

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
P. C CIVIL APPEAL NO. 67 OF 2021

*(Arising from Civil Appeal No. 43 of 2020
Originated from Civil Case No. 55/2020 Ilala Primary Court)*

RESOLUTION INSURANCE..... APPELLANT

VERSUS

ID - PRESS LIMITED..... RESPONDENT

Date of Last order: 23/11/2021

Date of Ruling: 11/02/2022

J U D G M E N T

MGONYA, J.

The above named Appellant being aggrieved by the Judgment of Hon. E. Nassary, SRM, delivered on 15th April, 2021 in an appeal number 43 of 2020 of Ilala District Court against an *ex-parte* decision in **Civil Case No. 55 of 2020** of Ilala Primary Court, appeals against the whole of the said judgment on the following grounds:

- 1. That, the Hon. E. Nassary SRM, erred in law and in fact by ignoring and abandon the other two grounds of***

petition raised by the Appellant against the decision of Hon. Karuta PCM.

2. That, the Hon. E. Nassary SRM, erred in law and in fact by failing to determine in merit the ground of appeal which she decided to consolidate in her decision.

3. That, the Hon. E. Nassary SRM, erred in law and in fact by holding that, the Appellant's officer one Mohamed Ramadhan had no Locus Stand and he was a stranger to case at Primary Court.

From the above grounds, the Appellant prays that Honorable Court to order the following: -

- (a) This appeal be allowed with costs; and
- (b) Any other orders this Honourable Court may deem fit to grant.

The Appeal was ordered to be disposed off by way of written submissions whereby after adhering to the court's scheduled order by filing the submissions, I am now in a position to determine this Appeal.

Submitting for the Appeal, particularly on the **first ground** of appeal, it is the Appellant's concern that the Petition of Appeal at the District Court had three grounds of appeal. However, the honorable District Court Magistrate ignored and totally abandoned

ground number one and three. Submitting further, the Appellant's Counsel informed the court that, in her judgment, the Magistrate did not decide anything concerning those grounds. From the same, it is the Appellant's submission that this is procedural error, which denied the Appellant the right to be heard. To support this assertion on the issue of failure to consider grounds of appeal, the case of **MOSI S/O CHACHA @ IRANGA & ANOTHER VS. R CRIMINAL APPEAL NO. 508/2019 COURT OF APPEAL OF TANZANIA AT MUSOMA AT PAGE 10** was cited where it was held that:

*"That the impugned Judgment of the first appellate court suffers from irreparable irregularity of failing to consider the Appellants' grounds of appeal, and has also denied the appellants their fundamental right to a fair hearing. As a result, we invoke our power of revision under section 4 (2) of the AJA to quash and set aside all the proceedings in the Resident Magistrate's Court of Musoma (Extended Jurisdiction in **Criminal Appeal No. 27 of 2019**), together with the Judgment of W. Ngumbu-RM (EJ) delivered on 17/10/2019."*

Submitting further, it is the Appellant's Counsel concern that in the ruling delivered on 04/09/2020, the trial primary court

Magistrate did not frame any issue concerning the appellant's non-appearance nor make any finding on the cause of the non-appearance as applied by the Appellant. It is the Appellant's counsel submission that this is not legally correct. Further, for the reasons that were explained by the Appellant's officers it is their submission that they had good and sufficient reason to make an order setting aside the *Ex-parte* judgment.

Submitting for the second ground of Appeal, it is the Appellant's concern that the District Magistrate consolidated the Appellant's grounds of appeal into one ground that "*whether the trial magistrate erred in law and in fact by holding that the appellant was given chance to be heard on 10/06/2021*".

Submitting more, it is the Appellant's counsel observation that in that judgment she did not make any finding on the consolidated ground of appeal. Therefore it is the Appellant's Counsel submission that this is an error as per **Rule 16 (a), (b) and (c) of the Judicature and Application of Laws Act (the Civil Procedure (Appeal in Proceedings Originating in Primary Court) Rules G.N. No. 312 of 1964;** which provides that the Judgment of the appellate court shall be in writing and shall state the points of determination, the decision thereon and reason for the decision.

On the third ground of Appeal, the Appellant's Advocate is of the view that, the District Magistrate at page four of the Judgment held that the Appellant's officer **Mohamed Ramadhan** had no *locus stand* to address the Court, as he was a stranger to the case. In the event therefore the counsel states that the matter before the court was not against **Laura Lyabandi** but rather against Resolution Insurance Limited which is a registered company of which can be represented by any authorized officer such as it was for Mohamed Ramadhan who is an officer of the Appellant as he was authorized to represent the Appellant after **Laura Lyabandi** had problems. In the event therefore, The Appellant's counsel resist that it was wrong to hold that only **Laura** was supposed to appear to represent the Appellant.

In response to the above Appellant's submission on the grounds of Appeal, it suffices to say that the appeal encountered serious objection from the Respondent herein.

It is from here I will straight determine the grounds of appeal as herein below.

Before I proceed, let me briefly give the short history of the facts of the case. That the Respondent herein **ID-PRESS LIMITED** filed a case at Ilala Primary Court claimed from the Appellant herein **RESOLUTION INSURANCE** a tune of **Tshs. 15,044,672/=** and

the matter was heard *ex-parte* on 1st July, 2021 and decided in favor of the Respondent on 15th July, 2021. The Appellant herein filed an application to set aside *ex parte* hearing and judgment on the same court and he raised the ground that on the same material date of hearing of the matter their principal officer one **Laura Lyabandi** who was supposed to appeared before the court, and who had already appear before the court after being issued with summons, was bereaved by her relative. In the event therefore, another authorized officer one **Mohamed Ramadhani** was shifted to appear before the court. It is alleged that, when he entered appearance was informed by the court clerk that the case was already adjourned to 06th July, 2021, but when he appeared again on 06th July, 2021 the case had an exparte judgment.

