IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CIVIL APPEAL NO. 40 OF 2020

(Originating from the decision of the Resident Magistrate's Court of Arusha, Misc. Civil Application No. 4 of 2020)

TARPO INDUSTRIES TANZANIA LIMITED ..... APPELLANT

Versus

MOIVARO INVESTMENT & TRADING COMPANY LIMITED t/a MOIVARO LODGE AND TENTED CAMPS ..... RESPONDENT

JUDGMENT

27th April & 20th May, 2022

Masara, J.

At the Resident Magistrate's Court of Arusha ("the trial court"), the Appellant filed Misc Civil Application No. 4 of 2020 seeking to set aside the dismissal order made in Civil Case No. 49 of 2019 on 30/01/2020. The trial court dismissed the said application. According to the trial court records, the ruling dismissing the application was delivered on 19/11/2020, while the ruling itself is dated 03/11/2020. Irrespective of variance of the dates, in its decision, the trial court dismissed the application for being preferred against a party who was not a party in Civil Case No. 49 of 2019 subject of the order to be set aside. That decision did not please the Appellant, he has preferred this appeal on three grounds as reproduced verbatim hereunder:

a) *That, the honourable Learned Magistrate erred in law by determining the application to set aside the dismissal order (Misc. Civil Case No. 4 of 2020) before determining the legality of the Court to dismiss the preliminary objection and the main suit in Civil Case No. 49 of 2019;*
b) *That, the Honourable Learned Magistrate erred in law and in fact by ordering dismissal of Misc. Civil Case No. 4 of 2020 as a relief of suing a wrong party contrary to Order I Rule 10(1) of the Civil Procedure Code, Cap. 33 [R.E 2019]; and*
c) *That, the Honourable learned Magistrate erred in law and by fact by determining the issue regarding the names of the respondent that was already functus officio.*

Based on the above grounds of appeal, the Appellant prays that the appeal be allowed by quashing the decision of the trial court and order that Civil Case No. 49 of 2019 be restored to continue from where it had ended.

The brief facts leading to this appeal as obtained from the record indicate that the Appellant and the Respondent were Plaintiff and Defendant respectively in Civil case No. 49 of 2019, which was instituted at the trial court in August, 2019. In that case, the Appellant sued the Respondent in the name of Moivaro Lodge and Tented Camps. In its written statement of defence, the Respondent raised a preliminary objection, which was fixed for hearing on 30/01/2020. Unfortunately, on that date, neither the Appellant nor the Respondent entered appearance in court. As a result,

the trial magistrate dismissed both the preliminary objection and the main suit.

Thereafter, the Appellant filed Misc. Civil Application No. 4 of 2020 in the same trial court seeking to set aside the dismissal. Before hearing of the application commenced, on 03/07/2020 the Appellant's counsel sought leave of the court to amend the application in order to mend the name of the Respondent. The prayer was granted. The Appellant's counsel filed the amended application on 20/07/2020. The Respondent's name was altered to read Moivaro Investment & Trading Company t/a Moivaro Lodge and Tented Camps. After thorough hearing of the parties, the trial court dismissed the application holding that the application was improperly made before the court for being preferred against a new party who was not a party in Civil Case No. 49 of 2019.

At the hearing of the appeal, the Appellant was represented by Mr Emmanuel Sood, learned advocate, while the Respondent was represented by Mr Steven Mushi, learned advocate. It was resolved that the appeal be argued through filing of written submissions.

Submitting in support of the first ground of appeal, Mr Sood contended that on 30/01/2020 when Civil Case No. 49 of 2019 was dismissed, the

same was fixed for hearing of the preliminary objection. Therefore, since both parties and their advocates defaulted appearance, the trial magistrate ought to have dismissed the preliminary objection and not the main suit. He contended that where a preliminary objection has been raised, the court stops determination of the main suit until the preliminary objection is determined. To reinforce his proposition, he made reference to the decisions in **Ally M. Tarimo vs Julius Gogadi, Civil Appeal No. 26 of 2011** and **Vumwe General Services & Supplies Company Limited vs Kahama Oil Mills Limited, Civil Revision No. 4 of 2020** (both unreported).

On the second ground of appeal, Mr Sood stated that on 20/07/2020 he prayed to amend the application so as to insert the proper name of the Respondent. Leave to amend the application was granted by the trial court. He was therefore surprised by the holding of the trial magistrate that the application was against a stranger, which in his view, is a misconception. It was his further argument that even if the Appellant had sued a wrong party, it was not proper for the trial magistrate to dismiss the application on that basis since that would have been remedied under Order I Rule 10(2) of the Civil Procedure Code, Cap. 33 [R.E 2019] (hereinafter "the CPC"). According to the counsel for the Appellant, that

provision is a cure to a party who has sued a wrong party, hence the trial magistrate ought to have ordered substitution of the proper party by striking out the application.

