IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 13 OF 2022

MWINYIHAJI SHAABAMIZA ..... APPELLANT

VERSUS

ABDALLAH SAID MABOYU ..... RESPONDENT

(Arising from the decision of the District Court of Kinondoni at Kinondoni in Civil Appeal No. 97 of 2021)

JUDGMENT

16th June, 2023

KISANYA, J.:

This appeal arises from the decision of the District Court of Kinondoni at Kinondoni (the first appellate court) in Civil Appeal No. 97 of 2021, in the exercise of its appellate jurisdiction against the decision of the Primary Court of Magomeni at Magomeni (the trial court) in Civil Case No. 103 of 2021.

To appreciate the essence of the appeal, I find it necessary to set out its factual background, albeit briefly. The respondent, Abdallah Said Maboyu was the plaintiff in Civil Case No. 103 of 2021 filed in the trial court, in which the appellant, Mwinyihaji Shaabamiza was the defendant. The respondent's claim against the appellant was for payment of TZS 14,000,000/ arising from the decision of the District Court of Kinondoni in Criminal Case No. 573 of 2014. The appellant did not dispute to the claim. After considering facts

given by the respondent, the trial court held the view that the appellant had admitted the claim. It went on entering a judgment on admission in favour of the respondent.

Not amused, the appellant appealed to the first appellate court. One of the grounds of appeal was to the effect that the trial court had no jurisdiction to entertain the matter. However, his appeal was dismissed by the first appellate court for want of merit.

Still aggrieved, the appellant appealed to this Court on six grounds of appeal. For the reasons to be noticed in this ruling, I find it apt to reproduce the first ground only. It reads:

> *That, the appellate Magistrate erred in both law and facts in deciding that the Primary Court has jurisdiction to entertain the matter rooted from the District Court.*

When the matter was called on for hearing on 14th April, 2023, the appellant was represented by Mr. Nickson Ludovic, learned advocate, where the respondent was represented by Mr. Munishi, also learned advocate. On that day, this Court granted the prayer by the respondent's counsel, for the hearing to proceed by way of written submission. It turned out that, the respondent was not served with the written submissions in chief on the ground that his counsel's address was not known to the appellant. Therefore,

when the matter came for mention on 28th April, 2023, this Court found it just to order as follows:

1. *The respondent be served with the written submission in chief.*
2. *Reply submission be filed on or before 12/05/2023.*
3. *Rejoinder submission if any be filed on or before 19/05/2023.*
4. *Ruling on 16/2023*.

Following the above order, the respondent filed his reply submission on 12th May, 2023. Three days later, on 16th May, 2023, the respondent lodged a notice of preliminary objection on the following point of law:

> *"That the appeal is purely defective and bad in law as it contravenes Rules and principle governing appeals as the appeal lies from judgment on admission."*

It is settled law in this jurisdiction that the practice of filing written submissions is equivalent to oral hearing. See for instance, the case of **Kelvin Thobias Mvenile vs R**, Criminal Appeal No. 32 of 2022, HCT at Mbeya (unreported) in which this Court cited with approval the case of **P3225 LT Idahya Maganga Gregory vs the Judge Advocate General**, Court Martial Appeal No. 2 of 2002 where it was held as follows:

> *"It is now settled in our jurisdiction that the practice of filing written submission is tantamount to hearing."*

In view of the above stated position, I hold the view that the respondent was duly heard on 12th May, 2023 when he filed his reply submission. On that account, I find no need of recalling and hearing the parties on objection which was raised after the parties had been heard on merit.

Reverting to the merit of the appeal, ground one in particular, the appellant faults the first appellate court for holding that the trial court had jurisdiction to entertain the matter.

Mr. Ludovic was in agreement with the first appellate court that, under section 18(1)(a)(ii) of the Magistrates Courts Act, Cap 11, R.E. 2019 (the MCA), the trial court (primary court) had pecuniary jurisdiction in respect of TZS 14,000,000 claimed before it by the respondent. However, he urged me to consider that the respondent's claim for payment of TZS 14,000,000 was founded on the compensation order of the District Court of Kinondoni in Criminal Case No. 573 of 2014. It was his argument that, under section 328 of the Criminal Procedure Act, Cap. 20, R.E. 2019, the proper recourse was for the respondent to apply, in the District Court, seeking execution of the compensation order, instead of instituting a fresh suit in the trial court.

