. Whether there were any legal rights for the plaintiffs which have been infringed;*
- 2. If the first issue is in affirmative who caused the said infringement and*
- 3. What reliefs the parties were entitled.*

Mr. Tasinga proceeded that, the first issue was the core issue and all the rest of the issues depended on this issue. Since it was not proved the remaining issues automatically collapsed. He asserted that, the appellant's did not prove whether the said DVDs had their voices or that they have ownership of the same. Also, all the appellants testified that they sang for God and for the church. Besides, the proceeds from the DVDs were to buy a choir bus hence were not for personal or individual gain. On the second ground Mr. Tasinga argued that, the sub-issues raised by the trial magistrate were raised to answer the 1st issue. These were; *i. whether the plaintiffs were owners of CD containing 20 audio songs, ii. whether the plaintiffs are registered or protected under the Copyright and Neighboring Rights Act, iii. is there evidence that the plaintiff's voices were contained in the DVD*

tendered as exhibit P4. He argued that, all of the sub-issues were answered in accordance to the evidence tendered in court. That, the plaintiff admitted the songs belongs to the Lord God and the church and that they did not have ownership of the same and all the proceeds earned from the DVD was for the church and the choir. In the circumstances there were no new issues framed as the appellants allege.

As to the last ground, it was the learned counsel's contention that, information recorded in DVD or CD are electronic evidence which cannot be printed and read as emails. The Appellant's ought to have played the same in court in order for them to be relied upon as evidence or be given weight. Thus, the trial court cannot be blamed for not giving weight to the CD and the DVD while the appellant's out of their own volition or ignorance failed to play the said CD and DVD so that the trial court can appreciate their content. He prayed that this appeal be dismissed for want of merit with cost.

In rejoinder, the appellant's reiterated most of their submission in chief and insisted that it was necessary for the trial court to address all the raised issues and give weight to their evidence. Also, it was the trial court's duty and not their duty to play or display the CD and DVD in court so as to appreciate the content as provided under section 75 (1) of the Evidence Act. They maintained that this appeal be allowed.

I have considered the submission by the parties and the lower court records. I will now proceed to determine the grounds of appeal. Starting with the first

ground that the trial court magistrate did not deal with all issues raised in determination of the parties' rights, it is a well-established law that a judgment should be based on the issues which are framed by the court. Order XIV rule 1(5) of the Civil Procedure Code [Cap 33 R.E. 2019] requires that issues for determination be framed prior/at the commencement of the first hearing of the case.

The issues so framed may be amended at a subsequent stage under Order XIV rule 4 and the 5(1), the law is clear that the framing of issues or amendment of the same should not be done without according the parties the right to be heard prior to the amendment or framing of new issue. Failure to accord the parties the right to be heard during the framing of issues or amendment of the same constitutes a fatal anomaly capable of vitiating the proceedings. **Mulla** in his book on the Code of Civil Procedure Vol II 15th Edition at page 1432 states that:-

“If the Court amends an issue or raises an additional issue, it should allow a reasonable opportunity to the parties to produce documents and lead evidence pertaining to such amended or additional issue. Amendment of issue is the discretion of the trial Court. No right or obligation of a party is determined, either by the court refusing to delete issues, or by the court adding more of them. It is only a procedural matter. The trial court is required to determine the controversy between the parties”.

In **Scan-Tan Tours Ltd Vs. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 Of 2012 CAT At Arusha (unreported) Court of Appeal insisted that;

“We are of the considered view that generally a judge is duty bound to decide a case on the issues on record and that if there are other questions to be considered they should be placed on record and the parties be given an opportunity to address the court on those questions.” (emphasis mine)

In the present case, the records are clear that during trial the trial court raised the following issues;

1. Whether there are any legal rights for the plaintiffs which have been infringed,
2. If the first issue is in affirmative, who caused the said infringement
3. What reliefs the parties were entitled.

The judgment shows that, during determination of the first issue, the trial court magistrate stated that;

“Claims for plaintiff is that the 3rd defendant did record the DVD by using a CD which contained plaintiff voice. In order to know if their rights were infringed or not the following sub questions must be answered

- a) Whether plaintiffs were owners of 20 songs in the audio CD?

- b) Whether plaintiffs are registered or protected under copyright and neighboring Act
- c) Is there evidence that plaintiffs' voices were contained in the DVD tendered as exhibit P4?"

After the trial magistrate answered all the above sub issues negatively, he went on dismissing the suit without dealing with the remaining issues.

In the foregoing, much as it may be true, as argued by Mr. Tasinga, that the sub issues were all intended at determining the first main issue regarding the appellants' right of over the CDs and the DVDs in question, the argument that they raise new issues and ought to have been determined as such is not farfetched. In my considered view, the issue of ownership of the DVD/CD and copyright registration which were raised and determined as sub issues do not qualify as sub issues. Given their nature and weight in determining the controversy between the parties, they ought to have been raised as independent issues and determined as such. Raising them and proceeding to determine them without affording the parties the right to be heard was a fatal anomaly as it constitutes an infringement of the parties right to be heard hence offensive of the principle of *audi alteram partem* which underscores the need to accord the parties the right to be heard before any adverse decision is made against them.

In the upshot, the first ground of appeal is found to have merit. As this ground suffices to dispose of the appeal, I will, on this sole ground, allow the appeal. The judgment and decree of the trial court are hereby quashed

and set aside. It is subsequently ordered that the case file be remitted back to the trial court for composing of a fresh judgment. Should the trial court find the three sub issues indispensable, it should first afford the parties the right to be heard on these issues before composing the judgment. Costs to follow event. It is so ordered.

Dated and delivered at Dar es Salaam this 7th day October, 2022.

10/7/2022

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

