

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

**AT DAR ES SALAAM**

**CIVIL APPEAL NO 342 OF 2021**

**(Appeal from the Decision of the Resident Magistrate Court of Dar Es  
Salaam in Civil Case No 24 of 2017, Mtega Esq Principal Resident  
Magistrate)**

**BETWEEN**

**CAPITAL RADIO.....1<sup>st</sup> APPELLANT  
SOFIA RAJAB.....2<sup>nd</sup> Appellant  
INDUSTRIAL PRODUCTION PROMOTIONS (IPP) MEDIA.....3<sup>rd</sup> APPELLANT  
WILBERT DEOGRATIAS MASONA.....4<sup>th</sup> APPELLANT**

**VERSUS**

**CATHERINE HENRY MALILA.....RESPONDENT**

**JUDGMENT**

**MRUMA, J.**

By a plaint dated 18<sup>th</sup> January 2017, the Respondent herein sought compensation in the form of general damages of Tanzania Shillings Four Hundred Thousand, costs and interests. The cause of action, it was pleaded, arose from defamatory statements allegedly published by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Appellants against the Respondent. As for 3<sup>rd</sup> Appellant Industrial Production Promotions (IPP) Media she was sued for being vicarious liable for the torts allegedly committed by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants. The Respondent also claimed Tanzania Shillings 50, 000,000/= against the 1<sup>st</sup> Appellant, Capital Radio only as general

damages for her refusal and/or failure to heed to a demand notice dated 15<sup>th</sup> March, 2016.

For reasons which do not feature clearly on the record the Appellants' counsel stopped from representing the Defendants during the continuation of the hearing of the Respondent's (Plaintiff's) testimony. Five witnesses testified for the Respondent (Plaintiff). After the closure of the Plaintiff's (Respondent) and as the Defendants were absent court set a date of judgment. At the date of judgment the first Defendant was represented by advocate Makene Emanuel who was holding brief of Mr Manento advocate for the 1<sup>st</sup> Defendant, 2<sup>nd</sup> Defendant was also present in person and 3<sup>rd</sup> Defendant was represented by Mr Ayub Semvua while the 4<sup>th</sup> Defendant was present in person.

In its judgment, the court, on 6<sup>th</sup> September 2021 found the Appellants partly liable and awarded the Respondent Tanzania Shillings 50,000,000/= (Say Fifty Million) only as "nominal" damages and Tanzania shillings 10,000,000/= (Say Ten Million) as punitive damages together with costs. The Defendants through their media were ordered to "clean" the Respondent (Plaintiff) for four consecutive days.

The record does not indicate whether the order for ex parte hearing which was made on 3<sup>rd</sup> November 2020 was ever set aside or whether there was any application made to have it set aside. What however is not disputed is that on 28<sup>th</sup> September, 2021, which is about one year after it was made and over two months after the “ex-parte judgment” was handed down, the Appellants advocate filed Miscellaneous Civil Application No 142 of 2021, and eight days later, i.e. on 6<sup>th</sup> October 2021 this appeal was lodged and this forms the core of the 2<sup>nd</sup> and 3<sup>rd</sup> limbs of the Respondent’s preliminary objections.

The Appellants do not dispute the fact that they filed an application to set aside the ex-parte judgment but they contend that the trial court opted to strike it out instead of staying it pending the determination of this appeal. They didn’t however submit any order which shows that the matter is no longer pending in the Resident Magistrates Court of Dar Es salaam at Kisumu before the same Magistrate who passed the impugned judgment. In other words the Appellants are admitting that having being dissatisfied with the ex-parte judgment of the trial court they attempted to challenge it by filing an application to set it aside and eight days later they sought to challenge it in this court by way of an appeal. While I have no doubt that both options were

available to the Appellants, but I do not agree with them that they could pursue both simultaneously. As it was held by the Court of Appeal in the case of the **Registered Trustees of Kanisa la Pentakoste Mbeya Versus Lamson Sikazwe and 4 others Civil Appeal No 210 of 2020** the filing of the subsequent proceeding was unwarranted. In the present matter I have tried to imagine the presence of two closely related actions in two different Courts and what would be the consequences. Take for instance, a situation where the Resident Magistrate's court allows the application to set aside the ex-parte judgment and at the same time this court dismisses the appeal against that very judgment which will impliedly mean one court has set it aside while the other (which is a higher court) has upheld it. This will bring confusion to the parties and even to the two courts by making conflicting decisions. The Appellants had to choose one option and not both. The filing of the appeal subsequent to the filing of an application to set aside an ex-parte judgment on the same matter was an abuse of court processes and an impropriety of the highest order. And since there is nothing to show that the application to set aside was either withdrawn, strike out or dismissed, it is my finding that this appeal is improperly before the court.

Regarding the complaint that the decree offends the provisions of Order XX Rule 7 of the Civil Procedure Code [Cap 33 R.E. 2019], it is trite law that the law mandatorily requires the decree to bear the date of the day on which the judgment was pronounced. The record indicates that judgment was delivered in presence of the parties on 6<sup>th</sup> September 2021, but the decree issued to the parties indicates that it was given under the hand of the trial Magistrate on 3<sup>rd</sup> Day of September 2021 which is three days before the delivery of the judgment from which it was extracted.

Having considered both sets of preliminary objections, I find them to be merited. First, it was an abuse of court processes and un-procedural for the Appellants to file this appeal subsequent to filing of an application to set aside an ex-parte judgment. Secondly, the record of appeal is defective for containing a decree which purports to be passed three days before the judgment from which it was extracted and thus offends the provisions of Rule 7 of Order XX of the Civil Procedure Code [Cap 33 R.E. 2019]

Accordingly, both preliminary objections are sustained, civil appeal No. 342 of 2021 is struck out from.

As the Appellant are wholly to blame for the manner in which the proceedings were conducted, they are condemned to pay costs.

It is so ordered



A.R. Mruma,

Judge

Dated at Dar Es Salaam this 31<sup>st</sup> Day of October, 2022.