**IN THE HIGH UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA**

**CIVIL APPEAL NO.26 OF 2021**

**(C/F Civil case No. 1/2020 at the District Court of Karatu at Karatu)**

**M/S SAM CONSTRUCTION LIMITED.....1ST APPELLANT**

**MR. SAMWELI G MHINA.....2ND APPELLANT**

**Vs**

**MR. PETER GWAYDES GORWA.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 6-5-2022*

*Date of Judgment: 30-5-2022*

**B.K.PHILLIP,J**

The appellants herein being aggrieved by the judgment of the District Court of Karatu at karatu lodged this appeal on the following grounds;

*i) That the trial Court erred in not conducting mediation.*

*ii) That having marked mediation to have failed , the trial Court erred in not reffering the parties to Arbitration or Reconciliation and or Negotiations.*

*iii) That the trial Court erred in failing to hold that the respondent has no cause of action against the second Appellant .*

*iv) That the Court grossly erred in failing to admit on record ( Except Exhibit P1) any of the documents produced by the respondent during the trial.*

v) *That the trial Court grossly erred in admitting secondary evidence ( all exhibits ) which were not admissible under the law.*

vi) *That the trial Court erred grossly in failing to hold that the claims set out in paragraph 8 of the plaint were not proved at all.*

vii) *That the trial Court grossly erred in the manner and ways it handled the claim based on an order ( No.27) issued to Ms Mushi Brothers.*

viii) *That the award of general damages in the sum of shillings 10,000,000/= is bad in law and without any sound reason.*

ix) *That the trial Court erred in awarding interests at the rate of 15% after the date of judgment.*

x) *That the trial Court erred in purporting to hold that the delivery of Notes , exhibit P1 was delivered to the first appellant.*

In this appeal the appellants pray for the following orders;

i) *The appeal be allowed with costs with an order for trial de novo.*
*Alternatively*

ii) *The appeal be allowed with costs and the judgment be quashed and the decree be set aside. .*
*Alternatively*

iii) *The Appeal be allowed with costs and the decretal amount and rates of interests be varied accordingly.*

A brief background to this appeal is that the respondent instituted a case against the appellants jointly and severally, claiming for payment of a sum of Tshs 74,558,500/= being unpaid amount for the building

materials sold to the appellants on credit . The 2nd appellant is the managing Director of the 1st appellant.The respondent prayed for judgment and decree against the appellants as follows;

*i) An order for payment of Tshs 74,558,500/= being special damages.*

*ii) An order for payment of general damages being assessed by the Honourable Court.*

*iii) Interests at bank rate of 15% from the date of prosecution to the date of judgment.*

*iv) Interests at the Bank rate of 15% on (i) and (ii) above from the date of judgment to the date of payment in full.*

*v) Costs of the case and any other relief(s) as this Honourable Court may deem fit and just to grant.*

The case was heard inter parties.The trial Court entered judgment for the respondent and ordered as follows;

*i) Payment of Principal sum Tshs 74,558,500/=*

*ii) Payment of general damages Tshs 10,000,000/=*

*iii) Payment of interests at bank rate of 15% from the date of prosecution to the date of judgment.*

*iv) Payment of interests at the Bank rate of 15% on (i) and (ii) above from the date of judgment to the date of payment in full.*

*v) Costs of the case.*

The learned advocates Elvaison Maro and John Shirima appeared for the appellants and the respondent respectively. I ordered the appeal to be

disposed of by way written submissions. Both advocates filed the written submissions as scheduled.

