

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

CIVIL APPEAL NO. 118 OF 2022

(Originating from the Ex- Parte Judgment and Decree of the District Court of Kinondoni at Kinondoni in Civil Case No. 209 of 2021 before Hon. E.R. RWEHUMBIZA- PRM)

DEXTER INSURANCE AGENCY..... APPELLANT

VERSUS

WAUBANI MOHAMED LINYAMA.....RESPONDENT

JUDGMENT

MKWIZU J:-

This appeal originates from an *ex-parte* judgment in Civil case No 209 of 2021 delivered on 10 August 2022 at Kinondoni District Court. In that original suit, the Respondent herein had complained of unauthorized use of his photographs for commercial benefit by the Appellant. The Appellant denied the claim but could not participate in the trial after she had defaulted an appearance on mediation that resulted in an order for an *ex-parte* hearing against her.

It is on the records that the *ex-parte* hearing ended in favor of the plaintiff, now, the respondent. The trial court held in the affirmative that the appellant's publication of the respondent's photos was without a mandate/consent followed by an order restraining the defendant and whoever acting under his capacity from broadcasting, publishing the plaintiff's image in their social media accounts or to any other social media platform and the plaintiff was lastly awarded 150,000,000 general

damages, interest at 7% court rate from judgment date to its full payment and costs of the suit.

Aggrieved, the appellant filed a Memorandum of appeal advancing seven grounds of appeal as follows;

- 1. That the trial magistrate grossly erred in law and facts by relying intensively on exhibit P-2 being an image presumed to be posted by the appellant which carries many discrepancies as it does not reflect the appellant rather it introduced other strangers to the suit parting in the names of Dexter Insurance Bima Chap Chap and Dexter _ Insurance.*
- 2. That the trial magistrate grossly erred in law and facts by failing to rule that Dexter Insurance Bima Chap Chap and Dexter _ Insurance are two persons different from the Appellant.*
- 3. That the trial magistrate grossly erred in law and facts by relying on the written statement of defense filed by the Appellant herein which was later on "struck out" upon the Appellant's failure to attend mediation.*
- 4. That in not considering the relevancy and authenticity of evidence tendered in court, the trial magistrate grossly erred in law and fact by holding that the Appellant pleaded wrong information in social media which has an uncontrolled number of visitors number in the absence of requisite and cogent evidence.*
- 5. That the successor trial magistrate who took over the proceedings in District Court of Kinondoni at Kinondoni in Civil Case No 209 of 2021 and proceeded to finalize it, grossly erred in law by failing to record reasons for the takeover.*

6. *That the trial magistrate grossly erred in law and purported to hold without cogent evidence that the respondent (to this appeal) employer may decide to terminate his employment or fails to renew on a fixed basis.*
7. *That the trial magistrate grossly erred in law and facts by failing to consider and or to properly evaluate the evidence on the extent the respondent herein claims to suffer either social, psychological, economic, or any other kind of injury as a result of the purported intrusion of personal privacy on his identity or image if there was any by the Appellant herein and thereby employed a wrong principle of law on general damages thus arrived to an extortionate quantum of general damages.*

Hearing of the appeal proceeded by way of written submission. The appellant enjoyed the legal service of Mr. Allen Nanyaro learned advocate while the respondent had the services of Mr. Makole Ferdinand also a learned advocate.

Mr Nanyaro began his submissions by abandoning the fifth ground of appeal in his Memorandum of Appeal. Arguing the first and third grounds of appeal together Mr. Nanyaro blamed the trial magistrates for relying intensively on exhibit P -2 an Image presumed to be posted by the Appellant for two reasons (1) that the exhibit is faulty for introducing other strangers to the suit claiming that DEXTER INSURANCE BIMA CHAP CHAP and DEXTER_INSURANCE, are quite distinct from that of the appellant DEXTER INSURANCE AGENCY. The cases on **Stella Edward Magai Vs Bulyanhulu Gold Mine**, Revision No214 of 2020, HC, Labour Division at DSM, and **National Oil Vs Aloyce Hobokela**, Misc Labour Application

No 212 of 2013, HC (Labour Division)(All unreported) were cited on the point

His second point was that exhibit P2 was admitted without a foundation required contrary to section 64 A (3) of the Tanzania Evidence Act [CAP. 6 RE. 2022], 18 (2) of the Electronic Transaction Act [CAP. 442 RE. 2022].

On the third ground of appeal, the Respondent blamed the trial Magistrate for relying on the Written Statement of Defense which was “struck out” upon the Appellant’s failure to attend mediation. Referring to the court to pages 14, 15, 16, and 17 of the trial court proceedings, Mr. Nanyaro said, the suit was on November 11, 2021, ordered to proceed *ex -parte* after failure by the appellant to appear in a mediation session and therefore the reference of the contents of the WSD in the trial courts judgment was irregular.

