IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL N0. 93 OF 2022

(Arising from Civil Case No. 178 of 2018 from the Resident Magistrate Court Dar es Salaam at Kisutu, Before Hon. E.M Kassian, PRM dated 23rd March 2022)

NATION MEDIA GROUP LIMITED..... APPELLANT

VERSUS

MKOMBOZI COMMERCIAL BANK PLC.....1stRESPONDENT

NATION MEDIA GROUP.....2nd RESPONDENT

GERVAS BERNARD LYENDA.....3rd RESPONDENT

JAMES JAMES NG'AMBA.....4th RESPONDENT

BENARD MTOLELA.....5th RESPONDENT

MAGDALENA MIGUTA MIKOMANGWA.....6th RESPONDENT

JUDGMENT

6th April & 16th June 2023

MKWIZU, J: -

The appellant is a losing party in Civil case No 93 of 2022. Her claims against the respondents jointly and severally are for among other things payment of 200,000,000, a financial loss suffered as a result of gross negligence of the 1st respondent in authorizing the 2nd to 6th respondent to open an account in the name NATION MEDIA GROUP and general damages at the tune of one billion Tshs.

The story behind this claim is simple. It is asserted that in 2015, the 1st respondent permitted the 2nd to 6th respondent to open a bank account in

the 1st respondent's Banks in the name of the NATIONAL MEDIA GROUP through which the appellant's advertisement claims from her clients adding to 200,000,000Tshs was channeled and paid without the knowledge and authorization of the appellant's directors and shareholders exposing the appellant to a great loss.

In the plaints, the 1st respondent was blamed for having caused the loss for failure to act diligently in authenticating the 2nd respondent during the opening of the said account. The claims were in the end dismissed for lacking merit. The appellant is unhappy. She has appealed to this court on the following grounds 5 of appeal:

1. The trial court erred in law and fact by delivering judgment and decree in favour of the Respondent while the Appellant proved its case on the balance of probabilities.
2. The trial court erred in law and fact by giving judgment and decree for basing its decisions on wrong assumptions of the law and facts which were brought before the court.
3. The trial court erred in law and facts for not taking into consideration the evidence which proved the plaintiff's case.
4. The trial court erred in law and facts for failure to analyze issues that were raised and confined itself to the wrong angle of point of decision of the case.
5. The trial court erred in law and facts for not issuing judgment against the 2nd to 6th respondents who did not appear before the court while the plaintiff proved his case against them.

When the matter came before me for hearing appellant was represented by Mr. Amos Nkwera advocate, Mr Daibu Kambo advocate for the 1st

respondent while the rest of the respondents were absent in court. It was ordered that the appeal be argued by written submission. The Appellant and 1st Respondent have filed their written submissions and the rest of the respondents have not responded to the court order hence this *ex-parte* judgment against the 2nd, 3rd, 4th 5th, and 6th respondent.

Arguing the 1st and 3rd grounds of appeal together, the appellant's counsel blamed the trial court for failure to uphold the overwhelming evidence adduced by the appellant. Referring to pages 47 and 48 of the trial court's typed proceedings, the learned counsel contended that the facts of there being a bank account opened by the Respondents including the 3rd Respondent who was their employee with a name resembling the Appellant's name aimed at fraudulently channeling the Appellant's client's sale payments to the 1st Respondent account supported by Exhibit P2 remained unchallenged. Citing the provisions of section 110 of the Law of Evidence Act Cap 6 R.E 2022; the cases of **Berelia Karangirangi Vs Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 CAT at Mwanza, **Hamed Said Vs Mohamed Mbilu** [1984] TLR 113 and John **Rwonga Vs Salimu Ngozi**, Land Appeal No 31 of 2017 HC (unreported) he said, the appellant's evidence was heavier than that of the respondents.

He on the second ground of appeal challenged the trial court's decision for basing on wrong assumptions of the law and facts which were brought before the Court. His contention was that the drawing of an adverse inference by the trial for failure by the appellant to call a witness who made payment to the 2nd Respondent was erroneously arrived at because the documentary evidence admitted as Exhibit P2 and P3 were enough to prove the case and there was no evidence brought to contradict the same.