Regarding the last ground of appeal, Mr. Sood submitted that since he was granted leave to amend the name of the Respondent by the trial magistrate on 20/07/2020, it was inappropriate for the same trial magistrate to deliberate and dismiss the application on the reasoning that the Appellant sued a wrong party, because by so doing, the trial magistrate was *functus officio*. To bolster his argument, the learned advocate cited the case of **Benhardad Mbaruku Tito and Another vs Republic, Misc. Economic Cause No. 9 of 2018** (unreported). Mr Sood concluded by urging the Court to allow the appeal with costs by quashing and setting aside the decisions of the trial court.

On his part, Mr Mushi premised his submissions on a preliminary point of objection to the effect that the appeal is incompetent for being brought against a Respondent who was not a party to the main case, Civil Case No. 49 of 2019. Elaborating the objection, the learned counsel for the Respondent submitted that Civil Case No. 49 of 2019 was against Moivaro Lodge and Tented Camps but the instant appeal, which emanates from the very same suit, has been preferred against Moivaro Investment &

Trading Company Limited t/a Moivaro Lodge and Tented Camps. According to Mr Mushi, the plaint was never amended to rectify the name of the defendant therein, who is the Respondent in this appeal. It was his further submission that counsel for the Appellant sought leave and was allowed to amend the name of the Respondent in Misc. Civil Application No. 4 of 2020 without first seeking to amend the plaint in the main suit to match the name of the Respondent in the application.

According to Mr Mushi, parties in the main suit must be the same parties in the subsequent applications and/or appeals. To bring his argument home, he made reference to decisions of the Court of Appeal and this Court; namely, **CRDB Bank PLC (Formaly known as CRDB (1996) Ltd) vs George Mathew Kilindu, Civil Appeal No. 110 of 2017, MIC Tanzania Limited vs Hamis Mwinyijuma & Others, Civil Appeal No. 64 of 2016** (both unreported) and **Attorney General vs Maalim Kadau and 16 Others [1997] TLR 69**. Those decisions proffer that where the name of a party in the application or appeal differs with the name in the plaint, that amounts to a fatal irregularity which renders the appeal or application incompetent. Mr Mushi further added that the above irregularities cannot be cured by the principle of the overriding objective, as it goes to the root of the case. He relied on the decision in **District**

Executive Director Kilwa District Council vs Bogeta Engineering Limited, Civil Appeal No. 37 of 2017 (unreported). The advocate for the Respondent urged the Court to dismiss the appeal with costs.

Without prejudice and in the alternative, Mr Mushi, in response to the first ground of appeal, propounded that notwithstanding the fact that the suit was fixed for hearing of the preliminary objection, counsel for the Appellant ought to have appeared in court. That blaming the trial magistrate was inappropriate. What ought to have been done by the Appellant's counsel was to assign reasons for his absence in court on 30/01/2020 when the suit was dismissed. He concluded by making reference to the maxim: *'he who comes to equity must come with clean hands'*.

Responding to the second ground of appeal, Mr Mushi opposed the argument by the Appellant's counsel that the application ought to have been struck out since suing a wrong party is a curable defect under Order I Rule 10(2) of the CPC. He argued that the said provision is inapplicable in the case at hand since in the said application the Appellant sued a non-existing party as opposed to a wrong party. To appreciate the difference between a non-existing party and a wrong party, Mr Mushi referred to the case of **Singida Sisal Production & General Supply vs Rofal**

General Trading Limited & 4 Others, Commercial Review No. 17 of 2017 (unreported). He thus asserted that the name of the Respondent herein as appeared in the application in the trial court is for a non-existing party, hence the appeal has also been preferred against a non-existing party.

On the last ground of appeal, Mr Mushi contended that a court becomes *functus officio* when it disposes a case by a verdict, or conclusively determines the dispute between the parties. To support his argument, he cited the case of **Nasra Said vs KCB Bank Tanzania Limited, Misc. Commercial Cause No. 40 TLR 2015**. He maintained that the order for amending the name of the Respondent that was granted by the trial court on 20/07/2020, was a directive order which did not dispose the matter, hence the principle of *functus officio* is inapplicable. He summed up his submission by praying for dismissal of the appeal with costs for being preferred against a party who was not a party in Civil case No. 49 of 2019.

In his rejoinder submission, Mr Sood opposed the preliminary objection raised by counsel for the Respondent for being raised in the reply submissions. He contended that the same ought to have been filed

through a formal notice. He added that the instant appeal is against the decision of the trial court in Misc. Civil Application No. 4 of 2020.

