

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MOROGORO)
AT MOROGORO
CIVIL APPEAL NO. 03 OF 2022**

*(Arising from Civil Appeal No. 16 of 2021 by Kilombero District Court at Ifakara
dated 12/8/2021 by Hon. L.O. Khamsini SRM)*

PETER MWALUKO..... APPELLANT

VERSUS

MENGI MLANGALI.....RESPONDENT

JUDGEMENT

Last Court Order on: 05/04/2022

Judgement date on: 06/05/2022

NGWEMBE, J:

This is a second appeal from the judgement of the District Court of Kilombero at Ifakara which upheld the decision of primary court of Mngeta, in civil case No. 10/2020. In trial court, Mengi Mlangali was a plaintiff claim among others a total shilling of One Million and Five Hundred Thousand (1,500,000/=) only against defendant/appellant herein. Peter Mwaluko, being a defendant during trial, was ordered to pay the respondent herein a total sum of shillings 1,500,000/=.



To recap just briefly, the genesis of this appeal arose from the act of the appellant collecting levies from wananchi on behalf of the respondent who was an employee of the District Council. The appellant collected a total of TZS. 2,000,000/= but refunded only TZS. 500,000/= remaining with TZS. 1,500,000/=. The record discloses more clearer that, the Respondent Mengi Mlangali on 1/8/2018 was sent by the District Executive Director to collect levies from Ifakara District Council, in so doing he involved the Village Executive Officers and Peter Mwaluko (Appellant) was responsible to execute collection of that levies. They used special machine called Point of Sale (PoS) in collecting those levies. Out of all collections, the appellant paid only TZS 500,000/= hence remained with TZS. 1,500,000/= as a debt. The appellant out of any reason, leave alone good reason refused to repay the balance of TZS. 1,500,000/= as agreed, thus resulted into civil action No. 10 of 2020. Upon hearing both parties, the trial court found the appellant liable to pay the balance of TZS. 1,500,000/= to the respondent.

The appellant was dissatisfied with that judgement, hence appealed to the District Court armed with seven grievances. Unfortunate for him, the appeal was dismissed and the trial court's decree was upheld. Being dissatisfied with the dismissal order, the appellant has ventured into this court grounded with three grievances namely:-

1. That the appellate Magistrate grossly erred in law and fact for not considering ground raised in the petition of appeal to join District Council the owner and warrant holder of the District Council.

2. That the decision is tainted with fatal irregularities, which should not be left to stand.
3. That the first appellate District Court erred in law and fact to uphold the decision of the Primary Court, which the respondent has no *locus stand* to sue the appellant on his own name, while he was not a warrant holder of the District Council.

On the date fixed for hearing, the appellant made an oral application to allow parties to address the court by way of written submissions. The prayer was not opposed by the respondent and this court proceeded to grant them as prayed. Each party complied with the scheduling order of filing their written submissions.

In turn, the appellant stood firm to convince this court to set aside both judgements and decrees of the lower courts. The reasons therein were the alleged irregularities which vitiated the whole proceedings at the court below. Proceeded to argue that the Primary Court Magistrate did not sign at the end of the evidence of each witness, thus violated the provision of order XVIII Rule 5 of the Civil Procedure Code Cap 33 RE. 2019. He cited the case **of Iringa International School Vs. Elizabeth Post, civil application No. 155 of 2019 (CAT)** where the Court of Appeal went on to quote the provision of Order XVIII Rule 5 of the CPC as follows; -

"The evidence of each witness shall be taken down in writing, in the language of the court by or in the presence and under the personal direction and superintendence of the Judge/Magistrate not ordinarily



in the form of question and answer, but in that of a narrative and judge or magistrate shall sign the same"

The Court of appeal further quoted section 210 (1) of the CPA as it provides:

"S. 210 (1) in trials other than trials under section 213, by or before a magistrate, recorded in the following manner, the evidence of each witness shall be taken down in writing in language of the court by the magistrate, or in his presence and hearing under his personal direction and superintendence and shall be signed by him and shall form part of the records"

Followed by citing quite relevant precedents including the case of **Yohana Mussa Makubi and another Vs. R, Criminal Appeal No. 556 of 2015, Portland cement Co Ltd Vs. Ekwabi Majigo, Civil appeal No. 173 of 2019**, and the case of **Catholic University of Health and Allied Science (CUSHS) Vs. Epiphania Mkude Athanase, Civil appeal No. 257 of 2020**.