He stated that the Principle of Adverse inference applies where the uncalled person is a material witness to the case and within. He cited the case of **Azizi Abdallah Vs Republic** [1991] TLR 71. To him, the uncalled witness, in this case, was not a material witness because he had a similar testimony to that of PW1 and therefore calling him would be a waste of the Court's precious time and it wouldn't have helped the Appellant's case. He supported his arguments with the provisions of section 143 of the Evidence Act, and the case of **Siaba S/O Mswaki Vs Republic** Criminal Appeal No. 401 of 2019 [2021] (Unreported) pressing that, the case is not proved by the Number of witnesses but rather the credibility and weight of the evidence.

The fourth ground criticized the trial court's decision for confining to a wrong point of decision. His point here was, while the court had in the trial framed three issues for determination, neither of them was analyzed or decided contrary to the requirement of Order XX Rule 5 of the Civil Procedure Code Cap 33 R.E 2019. Instead of answering the issues framed during the Final Pretrial Conference, the trial Court jumped to the conclusion that the Appellant did not prove its case on the required standards. To fortify his submission, he referred the court to the decision of **Jasson Samson Rweikiza Vs Novatus Rwechungura Nkwama** Civil Appeal No. 305 of 2020 [2021]; **Sheikh Ahmed Said Vs The Registered Trustees Of Manyema Masjid** [2005] TLR 61 and **Barclays Bank (T) Ltd Vs Ayyam Matesa**, Civil Appeal No. 255 of 2017 stressing that failure to analyze, discuss and conclude the framed issues did not only bring about injustice to the parties but also violates the procedural requirement, the consequence of which renders the impugned judgment fatal defective.

In the 5th ground of appeal, the appellant's counsel criticized the trial Court for not issuing a judgment against the 2nd to 6th Respondents who did not appear before the Court. He stated that the appellant's evidence through PW1 was very clear that the account at the 1st Respondent's bank opened by the name of the 2nd Respondent was opened by the 2nd to 6th Respondent and that the 3rd Respondent is the one who tricked their client to deposit the money that they owed the Appellant into the 2nd Respondent's account, the testimony that was never disputed by the 3rd to 6th Respondents who deliberately defaulted to enter appearance despite of them being served with summons. He said it was a total misdirection by the Trial Magistrate to decide that the case was not proved against the 2nd to 6th Respondents.

Responding to the 1st and 3rd grounds of appeal, 1st Respondent's counsel said, the Appellant failed to prove that banks must conduct due diligence to open an account to its clients and that she incurred any loss. The decision on **Berelia Karangirangi V.S Asteria Nyalwambwa** Civil Appeal No. 237 of 2017 (CAT- unreported) and **Zuberi Augustino V. Anicet Mugabe** [1992] TLR 137 were cited in support of this contention.

He explained that the loss suffered was pleaded but not proved. The Plaintiff/Appellant claims to have suffered the loss of TZS 2000,000,000/- as the sum which she could have obtained if not for the alleged fraud by the Defendants/ Respondents but did not produce the audit report before the trial court to substantiate such claims. He relied on the established principle that once a claim for a specific item is made, that claim must be strictly proved, or else there would be no difference between a specific claim and a general one as stated in the case of **Masolele General**

Agencies V. Africa Inland Church Tanzania [1994] TLR 192; and **Strabag International (Gmbh V. Adinani Sabuni**, Civil Appeal No. 241 of 2018 (cat- Unreported).

On the second ground, the respondent counsel was of the view that the trial magistrate's decision was justified, it reached a conclusion based on facts and evidence presented to it. Citing the case of **Hemed Said V. Mohamed Mbilu** (1984) TLR 113 he said, where for undisclosed reasons a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness were called, they could have given evidence contrary to the party interests.

