

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IRINGA SUB REGISTRY)
AT IRINGA**

CIVIL APPEAL NO. 4 OF 2023

*(Originating from Civil Case No. 5 of 2021 of the Resident Magistrate's Court of Njombe
before Hon. I.R. Mlowe, SRM)*

TANGANYIKA WATTLE COMPANY LIMITED..... APPELLANT

VERSUS

TANZANIA AUTOMOTIVE MAINTENANCE LIMITED..... RESPONDENT

JUDGMENT

20th July & 5th October, 2023

I.C MUGETA, J:

For reasons to be apparent shortly I shall not deal with the all the grounds of appeal.

The respondent sued the appellant, among other reliefs, for payment of Tshs. 51,969,000/= being unpaid specific damages for services rendered. The appellant filed a counter claim. At the trial the appellant tendered documents intended to object the plaint and to prove the counter claim. They include exhibits D1, D2 and D5. In its judgment, without hearing the parties, the trial court expunged the same for being irrelevant.

Two of the eight grounds of appeal are that the trial court erred to expunge the exhibits after admission without hearing the parties on the grounds for expunging the same and that the trial court did not

determine the counter claim. They are the 5th and 4th grounds of appeal respectively.

Erick Mhimba, learned advocate, represents the appellant. In his written submissions he reiterated the two complaints. Claus Mwainoma for the respondent argued that the trial court did not expunge those exhibits. It just disregarded them. Regarding the counter-claim he submitted that as there were no separate issues framed for the counter-claim and since all issues framed were determined, the counter claim was decided too.

On whether the exhibits were expunged or not, let the trial court judgment speak for itself per page 14:

"To cum it all while expunging exhibit D1, D2 and D5 for being irrelevant to the case, am (sic) convinced that the plaintiff has proved the case to the balance of probabilities ..."

Considering the above quote, there is no gainsaying that the trial court expunged the appellant's exhibits from the record. It did not disregard them as submitted by counsel for the respondent. Having admitted them, to expunge them at the judgment stage amounts to condemning the appellant unheard. In **Festo Japhet Mkilana v. National bank of Commerce Limited**, Civil Appeal No. 324 of 2019,

Court of Appeal – Dar es Salaam (unreported) the court was faced with a similar situation. It held at page 6:

"... we are settled in our minds that the trial court's decision to expunge exhibit P1 from record for want of stamp duty, as it happened, adversely affected the parties and abrogated the Constitutional fundamental right to be heard".

On the counter claim, I agree with counsel for the respondent that joint issues were framed to determine both the plaint and the counter claim. However, the judgment is silent on the fate of the counter claim: whether the same has been allowed or disallowed. This is an irregularity.

For the foregoing, I quash the judgment of the trial court for being incompetent. Relevance of exhibits is determined at admission stage. If their irrelevance was discovered at the judgment stage, the parties ought to have been consulted. It was wrong to condemn the appellant unheard. As submitted by counsel for the appellant, those exhibits are relevant as far as the counter claim is concerned. I remit the file to the trial court to compose a fresh judgment before the same magistrate after hearing the parties on the issue raised *suo moto* regarding exhibits D1, D2 and D5 and to state the fate of the counter claim. This is the reason I did not consider the remaining grounds of appeal which

touches on the merits of the case. I give no orders as to cost since no party can be condemned for errors accessioned by the court. I so order.



Mugeta

I.C. MUGETA

JUDGE

5/10/2023

Court: Judgment delivered in chambers in the presence of the Erick Mhimba, learned advocate for the appellant and Lazaro Hukumu, learned advocate holding brief for Claus Thomas, learned advocate for the respondent.

Sgd. I.C. MUGETA

JUDGE

5/10/2023