

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CIVIL APPEAL NO. 33 OF 2022

(Arising from the decision of the District Court of Tarime at Tarime in Petition Case No. 1 of 2020)

SAMSON CHACHA APPELLANT

VERSUS

SINDA GETEBA RESPONDENT

JUDGMENT

23rd February & 02nd March, 2023

M. L. KOMBA, J.:

This is an appeal against the decision of the District Court of Tarime (the trial court) in Petition Case No. 1 of 2020 where respondent, **Sinda Geteba** was claiming a total sum of Tshs. 100,000,000/= from the appellant **Samson Chacha** being a general damages for defamation he suffered from publication made by the appellant in Habari Leo Newspaper of 24th June, 2020.

It was alleged in the petition before the trial court that, on 24th June, 2020 the appellant being the news reporter of Habari Leo News Paper did publish the false statement intended to defame the respondent. It was stated that on the said particular date at page 17 of Habari Leo News

Paper the appellant reported the news with the heading "**Marobota ya Vitenge 222 Yakamatwa Kituo cha Sirari**" the contents of the news were to the effect that, the respondent was involved in driving a cargo motor vehicle with Registration No. T 806 DSY, make Mitsubishi Fuso the property of Victor Nyangoye carrying 222 bales of African Garments popularly known as "vitenge" made in China and alleged entered in Tanzania from Kenya illegally through unauthorized pathway with intention of avoiding paying Government taxes and Levies amounting to Tshs. 204 million.

Upon full hearing of the petition, the trial court decided in favour of the respondent (the petitioner then) and ordered the appellant to pay him Tshs. 20,000,000/= (twenty million) as the general damages for libel. The respondent also awarded the suit costs.

That decision by the trial court displeased the appellant. He decided to step up before this court armed with seven grounds of appeal, determined to challenge the decision of the trial court. Those grounds of appeal can be summarized as follows;

- 1. That the matter was Res Judicata.*

- 2. That the trial Magistrate determine the new issues which were not framed during pre-trial conference.*
- 3. That the case was not proved to the required standard.*
- 4. That the trial court decision based on minor technicalities with respect to the standard of proof.*
- 5. That the trial court erred by alleging that the petitioner was not properly identified in the court.*
- 6. That the trial court reached its decision without critical analysis of the evidence adduced.*
- 7. That the trial court reached its decision without undergoing the preliminary matters as the requirement of the law.*

During the hearing of the present appeal, the appellant was represented by Mr. Paul Obwana while on the other hand the respondent was represented by Mr. Dominic Jeremiah Chacha, both the learned advocates.

Upon considering the grounds of appeal, the submissions of the parties and the record of the appeal, I will proceed in determining whether the appeal is meritorious. And in doing so, in disarray, I will answer the issues when relating with grounds of appeal and submissions of the parties at once.

Starting with the issue of *Res Judicata*, it is the appellant's counsel submission that there was another case, Civil Case No. 9 of 2020 where the respondent sued Tanzania Standard (Newspaper) Ltd, Editor and the

appellant. In that case the respondent counsel, Mr. Dominic prayed to be dismissed and it was done so. It is Mr. Obwana's contention that the effect of dismissal order is valid until when the order is vacated as was decided in the case of **Raphael Sagily Kalolo vs. Ally Salamba**, Land Case No. 106 of 2019 HC at Dar es Salaam. He elaborated that on that case the High Court referring the case of **NIC vs. Shengena Limited**, Civil Appeal No. 230 of 2013 CAT at Dar es Salaam where it was held that struck out and dismissal has different implication. Where the case is dismissed is referred as it was heard on merit.

He proceeded that the case at hand is about defamation just as the Civil Case No. 9 of 2020 which was dismissed, thus before filing the Petition Case No. 1 of 2020 the respondent was supposed to vacate his dismissal order. But if the situation remains as it is, the present matter will be *Res Judicata*.

In his rebuttal, the respondent's counsel Mr. Dominic submitted that the matter is not *Res Judicata*. He argued that section 9 of the Civil Procedure Code [Cap 33 R.E 2019] (the CPC) provides for *Res Judicata* principle and its elements which include, the parties must be the same. He submitted

further that in the said two suits, that is, Civil Case No. 9 of 2020 and Petition Case No. 1 of 2020 parties are different.

Referred to the case of **The Registered Trustee of Chama cha Mapinduzi vs. Mohamed Ibrahim V and Sons & Another**, Civil Appeal No. 16 of 2008 at page 8 Mr. Dominic submitted further that another element in principle of *Res Judicata* is the suit must be determined on merit by competent court. He added that in this case right of the parties has never been determined in former suit.

Before I reach further on determining this issue, I find it apposite to go through section 9 of the CPC which provide for the *Res Judicata*. The section reads;

*9. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit **between the same parties** or between parties under whom they or any of them claim litigating under the same title in **a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.***

From the above quoted section of the law, it is clear that the suit will become a *Res Judicata* if the parties are the same, a court is competent to try such matter and the matter has been determined to its finality. I agree with Mr. Dominic submission that the parties in the present suit are different from the former one. In the former suit the defendants were three while in the present suit there is only one respondent.