This point was not raised and form part of the three grounds of appeal, rather is raised in the cause of making his submission. Though this court take it as judicial notice because this point is purely legal point. Yet same cannot be constitute illegality or irregularity of the trial court, because, the trial Primary Court do not use Civil Procedure Code Cap 33 R.E. 2019 rather uses rules governing civil disputes in Primary Courts.

Moreover, Primary Courts do not use Criminal Procedure Act in conducting its criminal trials. Therefore, what the appellant has argued in this ground is good for thought but is not applicable in this appeal.

The appellant proceeded to argue on the first ground that, the first appellant court grossly erred in law and fact for not joining the District Council as true owner and warrant holder of the District Council. Argued this ground jointly with ground three that the first appellate District Court erred in law and fact to uphold the decision of the Primary Court which the respondent has no *locus stand* to sue the appellant on his own name, while he was not a warrant holder of the District Council.

Submitting therein, the appellant submitted that, the respondent was not a warrant holder of the District Council, which was the proper procedure. It was necessary for the respondent to join the District Council in the case before the Primary Court. To buttress his argument, the appellant referred this court to the case of **J. B Shirima and Others Vs. Humphrey Meena t/a Comfort Bus Service (1992) TLR 290.**

Stood firm that since the said money belonged to District Council and it is not a personal money, then the trial court supposed to believe that there was a cause of action against the District Council to be joined in the cause. The appellant referred this court to the case of **Juma B Kadala Vs. Laurent Mnakande (1983) TLR 103 HC,** where it was held :-

"In a suit for recovery of land sold to a third party; the buyer should be joined with the seller as a necessary party defendant; non-rejoinder will be fatal to the proceeding"

Moreover, submitted that, the logic of joining the third party as necessary party is that, he will be accorded an opportunity to be heard

which is one of the cardinal principles of natural justice. Insisted that the appeal is valid same be allowed.

Arguing on the second ground that the decision is tainted with fatal irregularities, which should not be left to stand. Submitted that, illegalities are depicted from page 1 paragraph 2, page 2 paragraph 1 and page 4 paragraph 4 of the judgement of the 1st appellate Court. That those illegalities render the whole decision incompetent. Rested by praying this appeal be allowed and the court proceed to set aside the judgement and decree of District Court as well as of the Primary Court with costs.

Unfortunate and without colour of justification, the respondent either by default or deliberately did not file his written submission as per the court's schedule. Thus, rendering this court to consider this appeal based on one side.

It is a legal position that failure to file written submission is tantamount and manifestation of failure to appear and prosecute a case in a court of law. This position has been repeated in several cases including in the case of **Haleko Vs. Harry Mwasaijala, DC Civil Appeal No.16 of 2000**, (unreported), the court held:-

"I hold, therefore that the failure to file written submission inside the time prescribed by the court order was inexcusable and amount to failure to prosecute the appeal. Accordingly, the appeal is dismissed with costs."

Similar position was emphasized in the case of **Olam Tanzania Limited**

Vs. Halawa Kwilabya, DC. Civil Appeal No.17 of 1999 where it was held:-

"Now what is the effect of a court order that carrier instructions which are to be carried out within a pre-determined period? Obviously, such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is conversant to them. In addition, an order for filing submission is part of hearing. So, if a party fails to act within the prescribed time, he will be guilty of in-diligence in like measure as if he defaulted to appear.....This should not be allowed to occur. Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos."