Submitting for the 1st and 2nd grounds of appeal conjointly, Mr Maro argued that the no mediation was conducted because on the date when the case was called before the mediator ( Hon.kupa, RM) for the first time, the advocate for the appellants ( defendants at the trial Court ) informed the mediator that his clients were disputing all the claims leveled against them and went on to express his opinions which were to the effect that the case cannot be settled amicably. Then, without inviting the advocate for the respondent herein (plaintiff at the trial Court) to make his response, the Mediator entered an order that mediation had failed. Mr. Maro contended that the aforesaid order was erroneous because the Mediator did not consult the parties. Both parties to the case were absent and the matter was not scheduled for mediation on that date. The failure to conduct mediation is fatal. It vitiates the judgment and the proceedings, Contended , Mr. Maro.To cement his arguments he cited the case of **LB Mafia Island Company Vs Ramadhani Bakari Joseph, Civil Appeal No. 106/2019** ( unreported). He went on submitting that the mediator was supposed to schedule the matter for negotiations or conciliation before remitting the case file to the trial Magistrate for continuation of the hearing.

In rebuttal , Mr. Shirima argued that the provisions of Order VIIIA, Rule 1 of the Civil Procedure Code ( "CPC") were complied with .The advocates for both sides appeared before Hon Kupa,RM who was the mediator in the case and upon being called to address the Court the advocate for the

defendant informed the Court that his clients were disputing all of the plaintiff's claims and there was no way the matter could be settled amicably.Under such circumstances the Mediator was justified to mark mediation to have failed. Relying on the provision of Order VIII of the CPC, Mr.Shirima contended that the upon consulting the parties, the Mediator has powers to make a declaration to the effect that mediation is not worthwhile. He contended that the case cited by Mr. Maro in his submission is distinguishable from the facts of this case.

In rejoinder, Mr.Maro reiterated his submission in chief and insisted that the Mediator was wrong to mark mediation to have failed.The opinion made by the advocate for the appellants that there was no likely hood of amicable settlement of the case was not supposed to be relied upon by the Mediator since a Mediator is a trained person he/she is supposed to employ different techniques to assist the parties to solve their disputes amicably.

It is a common ground that on 22nd July 2020 the advocates for the parties appeared before the Mediator and the advocate for the appellants informed the Court that his clients were disputing all the claims filed against them, therefore there was no any chance of reaching an out of court settlement of the case. The advocate for the respondent conceded to that position as he did not raise any objection to the same or a suggestion that settlement could be reached. Let me point out here that the Advocates are officers of the Court. The law allows them to appear in Court on behalf of their clients. [See Order III Rule 1 of the CPC.] The Court's records show clearly that the Mediator marked mediation to have

failed after discussing with the learned Advocate .The Mediator cannot be faulted for listening to the opinion/ suggestion made by the learned advocates

It is noteworthy that mediation is possible only when the parties are willing to mediate. If parties indicate clearly before the Mediator that they are not ready to mediate the matter the Mediator cannot be faulted to mark mediation to have failed. After Marking that mediation have failed the Mediator is not obliged to pursue other ways of alternative dispute resolutions such as negotiation or conciliation as argued by Mr. Maro. The practice has been that when mediation fails the case has to revert to the trial Magistrate/ Judge for continuation of hearing. To my understanding what is envisaged in the Law [ Order VIIIC of the CPC] is that parties will have to pursue one type of alternative dispute resolution ,that is either mediation, or negotiation , or Arbitration or conciliation. Mr. Maro's argument is misconceived since taking the root he suggests would lead to delay in the determination of case for no good reason. From the foregoing, it is the finding of this Court that the procedures stipulating in Order VIIIB and VIIIC of the CPC were all complied with. Thus, the 1st and 2nd grounds of appeal have no merit.

I have noted that the determination of all the remaining grounds of appeal requires analysis of the evidence adduced. Under the circumstances ,I am compelled to skip the 3rd ground of appeal and deal with the 4th ground of appeal first, which is on the admission of the documentary evidence ( exhibits ) since the same have an impact on the determination of the remaining grounds of appeal.