Making reference to section 9 of the Civil Procedure Code (Cap. 33, R.E. 2019) and the cases of **Paniel Lotha V. Tanaki And Others** [2003] TLR 312 and **Esterignas Luambano V. Adriano Gedam Kipalile,** Civil

Appeal No. 91 of 2014, CAT at Zanzibar (unreported), the learned counsel submitted that the matter before the trial court was *res judicata.*

In his response, Mr. Munishi did not dispute that, in Criminal Case No. 573 of 2014, the District Court of Kinondoni had ordered the appellant to pay the respondent compensation of TZS 14,000,000. He submitted that, following the appellant's failure to pay the compensation, the only remedy for the respondent was to recover his money by filing a civil suit in the court with competent jurisdiction to entertain the claim of TZS 14,000,000.

The learned counsel further submitted that the suit was not *res-judicata* as contended by the appellant's counsel. His argument was based on the reasons that the parties in the former case (Criminal Case No. 573 of 2014) and the suit before the trial court were different; and that, section 9 of the CPC relied upon by the appellant does not apply in the primary court. To bolster his argument, he cited the case of **Julius Madaraka Mashauri vs Mua Mashauri Makaranga**, Civil Appeal No. 27 of 2021.

Mr. Munishi was aware of the provision of section 348 of the CPA which provide for payment of compensation to the victim of crime. However, he submitted that the said provision does not bar filing of civil suit in the court with competent jurisdiction to entertain the matter. Citing section 350 of the CPA, he reiterated that the respondent was entitled to institute the suit because the appellant had paid nothing to the respondent.

Rejoining, Mr. Ludovick maintained his assertion that the proper cause was for the respondent to execute the compensation order. He was of the view there was no need of having two judgments awarding the same amount. To cement his argument, he referred the Court to the case of **Fredy Kweka and 3 Others vs Abdallah Njema and Another**, Land Case No. 352 of 2015 (unreported).

I have dutifully examined the record and considered the rival arguments by the parties. The ground that the suit filed before the trial court was *res-judicata* was not listed in the memorandum of appeal instituted in this Court. It was raised and argued in the written submissions without leave of the Court. The law is settled and I need not cite any authority, that, parties are bound by their own pleadings. For that reason, I will not determine the issue whether the suit before the trial court was *res-judicata* which was because it was raised and argued without leave of the Court.

As for ground one, it is not disputed that, upon being convicted in a criminal case laid against him before the District Court of Kinondoni, the appellant was, among others, ordered to pay to the respondent compensation of TZS 14,000,000. Further, Mr. Munishi does not dispute that the respondent instituted a civil suit to claim TZS 14,000,000 which was awarded to him as compensation in the said criminal case. Indeed, such fact

is reflected in the particulars of the claim (Form No. MCA/63) lodged in the trial court, as follows:

> *"**Andika madai na habari fupi ya kwetu ya mdai na lini yalitokea**:*
>
> *MDAI ANAFUNGUA SHAURI LA MADAI YA PESA SHILINGI MILIONI KUMI NA NNE 14,000,000/=. DAI HILO LINATOKANA NA KESI YA JINAI NAMBA 573/2014 ILIYOHUKUMIWA NA MAHAKAMA YA WILAYA AMBAYO ALIHUKUMIWA MIAKA MITANO AU ALIPE FAINI YA SHILINGI LAKI TANO AKIMALIZA.*
>
> ***Kiasi kinachodaiwa**: HIVYO AMLIPE MLALAMIKAJI PESA ALIYOTAPELI SHILINGI MILIONI KUMI NA NNE 14,000,000. HIVYO MDAI ANAFUNGUA SHAURI LA MADAI ILI AWEZE KULIPWA PESA ZAKE SHILINGI MILIONI KUMI NA NNE."*

Furthermore, when the trial court invited the respondent to state or give details of his claim, he stated that:

> "*Ninamdai SU1 kiasi cha TZS 14m ambazo kimsingi namwakilisha Zubari Ahmada Mwinge kupitia power of attorney iliyosajiliwa mnamo tarehe 05/06/2021.*
>
> *Fedha hizo juu ni deni kutokana na shauri la jinai (W) No. 573/2014 ambalo SU1 alitiwa hatiani na uamuzi kuwa SU1 alipe Tsh 14m ambazo alichukuwa kwa njia ya udanganyifu toka kwa SM1.*

Naomba kuwasilisha vielelezo vya hukumu hiyo na ninaomba vichukuliwa kama sehemu ya ushahidi katika shauri hili."

On the foregoing reason, the issue is whether the trial court had jurisdiction to entertain the matter. Both counsel referred this Court to section 348 (1) of the CPA which stipulates:

"348.-(1) Where an accused person is convicted by any court of any offence not punishable with death and it appears from the evidence that some other person, whether or not he is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation, in kind or in money, as the court deems fair and reasonable."

My understanding of the above provision is that, a criminal court is enjoined to order the convicted person to compensate the victim of crime who suffers either material loss, or personal injury, which is recoverable in civil suit. I am bolstered by the case of **R. vs Tilusubya Mwishaki and Others** (1983) TLR 422, where it was held that compensation in criminal matter is awarded in the following circumstances:

(a) That the victim of the crime must have suffered either material loss, or personal injury, in consequence of the offence committed and charged, and

(b) *That substantial compensation is in the opinion of the court recoverable by the victim of the offence in a civil suit*.'

In the instant case, Mr. Ludovick is of the view that, the amount claimed in criminal case could not be claimed in the civil suit instituted before the trial court. On the adversary side, Mr. Munishi argues that the respondent was not barred from instituting the same claim in a court with competent jurisdiction because the appellant failed to pay compensation. This gives rise to the question whether compensation order issued to the victim of crime in criminal proceedings is executable by filing a civil case. Luckily, this issue was well addressed in the case of **CRSG Tanzania Trading Company Limited vs Ullaya Shomari Mohamed t/a Ushomo Enterprise,** Civil Case No. 37 of 2022, HCT at DSM (unreported), when my brother Kakolaki, J, held as follows:

> *"The answer to the issue in my firm opinion is the big NO. Section 349 of the CPA provides for the mode of recovery of compensation awarded in criminal proceedings to be in the like manner obtained for recovery of penalty, no doubt through warrant of levy as*

any default in compliance with court's order by the party, is punishable with six (6) months imprisonment.

…unless the plaintiff has more claims other than compensation of Tshs. 569,594,000/-, which is specific damages for the purposes of determination of pecuniary jurisdiction of this Court, the amount which is already awarded in Economic Case No. 3 of 2019, I hold he cannot maintain civil action on the same subject matter. To allow him therefore to prosecute this suit based on claims already awarded by Criminal Court to the full satisfaction is tantamount to reducing down the status of compensation orders awarded in criminal matter which orders are executable like the ones obtained in civil matter."

I subscribe to the above position. It tells it all and I need not add more. Since the respondent did not claim for other relief other than payment of TZS 14,000,000 which was awarded as compensation in a criminal court, the suit before the trial court was untenable. The proper cause was for the respondent to make use of the procedure for recovery of the compensation under the Criminal Procedure Act and not to lodge a fresh suit.

In the light of the foregoing, I agree with the appellant's counsel that the trial court had no mandate or jurisdiction to entertain a claim which was required to be executed under the provisions of Criminal Procedure Act. As

the issue of jurisdiction goes to the root of the case, I find no need of reproducing and considering other grounds of appeal.

On account of what I have endeavored to discuss, I allow the appeal and quash and nullify the proceedings, judgments and decree/order of the trial court and first appellate court. The respondent may, if still interested to pursue the matter, execute the compensation order issued by the criminal court in accordance with the law. As the matter arises from a criminal case, I refrain from making an order as to costs. Thus, each party shall bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 16th day of June, 2023.

S.E. KISANYA
JUDGE