Arguing ground 4th respondent counsel said, Judgment writing is an art, and it differs from one judge/magistrate to another, there is no hard and fast rule on that provided that it adheres to the legal guidelines on the content of a judgment. And therefore, it is wrong to challenge the skills of other judge or magistrate just because their writing skill is different from what the appellant thinks fits. The decision of **Issa Juma Magono And Another Vs Athawal's Transport And Timber Ltd And Another** Civil Appeal No. 22 OF 2018 (unreported) cited in this point arguing the impugned judgment is well spelled and detailed upon which it was correctly constructed as it contains all the necessary ingredients of a judgment as required by the law.

His response to ground 5 was that burden of proof lies upon the one alleges. Since the Appellant had at the trial court failed to prove the case, the case had to fail against all the respondents, The trial court could not issue a judgment against the 2nd to 6th Respondent while the Appellant

had failed to prove the claims against any of the Respondents. He prayed for the dismissal of the suit with costs.

In his rejoinder, the Appellant insisted that she managed to establish her claims to the required standards. The rest of her submissions were a reiteration of her submissions in chief with a prayer to have the appeal allowed with costs.

I have carefully considered the submissions of the parties, and I will begin with the fourth ground. On this ground, the trial court is being faulted for failure to determine the issues framed during the trial. I have revisited the trial court's records and the impugned decision. The appellant's complaint on this ground is laudable. The appellant's claim was based on fraud committed by the 2nd to 6th respondents supported by gross negligence by the 1st respondent by allowing the opening of an illegal account in the name of the Appellant to facilitate the diversion of the appellant's client's money that resulted to the claimed actual loss of 200,000,000 Tshs.

The claim was denied by the respondents. It was averred in the 1st defendant's written statement of defence that the 2nd respondent is a different entity from the appellant. She said, NATIONA MEDIA GROUP to whom the authority to open an account was given is just a group of people with a constitution not registered to BRELLA while the appellant is NATIONA MEDIAL GROUP LIMITED, a limited liability company incorporated in Kenya and operating in Tanzania by virtual of compliance issued by the BRELA and therefore Banking systemin would not at any rate accept payment made to the appellant to me made through the 2nd respondent a different entity altogether. That the authenticity and reliability of the 2nd respondent were established before the group was

allowed to open an account and that the appellant's directors/ shareholders had zero rights over the 2nd respondent. She also disputed any illegal transaction channeled through the 2nd respondent's account to her knowledge. The 3rd respondent WSD was also a denial of the claim by the appellant. The rest of the respondents were not available and hence the proceedings were conducted *ex-parte* against them.

During the final pre-trial and scheduling conference and in compliance with Order XIV rule 1 (5) and 3 of the CPC, the trial court framed the following three issues for determination:

a) Whether the 1st defendant acted negligently in opening an account in the name of National Media Group by the other defendants.
b) Whether the plaintiff has suffered loss and
c) What are the reliefs the parties are entitled to?

Parties were then allowed to lead evidence in support of their respective position. In its judgment, the trial court did not refer to the issues framed. Having summarized the evidence by both parties, the trial court moved ahead to conclude that the plaintiff has failed to establish her claim without a specific finding on the issues framed. Would this omission be fatal?

Order XIV rule 1(5) of the Civil Procedure Code [Cap 33 R.E. 2019] requires that issues for determination be framed before/at the commencement of the first hearing of the case. And it is settled that a court should base its decisions on the issues framed. There are a plethora of authorities on this point including the cited case of **Jasson Samson**

Rweikiza Vs Novatus Rwechungura Nkwama (supra), where it was held.

> *"We are alive to the time-bound principle of pleadings that each issue framed should be defiantly resolved and that a judge is obliged to decide on every issue framed to resolve the dispute..."*

Emphasizing the same issue the court in **Sheikh Ahmed Said Vs The Registered Trustees Of Manyema Masjid** (supra) said: -

> *"It is an elementary principle of pleadings that each issue framed should be resolved one way or the other. **A trial court must make a specific finding on every issue framed in a case, even where some of the issues cover the same aspect."** (emphasis added)*