With regard to the 4th ground of appeal , Mr. Maro submitted that the trial Court did not admit some of the exhibits as required by the law but used them in the determination of the case. Specifically the exhibits which are at issues are; the summary of building material, the cheques and demand notice. Mr. Maro referred this Court to pages 14 ,16 and 18, of the typed proceedings in which it is indicated that the trial Court overruled the objections which were raised during the tendering of the aforesaid exhibits and thereafter he did not enter any order for admission of those exhibits. Expounding on the proper procedure in admission of exhibits, Mr. Maro submitted that exhibits are supposed to be admitted first and thereafter are marked. He cited the case of **A.A.R.Insurance (T) Limited Vs Beatus Kisusi, Court of Appeal No.67 of 2015** (unreported).He urged this Court to expunge the aforesaid exhibits for being entered into the Court's records in contravention of the acceptable legal procedure.

In rebuttal, Mr. Shirima refuted Mr. Maro's contentions as far as the admission of exhibits is concerned. He contended that all exhibits were admitted and marked properly as exhibits P1,P2,P3, P4 and P5.He referred this Court to pages 9 to 21 of the typed proceedings, to bolster his arguments.

In rejoinder Mr.Maro, reiterated his submission in chief and insisted that in the entire proceedings no where the trial magistrate made an order for admitting exhibit P2, P3 and P4.

Let me say from the onset that Mr.Maro's assertion is correct. The Court's records reveal that after overruling the objections which were

being raised by the appellants' advocate in respect of the admission of the documentary evidence , the trial Magistrate did not enter the order for admitting those documentary evidence as exhibits. However, he took those documents, marked and indorsed them as exhibits. As correctly submitted by Mr.Maro, the proper order for admission of exhibits is only in respect of Exhibit P1. The correct procedure in admitting exhibits is that , a trial magistrate has to first give the order for admitting the documentary evidence in question tendered in Court as an exhibit. Thereafter , the same is numbered and indorsed as an exhibit. The order for admitting a documentary evidence as an exhibit is of paramount importance because it is the one which gives the trial Magistrate powers to indorse the same as an exhibit. This is in line with the provisions of Order XIII Rule 4(1) 7(1) of the Civil Procedure Code ( "CPC") which provides as follows;

*"4(1) Subject to the provision of subrule (2) , there shall be endorsed on every documents* ***which has been admitted in evidence*** *in the suit the following particulars, namely*

*(a) The number and title of the suit*

*(b) The name of the person producing the document*

*(c) The date on which it was produced and*

***(d) A statement of its been so admitted; and the endorsement shall be signed or initialed by the Judge or Magistrate"***

*"7 (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5 , shall form part of the original"*

( Emphasis is added)

From the above quoted provisions of the law, it is crystal clear that a documentary evidence has to be first admitted and the statement on its admission has to be signed by the trial Judge or Magistrate. Thus ,failure to enter the order for admission of exhibits is fatal. The case of **A.A.R.Insurance (T) Ltd** , (supra) cited by Mr. Maro is relevant in this matter since in that case the Court of Appeal discussed the proper manner of tendering and receiving exhibits, and it had this to say;

*" In our case the learned Judge considered the aforesaid documents without complying with the rules of admissibility and endorsement .That was not proper. Those document in terms of Order XIII , Rule 7(1) as correctly submitted by Mr. Mnyele should not form part of the record.... The same are expunged. In exercising our Revisional powers as provided under S.4(2) of the Appellate Jurisdiction Act, Cap 141 , we quash the High Court Proceedings commencing after Mediation and set aside the decree. We order for retrial before another Judge. We award costs"*

Thus, it is the finding of this Court that the 4th ground of appeal has merit. Under the circumstances, it is obvious that I cannot proceed with the determination of the remaining grounds of appeal. I hereby expunge exhibits P2, P3,P4 and P5 from the Court's records, quash the proceedings of the District Court of Karatu at Karatu commencing after mediation and set aside the decree. This matter should be tried *de novo* before another

Magistrate. I give no order as to costs since the fault in admitting the exhibits was not caused by the parties in this case.

Dated this 30th day of May 2022


**B.K.PHILLIP**

**JUDGE**