I fully subscribe to this guidance that, indeed in any civilized society, there must be respect to law and order. In this case, the respondent was present on 15th March 2022, when this court granted leave to the parties to address the court by way of written arguments. Above all, this court did provide schedules of filing their written submissions. Therefore, the respondent either refused to heed to the court's schedule or had nothing to reply to the applicant's written submission. As long as the respondent has failed to prosecute his case, this court shall proceed to determine the appeal in his absence.

In this appeal, the appellant submitted on the first and third ground on the issue of *locus stand* that failure by the respondent not to



join Ifakara District Council was fatal as he had no power to sue on his own name while he was not a warrant holder of the District Council.

Notably, *Locus standi* in any civil suits is a cornerstone upon which, a suit or a matter of civil nature is built. There is no need to deal with it in details for same is well known to all practicing lawyers. However, the question is whether the District Council knew the appellant as his employee or otherwise? Equally important is to answer whether the engagement of the respondent and the appellant was known by the District Council? Lastly, if the answer is in negative, how could the respondent join the District Council in a private arrangement made between the disputants?

The record speaks louder that the engagement of the two parties were private which did not involve the District Council. The one who was engaged by the District Council was the respondent to collect levies from villagers/tax payers. The engagement of the appellant was purely private arrangement to facilitate collection of such levies. This is supported to the fact that the respondent, upon finding the appellant delaying to settle his debt, decided to pay the District Council from his own money. Thus, the District Council has neither loss nor claim of right against the appellant, then how could it be joined as a party to that suit? I think not, joining the District Council in a claim which has no interest at all, would amount into misjoinder of parties.

In other words, such money, even if, is paid today, won't be refunded to the District Council, rather will end up in the ports of the respondent.

I am well aware that the District Councils are creatures of law as per section 5 of the **Local Government (District Authorities) Act**, which the section is quoted for easy of reference:-

"s.5 (1) Subject to section 7, and to the other provisions of this Part the Minister may, after consultation with the President, by order published in the Gazette, establish such district councils as he may deem necessary for the purpose of local government"

When the above quoted section is read together with section 12 print out clearer on the authorities of the District Councils. The section is quoted hereunder:-

"s.12 Every district council established under this Part, and in the respect of which there is furnished to the Minister by the Clerk of the National Assembly by a certificate of establishment, shall, with effect from the date of commencement of the establishment order, be a body corporate, and shall-

- a) Have a perpetual succession and an official seal;*
- b) In its corporate name be capable of suing and be sued;*
- c) Subject to this Act, be capable of holding and purchasing, or acquiring in any other way, and disposing of any movable or immovable property."*

The question remains, how could the council be joined in a case which has neither interest nor claim of right? Obvious, the conclusion remains that doing so would amount into misjoinder of parties.

Perusing critically on the evidences adduced in court during trial, as recapped in the judgement of trial court at pages 4, 5 & 6, I find the appellant cannot in any way, exonerate himself from his self-confession debt. He voluntarily confessed to be indebted to the respondent an amount equal to TZS. 1,500,000/=. Such piece of facts still stands tall and firm against the appellant.

It should be noted that at this stage of appeal, the appellate court do not hear new evidences, rather determines the suit based on the evidences adduced during trial. As such the appellant cannot raise new issues which were not raised and decided by neither the trial court nor by the 1st appellate court. The issue of locus standi, was rightly raised and argued at the 1st appellate court. As I have already decided such fact has no merits so long the appellant admits to be indebted by the respondent.

In totality, I find no reason to depart from the decision of the 1st appellate court which upheld the decision of the trial court. Accordingly, this appeal lacks merits same is dismissed with costs.

It is so ordered.

DATED at Morogoro this 6th May, 2022



A handwritten signature in blue ink, appearing to read 'P.J. Ngwembe', is written over a horizontal line.

P.J. NGWEMBE
JUDGE
06/05/2022

Court: Judgement delivered at Morogoro in Chambers on this 6th day of May, 2022 in the presence of the appellant and in the absence of the respondent.

Right to appeal to the Court of Appeal explained.



A handwritten signature in blue ink, appearing to be "P.J. Ngwembe", is written over the seal.

**P.J. NGWEMBE
JUDGE
06/05/2022**