Having outlined the submissions made by Counsel for the respective parties, I am obligated to make a determination of the appeal before me. To do so, I have arduously considered the trial court records as well as the submissions of the advocates for the parties. The issue for determination is whether the appeal before this Court has merits and whether the trial court was justified to dismiss Civil Case No. 49 of 2019.

Before embarking on the said issues, I feel duty bound to comment on the concerns raised by Mr Sood regarding the preliminary objection raised by Counsel to the Respondent in his reply submissions. It is a settled position of the law that a preliminary point of objection can be raised at any stage of the proceedings. See the Court of Appeal decision in **Zaidi Baraka and 2 Others vs Exim Bank (Tanzania) Limited, Civil Appeal No. 194 of 2016** (unreported) in which the Court held:

> *"There is consistent judicial pronouncements that **a point of law can be taken into cognizance and adjudicated upon at any stage of proceedings** provided that the facts admitted or proved on the record enable the court to determine the point of law in question."* (Emphasis added)

Going by the decision above, the contention by Mr Sood that he was denied the right to be heard on the preliminary objection is misconceived. I hold this view because the preliminary objection was raised in the Respondent's reply submission, of which the Appellant had a right to file a rejoinder where he could respond adequately on the points raised. I thus decline to agree with him and hold that the preliminary objection was properly raised and the Appellant was accorded the right to be heard through his rejoinder submissions.

On the issues for determination, I will first deal with the first one which, in my view, forms the kernel of this appeal. It covers the preliminary objection raised by the advocate for the Respondent as well as the 2nd and 3rd grounds of appeal. According to Mr Mushi, the appeal is incompetent for being preferred against a party who was not a party in Civil Case No. 49 of 2019. Mr. Sood vehemently contested that the appeal is not against a new party since on 20/07/2020 he sought leave to amend the name of the Respondent and the trial magistrate granted that leave.

On my part, going by the trial court records, it is an undisputed fact that in Civil Case No. 49 of 2019, the Appellant (Plaintiff in the trial court) sued Moivaro Lodge and Tented Camps, the Defendant. It is also undisputed that the said suit was dismissed on 30/01/2020, when it was scheduled

for hearing of the preliminary objection that was raised by the Respondent's advocate. It is further noted from the proceedings of Misc. Civil Application No. 4 of 2020 which was filed aiming at restoring the dismissed suit that on 03/07/2020 the advocate for the Appellant prayed to amend the application by inserting the proper name of the Respondent. The record shows that the amended application was filed in the trial court on 20/07/2020, whereby the name of the Respondent was rectified to read: Moivaro Investment & Trading Company Limited t/a Moivaro Lodge and Tented Camps, which is also the name of the Respondent in this appeal. In so far as I appreciate the submission by Mr Mushi that names of parties in applications and appeals must be the same as the names of the parties in the original suit, such proposition has some exceptions. This appeal presents one of such exceptions for the following reasons:

In the first place, Civil Case No. 49 of 2019 had not been heard to finality. It was dismissed at its earliest stages; that is, soon after the filing of the Written Statement of Defence. This presupposes that the Appellant had an opportunity to amend the plaint at any stage. I hold this taking into account that the correct name of a party may not be known to the other party at the time of filing the suit. That is why the law gives a room for amendment of the names of the parties once a party becomes aware of

the correct names of the adverse party. In the same spirit, on 03/07/2020 when the Appellant became aware of the correct name of the Respondent, he prayed to amend the application so as to read the proper names of the Respondent. Leave to that effect was granted. Therefore, the argument that the parties in the application were not the same parties in Civil Case No. 49 of 2019 is true; but, it has to be noted that Civil Case No. 49 of 2019 was not heard, implying that the Appellant could still amend the plaint. That room was, however, blocked because the case had already been dismissed.

As the record of the trial court bears it, in her ruling, the trial magistrate blamed the Appellant's advocate for not amending the plaint despite being granted leave to do so. At page 7 of the typed ruling, the trial magistrate made the following observation:

> *"... This is because from the court records, it is evident that on the 03rd July, 2020 when the application came mention (sic), the applicant prayed to this Honourable Court to be permitted to amend the name of the defendant in the plaint, so as he could file an amended plaint with the correct names of the defendant.* ***This Honourable Court ordered the applicant to file the plaint before 20th July, 2020. However from the court's records the amended plaint was never filed however the applicant filed an amended application*** *for an order to set aside the dismissal order on 20th July, 2020."* (Emphasis added)

From the above prescripts, the trial magistrate was in error because it was impractical for the Appellant to file amended plaint in a suit which was

dismissed. The best that could be done was for the Appellant's advocate to amend the application by inserting the proper name of the Respondent, which was the recourse taken by the Appellant's counsel. It is imperative to note that the case of **CRDB Bank PLC (Formerly known as CRDB (1996) Ltd) vs George Mathew Kilindu** (supra) cited by Mr Mushi is distinguishable. In that case, the High Court case subject of the appeal had been determined to its finality. Therefore, there was no room for the parties to amend the name of the Appellant unlike in the appeal under scrutiny where, as I pointed out earlier, it was not heard, hence the Appellant had reserved the right to amend the plaint.