Upon filling an application to set aside *ex-parte* judgment, the court framed two issues. The first issue is whether the applicant was given the right to be heard and the second issue is to whether the **procedures** were followed during the hearing of the case.

In the cause of the judgement, the court find that the applicant was given a chance to be heard because on the first date of the case the applicant entered appearance and she prayed before the court that after 2 weeks she will come with a proper figure of their debt in issue. However, the records shows that the officer did not

come back. Further on the issue of procedure, it was held that the procedures were followed during the hearing of the matter.

On the 1st ground that, ***Hon. E. Nassary SRM, erred in law and in fact by ignoring and abandon the other two grounds of petition raised by the Appellant against the decision of Hon. Karuta PCM;*** and on the second ground that ***That, the Hon. E. Nassary SRM, erred in law and in fact by failing to determine in merit the ground of appeal which she decided to consolidate in her decision,*** I have the following:

As the two grounds falls under the rule of **procedures**, then I will determine the m jointly.

It is from the judgment of the Court that I have gathered that the reason of Honorable Magistrate consolidate the two issues was that both issues emanated or rather concerned the procedure before the court. In that way they were procedural grounds of which a Magistrate can easily consolidate and determine. In doing so, I don't see if there was any **injustice** on the part of the Appellant that was occasioned.

I have also noted from the Appellant's submission that, it is their claim that the reasons given in their application for setting aside the exparte were sufficient. On this I would like to inform the Appellant that, on the issue of whether the reasons were sufficient

or not, that is the court's decision. Once the decision is out, then the party which was not satisfied have the right to appeal against the same as it is the case in this Appeal.

Above all, for the Appellant to raise the two grounds of appeal as they appear above it is my firm observation that it is an abuse of court process as the substantive matter before the court is a debt that the Appellant is having from the Respondent herein. That is the main issue that needs to be determined by the court and not on the procedure to determine this matter. I am fully aware that the matters before the court are to be determined judiciously so as parties controversies can end. However, as I can see is that the Appellant does not see the necessity to focus on the main controversy between them but have opted to beat around the bush to escape the liability. Hence **the first and second grounds of appeal are meritless.**

On the third ground that that, ***Hon. E. Nassary SRM, erred in law and in fact by holding that, the Appellant's officer one Mohamed Ramadhan had no. Locus Stand and he was a stranger to case at Primary Court.***

The Appellant claimed that the one **Laura Lyabandi** who was supposed to appear on the date of the case was bereaved of her relative while she was on her way to Court and another officer one

Mohamed Ramadhan was authorized to appear and he went to the Court and was informed by the court clerk that the case already adjourned to 06th July, 2021.

The records of the court shows that at the beginning of the trial, the Appellant's officer one **Laura Lyabandi** was in court. It is out of uncertainty on the Respondent's debt, she prayed for an adjournment so that she can come with the proper figure. However, she never returned and instead, another officer appeared in that respect; particularly on the wrong date.

The Appellant in his submission was on the view that the trial magistrate ignored to listen to **Mohamed Ramadhan** as to the cause of their non-appearance on the date of hearing and the Magistrate proceed to enter *expert* judgment.

It is the Respondent's reply that the Appellant was given right to be heard, as they were served with summons and they are aware that there is a case at Primary Court so they have the knowledge that they were supposed to appear. Failure to do so, doesn't implicate or justify that their right to be heard was infringed and that's why in the framed issues in the application the trial magistrate dismissed all of them.

Having heard submissions from both counsels on the issue of personal appearance of **Laura Lyabandi**, I agree with arguments

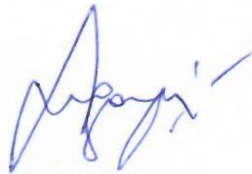
advanced by the Appellant's Advocate that it was not necessary for the later to appear personally, but the Company can be represented by an authorized officer to testify or rather to attend on behalf of the company. However, in this matter, the records shows that the person who was supposed to come back at the court was **Laura Lyabandi** as she promised to. However, she couldn't keep her promise on the mentioned date and later still that being on the wrong date, is when the other authorized officer decided to show up in court where already the Magistrate out of the non-attendance had already composed an *exparte* Judgment.

At this juncture, again despite of the fact that the authorized officer had *locus standi* to appear in court, the Respondent was not prompt in responding to what was promised before the court by them. Again, in the event where the major issue was a **debt**, then there was no any injustice that had occurred on part of the Appellant as I have read all the record of this matter and that I am satisfied that the decision on the main controversy between the parties was already determined a long time ago. What the Appellant is doing is just buying time and indeed abuse the court processes to prolong the matter.

Having said all the above, **this ground too is meritless for the above stated reasons.**

As all three grounds herein have failed, the instant appeal is accordingly **DISMISSED with costs.**

It is so ordered.



L.E. MGONYA

JUDGE

11/02/2022

Court: Judgement delivered in absence of both parties and in presence of Richard RMA.



L.E. MGONYA

JUDGE

11/02/2022