IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 317 OF 2021

(Appeal from the judgment and decree of the District Court of Kibaha at Kibaha (Mushi, RM) in Civil Case No. 12 of 2020 dated 29th of April, 2021)

TONGA FUETA *(Represented under)*
Special Power of Attorney) **..... APPELLANT**
by **TIMOTHY ALVIN KAHOHO**)

VERSUS

EVA PWELE SHOWE *(As Administrator*
of estate of the late **PWELE SHOWE**) **..... 1ST RESPONDENT**

CHRISTINA PWELE SHOWE *(As Administrator*
of estate of the late **PWELE SHOWE**) **..... 2ND RESPONDENT**

JUDGMENT

13th, & 25th April, 2022

ISMAIL, J.

The instant appeal arises from the decision of the District Court of Kibaha, in Civil Case No. 12 of 2020, in which the appellant moved the court to grant damages the aggregate of which was TZS. 350,000,000/-, plus interest, for what was alleged as loss of business. This followed demolition

of the plaintiff's house that triggered a number of court actions which were allegedly decided in the appellant's favour. The appellant's contention is that the demolition of the suit premises in 2016 was at the instance of the respondents. The latter denied any wrongful involvement in the matter and contended that the suit premises were owned by their deceased father. They, too, alleged that the appellant was responsible for the destruction of 12 frames, done by a court broker under the appellant's instructions. The loss allegedly arising from the illegal destruction was quantified at TZS. 45,000,000/-.

Five issues were framed at the Final Pre-trial Conference, as reflected at page 13 of the typed trial proceedings. These were:

1. *Whether the plaintiff is the rightful owner of the suit premise;*
2. *Whether the 1st and 2nd defendant had persistently and unlawfully occupied the suit premise till on 15th day of July, 2016;*
3. *Whether the defendant had any claims;*
4. *Whether the acts of both defendants over the suit premises caused loss of business to the plaintiff; and*
5. *To what reliefs are entitled to each party.*

Conduct of the trial proceedings was governed by these issues and it was expected that the impugned decision would consider and resolve each of the issues by weighing the testimony adduced by each of the witnesses.

This was not to be, as the contest between the parties was settled through issues raised *suo motu*, in the course of composing the judgment. The trial court raised two issues both of which were of a decisive importance. These touched on the claim of malicious prosecution, and the trial magistrate was eager to know if such claim would stand against the defendant. There was also a question of jurisdiction of the Court to handle land matters.

In the end, the court was satisfied that that there was no proof of malicious prosecution. In dismissing the matter, the trial magistrate had this to say:

> *"There was no way in which under the circumstances established, it could be said that, in doing what she did, the Plaintiff had no reasonable and probable cause. To that end I hold that, there is no element for the cause of malicious prosecution to stand exist in the Plaintiffs' suit.*
>
> *In view of the foregoing account, I hold that, the Plaintiff has failed to prove the loss suffered against the Defendants establishing the prosecution for malicious prosecution, renders the whole plaint want of merit."*

The parties preferred written submissions in disposal of the appeal. Noting, however, that the trial proceedings were resolved not based on the

issues drawn to the parties' concurrence, but on issues raised *suo motu*, I called upon counsel for both parties to address me on the propriety of the steps taken by the trial court in closing down the matter. Whereas the plaintiff was represented by Mr. Timothy Kahoho, the donee of the Power of Attorney, the respondents were represented by Mr. Godfrey Ukwonga, learned counsel.

Submitting on the first point, Mr. Kahoho argued that the claim for malicious prosecution was not pleaded and no claim was predicated on the issue. This was in view of the fact that no criminal proceedings were instituted by the respondents to form the basis for malicious prosecution. He took the view that this is issue was the Court's own invention.

With regards to jurisdiction, Mr. Kahoho submitted that the issues did not cover the question of jurisdiction as the same was addressed earlier on, through a preliminary objection which was heard and determined. He took the view that the court ought to have summoned the parties and ask them to address it if it felt that the issue was of any decisive importance.

For his part, Mr. Ukwonga took the same view with respect to malicious prosecution, holding the view that its inclusion came as a surprise to the respondents. He argued that the respondents abstained from submitting on

this issue which he thought was introduced as an obiter after completing a decision on jurisdiction.

Regarding the issue of jurisdiction, Mr. Ukwonga contended that the same was picked as a point of objection and that the trial court overruled it. It was a surprise, he argued, that the same issue featured in the judgment. He, however, held the view that it was important to make it an issue. On the court's wavering position on the matter, learned counsel chose to leave that to the Court.