I agree with the respondent's counsel's arguments that Magistrates /judges have different styles of judgment writing and one should not be censured for sticking to his style provided that the decision arrived at embodies all the essential prerequisites of a judgment. My concern is however whether the adopted style in this case has accommodated the judgment writing prerequisites. I have evaluated the pleadings and the entire court proceedings. The first issue framed was a key on which the entire appellant claims lies. As indicated above, the appellant's claims are based on fraud and negligence committed by the respondents as phrased in paragraph 8 of the amended plaint reading thus:

> *"8. That, the plaintiff claims against the Defendants jointly and severally is for the payment of the sum of Tanzanian Shillings Two Hundred million (Tsh. 200,000,000/=), being the financial loss the plaintiff has suffered as a result of the gross*

negligence of the 1st defendant in authorizing the 2nd defendant, 3rd defendant, 4th defendant,5th defendant and 6th defendant unauthorized persons, to opening a bank account in the name of NATION MEDIA GROUP, and general damages at the tune of Tanzanian shillings one Billion (Tsh 1000,000,000/=)."

This claim was vigorously disputed by the 1st defendant who was categorical that the 2nd respondent, ***NATION MEDIA GROUP*** to whom the mandate to open and run the account was given is just a group of people with their constitution and their own objective and therefore a distinct entity from the appellant, ***NATION MEDIA GROUP LIMITED*** who is a Limited liability company incorporated in Kenya with a valid license in Tanzania. The trial court was thus, under the circumstances above, expected to begin by answering the first issue on whether the 1st defendant acted negligently in opening an account in the name of National Media Group by the other defendants. Unfortunately, this issue was never considered by the trial court. The trial court decision is found on **pages 7 and 8** of the impugned decision where it says:

"Having heard from both parties, this honorable court b is of the decision that, the plaintiff, in this case, failed to certain(sic) the basis of their case by failing to prove their case beyond the balance of probability, as to the fact that, they mentioned that the 3rd defendant was an employee of the plaintiff but failed to produce the employment letter or any other prof to show such existence this is against the section 110 of the Evidence Act (Cap 6 R.E. 2019)

Furthermore, the plaintiff claimed forged invoices by the defendants which led the customers to pay the money which they were legally entitled to be paid to them but again they failed to produce to court such invoices to prove their case, moreover, the plaintiff also claimed to have suffered a loss of Tshs 200,000,000/- as the money which they could have obtained in the case were not fraudulently stolen by the defendants but still, they did not produce the audit report before this honorable court to substantiate such claims/ outcome.

In addition to this, the plaintiff also claimed that there having a witness who made such claimed payment to the defendant but also they had failed to call such a witness to testify before this honorable court which makes this court draw a negative inference against the plaintiff as provided under Section 127(1) of the Cap 6 R.E 2019). In addition to that, the plaintiff also failed to produce before this honorable court the audit report which shows how the amount claimed is generated up to 200,000,000/- all this makes the plaintiff left a lot of gaps to be filed in his case with a lot of doubts while it should be born in mind that, the standard of proof between the criminal and civil case is different in a criminal case the standard of proof is beyond reasonable doubts while in civil cases is on the balance of probabilities."

The entire decision was directed at answering the second and third issues leaving the 1st issues unresolved. This was, in my view, fatal. Underlining the court's duty to resolve all the issues arising out of the pleadings, the

Court in **Kukal Properties Development Ltd v. Maloo and Others**, (1990-1994) EA 281 said, a court of law has a legal obligation to resolve all issues arising out of pleadings, and failure to do so constitutes an abdication of duty to procedurally adjudicate disputes presented to the court.

Guided by the above, authorities I am satisfied that the trial court's omission to resolve the key issue in this matter is not just a matter of writing style adopted by the trial magistrate but a fatal irregularity that vitiates the entire decision.

In the upshot, the first ground of appeal is found to have merit. As this ground suffices to dispose of the appeal, I will, on this sole ground, allow the appeal quashes the trial court's judgment and set aside the resultant's decree. It is subsequently ordered that the case file be remitted back to the trial court for composing a fresh judgment in accordance with the law.

Dated and delivered at **Dar es Salaam** this 16th Day of **June 2023**.

E. Y Mkwizu
Judge
16/6/2023