Further, the Appellant did not change the name of the Respondent behind a closed door; rather, he did so after obtaining leave of the court. In **CRDB Bank PLC (formerly known as CRDB (1996) Ltd) vs George Mathew Kilindu,** (supra), it was held:

> *"It is our considered view that citing of all these new names for the appellant* ***without leave or an order of the court is a fatal*** *irregularity which has affected the competence of the entire appeal and cannot be rectified by a Slip Rule as we decided in the case of* ***Inter - Consult Limited*** *(supra) cited to us by Mr. Masumbuko."* (Emphasis added)

From the above holding of the Court of Appeal, it is noteworthy that a party who wishes to cite a name, different from that of the party in the

former suit, has to seek and obtain leave of the court. The Appellant's advocate complied with that condition after seeking and obtaining leave of the trial court in the application.

Another discrepancy in the ruling of the trial court is that, after deciding that the application was incompetent as the parties in the application were not the same as those in the main suit, the trial magistrate dismissed the application. That was unfair. By dismissing the application, the Appellant's right to file a competent application with proper names of the Respondent was curtailed. An incompetent application or appeal, implies that the application or appeal has procedural legal defects which are curable. Hence, once an application is found incompetent, it ought not to be dismissed rather it is to be struck out so that the aggrieved party can file a competent application or appeal. The decision of the Court of Appeal decision in **Thomas Peter @Chacha Marwa vs Republic, Criminal Appeal No. 322 of 2013** (unreported) cemented the position. It held:

> *"Furthermore, since Mwangesi J. had found the appellant's application to be misconceived and incompetent the best he could do was to strike it out and not dismiss it."*

As confirmed by all cases where the names of the parties in the appellate courts differed from those in the main suit, the tendency has been to strike out the appeal or application. Therefore, dismissal of the appeal

was against the settled tenets of administration of justice. From the above, it is the finding of this Court that dismissal of the application by the trial court was wrong and, in any case, unjustified. The first issue is resolved in the affirmative. The appeal is competent before this Court.

Regarding the second issue, Mr Sood submitted that Civil Case No. 49 of 2019 was fixed for hearing of the preliminary objection on 30/01/2020. Since both parties and their counsel defaulted appearance, the preliminary objection and the main suit were both dismissed. He faulted the trial magistrate for the course taken, stating that what ought to have been the proper direction was to dismiss the preliminary objection only. Mr Mushi, on the other hand, does not dispute that on the date the suit was dismissed the same had been fixed for hearing of the preliminary objection, which he had raised in his Written Statement of Defence. What he challenges is that the Appellant had to show sufficient reasons for defaulting appearance in court.

I had to make a thorough perusal of the trial court records to ascertain what went on. In the amended application, Mr Sood stated, under paragraph 6 of his affidavit, that he failed to enter appearance as he confused the date the case had been fixed. That is also reflected in his oral submissions at the hearing of the application. Whether confusing

dates amounts to sufficient reason, that was not determined by the trial court. I entirely agree with Mr Sood that since the case was fixed for hearing of the preliminary objection, it was inappropriate for the trial court to dismiss both the preliminary objection and the main suit. The proper recourse was for the trial court to dismiss the preliminary objection and fix the main case for the next orders. I hold this view because once a preliminary objection has been raised, the main case stops until the preliminary objection is determined. I find authority in the cited case of **Ally M. Tarimo vs Julius Gogadi** (supra) where it was held:

> *"As the matter was set up for hearing on a preliminary point of law, was the High Court Justified in dismissing the suit on that date? We do not think so. We are of the considered view that given the prevailing circumstances the matter should be heard on merit."*

I subscribe to the above decision. That is the proper position of the law. Since the case was fixed for hearing of the preliminary objection and since there was no appearance from either the advocate for the Appellant or the advocate for the Respondent, the trial magistrate ought to have dismissed the preliminary objection and not the main suit. That said, the second issue is resolved in the negative.

In the upshot, the appeal has merits. It is allowed in its entirety. I hereby quash and set aside the decision of the trial court dated 03/11/2020 dismissing the application as well as the order dated 30/01/2020

dismissing Civil Case No. 49 of 2019. This also relates to all other subsequent orders thereto. I direct that the file be remitted back to the trial court so that the matter can be determined on merits. Considering that the decision subject of this appeal cannot be blamed on either of the Parties, I make no order as to costs.

Order accordingly.

Y. B. Masara

JUDGE

20th May, 2022