Although the cause of action was the same in both suits, that is defamation, but the former suit was not competent to be tried before the trial court. Rule 4 (1) of the Media Services (Defamation Proceedings) Rules of 2019 provide that legal proceedings regarding defamation shall be instituted by way of a petition. The provision is couched in mandatory term "shall" that means the procedure is compulsory. The former suit was instituted by way of plaint as a civil case, that means the suit was incompetent and the trial court was not competent to try the same.

As to the other element, the former suit was not heard and determined fully by the trial court. See the case of **The Registered Trustee of Chama cha Mapinduzi (supra)**. I therefore, dismiss this ground for lacking of merit.

I know skipped to the ground number seven which will answer the issue whether the trial court reached its decision without undergoing the preliminary matters as the requirement of the law. It is appellant's counsel contention that all the cases which are civil in nature mediation is compulsory. He submitted that Order VIII Rule 24 which provide for mediation used the word "shall" which means the procedure is mandatory.

He added Rule 14 of the Media Services (Defamation Proceedings) Rules of 2019 provide that any matters which are not provided in the rules the CPC will be applicable. He elaborated that when you peruse the trial court proceedings nowhere you can find the record of mediation. Mr. Obwana urged this court that the ground attracts nullification.

On the other hand, Mr. Dominic sailed the same boat with Mr. Obwana on this ground. He only added that the trial court skipped the important step and the remedy is to nullify the proceedings of trial court and order it to abide with all necessary steps according to the law.

Coming to my side, I am not distant from what has been submitted by counsel for both parties. It is true that mediation is compulsory procedure

that must be observed in pre-trial stages before the court. Order VIII Rule 24 of the CPC recites as follows;

*24. Subject to the provisions of any written law, the court **shall** refer every civil action for negotiation, conciliation, mediation or arbitration or similar alternative procedure, before proceeding for trial.*

In the case of **Charles Rick Mulaki vs. William Jackson Magero**, Civil Appeal No. 69 of 2017, High Court of Tanzania at Mwanza (Unreported) Hon. Maige, J held that;

'...It is trite law that, mediation is mandatory procedure in civil proceedings unless for matters on which the procedure does not apply'.

Since the Media Services Act nor its Rules provided for mediation procedure, the CPC will apply automatically as stipulated under Rule 14 of the Media Services (Defamation Proceedings) Rules of 2019.

Mediation is very important in every civil action if conducted as is provided in Order 8 Rule 26 that;

'26.-(1) In conducting any mediation session under these Rules- (a) the parties shall strive to reduce costs and delays in dispute resolution, and facilitate an early and fair resolution of disputes; and

(b) the mediator shall facilitate communication between or among the parties to the dispute in order to assist them in reaching a mutually acceptable resolution.'

Moreover, benefits of conducting mediation are many. First, is having a greater control of the matter by the parties versus the court. Mediation increases the control of the parties over the determination of the matter. Each **party is directly involved in negotiating their own agreement** and no settlement can be imposed upon them. In comparison, dissatisfaction is often experienced in court where parties have little choice but to **accept the judgment** made, which they may not be happy with.

Second, is **confidentiality to the Parties**. Unlike the potential publicity of court proceedings, everything said at the mediation is entirely confidential to the parties (unless specifically agreed otherwise). Third, it is voluntary. Any party may withdraw at any time of the mediation, but at least the mediation could have commenced and tried by the parties. In this event, the mediation will be marked failed, not by non attendance, but for some other reason (s).

Fourth, is **reduced cost**. This mostly benefits the parties to the litigation. Generally, the cost is greatly reduced in mediation in comparison to full

trial in case the mediation fails. So, it is good to give it a try, as traditional litigation is very expensive and the total cost is highly unpredictable.

Fifth, is **faster outcome**. Because mediation can be used early in a dispute, an agreement can usually be reached quicker than if pursuing controversial issues through full trial. Sixth, **is support**. Mediators are trained in working in difficult situations. The Mediator acts as a neutral facilitator and supports each party through the process, unlike in trials. Seventh, and last is **preservation of relationships**. Whether in business or family disputes, preservation of relationships can be a key benefit of mediation. Mediation helps participants focus on effectively communicating with each other as opposed to attacking each other.

Above are few benefits that can be observed in mediation of which I am sure the same were in the mind of the Legislature who finally decided to amend the provisions of Mediation and Arbitration Procedure under the Civil Procedure Code and provide it to be mandatory.

Thus, failure to conduct mediation vitiates the judgment and proceedings of the trial court, which in the instant matter this only ground is suffice to dispose the appeal as I invoke my revisionary powers under section 44 (1)

(b) of the Magistrates Courts Act [Cap. 11 R.E 2019] nullifying the Judgment and Decree that, the trial court passed.

In the circumstance, I remit the file for re-trial before another Magistrate with further directive that, the same should be placed for mediation before hearing. No order as to the cost.

It is so ordered.



NK
M. L. KOMBA
JUDGE

2nd March, 2023