As I address the matter raised *suo motu* and submissions by the parties, I wish to restate the known principle in civil trial. This is to the effect that proceedings and the resultant decisions should come from what is contained in the parties' own pleadings. In other words, parties are bound by their own pleadings. This postulation has been restated by courts and authors of no mean repute in the legal profession. The decisions include: ***James Funke Gwagilo v. Attorney General*** [2004] TLR 161; ***Astepro Investment Co. Ltd v. Jawiga Company Ltd***, CAT-Civil Appeal No. 214 of 2011; and ***Scan TAN Tours Ltd v. Catholic Diocese of Mbulu***, CAT-Civil Appeal No. 78 of 2012 (both unreported). Crucially, in ***James Funge Gwagilo*** (supra), the upper Bench held:

"The functions of pleading, is to give notice of the case which is to be met. A party must therefore, so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby to identify with clarity the issues on which the court will be called upon to adjudicate and determine the matters in dispute."

This position was reiterated in the upper Bench's subsequent decision in ***Barclays Bank (T) Ltd v. Jacob Muro***, CAT-Civil Appeal No. 357 of 2019 (unreported), in which it was held:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings …. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows that the case has to meet and cannot be taken by surprise at the trial. The court itself is as bound by pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not

made by the parties. To do so would be to enter upon the realm of speculation."

See: ***Morghan's Law of Pleading in India***, 10th Edn at page 25.

Conclusion of this preambular analysis on the pleadings takes me to the crux of the matter. This relates to the framing, resolution and determination of issues.

It is a long established requirement, founded on Order XIV of the Civil Procedure Code, Cap. 33 R.E. 2019, that before commencement of trial proceedings in a suit, the trial court should frame issues which will guide it in the hearing of the matter. These issues are drawn from the evidence and statements of the parties contained in the pleadings. This duty extends to settlement and determination of those issues. Rule 5 of the said Order XIV allows amendment or framing of additional issues if doing so is necessary for determining matters in controversy. The condition precedent, however, is that the parties must be afforded an opportunity to address the court on the new or amended issues. This requirement was underscored in the case of ***Oriental Insurance Brokers Limited v. Transocean (Uganda) Limited*** [1992] EA 260, wherein it was held:

"Under the provisions of Order 13 of the Civil Procedure Rules, a trial court has the jurisdiction to frame, settle and determine issues in a suit. A trial court may frame issues

based on the evidence of the parties or statements made up by their counsel though the point has not been covered by the pleadings provided that that parties are afforded an opportunity to address the court on the new issues framed."

Worth of a note is the fact that deviation from this imperative requirement is not devoid of any consequences. It attracts an undesirable consequence, as was held in the case of ***EX-B.8356 S/Sgt Sylvester S. Nyada v. The Inspector General of Police & Attorney General***, CAT-Civil Appeal No. 64 of 2014, in which it was held:

"There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed suo motu which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying of the parties the right to fair hearing."

The upper Bench went further and guided as follows:

"We desire to add, as correctly submitted by the appellant ***that where this is done, prudence requires that the parties be afforded opportunity to address the Court on the issues so amended or added, in tandem with***

> ***the audi alteram partem principle of natural justice*** *as has been insisted in a range of cases including those relied upon by the appellant as pointed out at the beginning."* [Emphasis added]

See: ***D.P.P v. Benard Mpangala & 2 Others***, CAT-Criminal Appeal No. 28 of 2001 (unreported).

As unanimously held by the parties, the trial court's conduct in this matter blatantly ignored this fundamental requirement. The learned magistrate charted his own way and took upon himself to raise issues and settle them by himself. Needless to say, this was an abhorrent conduct whose consequence was to deny the parties their right to put a representation on these new issues before a determination was made. as was held in the just cited and quoted decision, the net effect of all this is to render the decision a mere charade that cannot see the light of the day.

In consequence, I hold that the judgment and the decree bred out of this travesty a nullity. Accordingly, I quash and set them aside and remit the matter back to the trial court for composition of a judgment that is based on the issues raised but not determined. Should the magistrate see the need of framing new issues then he should summon the parties and call upon them to address him on the new issues before he retires to compose a decision.

Parties shall bear own costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 25th day of April, 2022.

M.K. ISMAIL

JUDGE

25/04/2022