On the fourth and sixth grounds, the appellant's counsel argued that the trial court erred in law by holding the appellant responsible for pleading wrong information on social media which had an uncontrolled number of visitors and that had endangered the respondent's employment without cogent evidence. Citing to the court the case of **Paulina Samson Ndawavya V. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 [Unreported] the appellant’s counsel stressed that the trial court was required to obtain proof ascertaining the existence of the 13400 followers and the Instagram account owned and published by the appellant.

On the last ground of appeal, the appellant counsels attacked the trial magistrate for failure to properly evaluate the evidence in connection to the respondent's claims as to social, psychological, economic, or any other injury. Citing the case of Tanzania **Saruji Corporation Vs African Marble Company Ltd** (2004) TLR 155, **Loy Job Mbwilo Vs. Richard Mwera Matiku and Another**, Civil Appeal 7 OF 2018 and **Deogras John Marando V Managing Director, Tanzania Beijing Huayuan Security Guard Service Co. Ltd**, Civil Appeal No. 110 OF 2018, (All unreported) Mr. Nanyaro said, had the trial Magistrate taken the trouble to consider the evidence properly he could not have reached to such an exorbitant number of general damages [i.e., TSHS. 150,000,000. He implored the court to allow the appeal, nullify the whole proceedings, and quash the *Ex-parte* Judgment and Decree of the District Court of Kinondoni, with costs.

Responding to grounds one and two respondents' counsel said that the argument that the Dexter Insurance Bima Chap Chap and Dexter Insurance are strangers to the suit claim and that they are distinct and different persons from the appellant is not supported by the records. If anything, then it was expected that the appellant could have denied this fact in her Written Statement of Defence (WSD) that the names Dexter Insurance Bima Chap Chap and Dexter_Insurance refer to a different entity or body different from herself.

The respondent's counsel submitted further that the assertion in the WSD that the alleged publication did not violate the privacy right of the respondent because the likeness or image of the respondent had already gone viral and that she is a prominent insurance agency that earns business in terms of the quality of the services it provides to her customers

implies acceptance that she published the image or likeness of the respondent through her Instagram account registered in the name of Dexter_Insurance. He also maintained that failure by the appellant to deny that Dexter_Insurance is not her Instagram Account in her WSD entitled the trial court to draw an inference in favor of the respondent in terms of section 122 of the Evidence Act. He insisted that the names Dexter_Insurance and Dexter Insurance Bima Chap Chap refer to no one than the appellant herein and therefore grounds 1 and 2 are of no substance and must outright collapse.

On ground three, the respondent's counsel said, there was no order striking out the defence (WSD) as argued by the appellant, but rather an order for an *ex-parte* hearing. To him, non-appearance on mediation does not necessarily call for the striking out of the WSD. The matter may under order VIII Rule 29 be ordered to proceed *ex parte* without necessarily striking out the defence. The word 'may' as used in the provision implies that it is not mandatory. He supported the trial court's order for an *ex-parte* hearing leaving the WSD intact viewing reference made by the trial court to the WSD as a correct position.

On grounds 4 and 6 the Respondent's counsel was in support of the trial court's findings stating that the Respondent managed to establish infringement of his privacy, that there was a publication of his likeness or image by the appellant made without his consent the facts that was not disputed by the appellant's WSD. To him, a single witness was enough to establish the facts as no specific number of witnesses was required to prove the case or certain facts. The publication by the appellant was proved and there was no doubt that it is the appellant who owns and

manages the said Instagram Account with a total of 13,400 followers therefore it was probable to draw an inference that the appellant obtained profit out of the publication.

The respondent counsel submitted further that in exhibit P-2 the appellant asked her followers to tag friends with the caption “kila chombo cha kubba Abiria kinalipiwa Bima ya Abiria (passenger liabilities) ivyo endapo umepata ajali ukiwa hata kwenye bodaboda una haki ya kudai fidia aidha ya maumivu au kifo...”. which is a typical business seeking as correctly ruled by the trial court on page 10 of the judgment. He said since the issue of whether the account belongs to the appellant remained unchallenged, then the trial court was justified to adjudge in the respondent's favor.

On proof of the employment contract, the respondent's counsel said, Exhibit P-1 contained the names of the employer, which is New Force Enterprises Ltd, the name of the employee, Waubani Mohamed Linyama, and the expiry date of the said ID. Thus, the trial court was correct to find the fixed-term contract proved. He also supported the amount of TZS. 150,000,000/- awarded as general damages to the respondent.

I have closely evaluated the records, grounds of appeal, and parties' submissions. I will for the reasons to be disclosed hereunder begin with the third ground of appeal where the trial court is censured for refereeing to the WSD which was struck out by the court after failure by the respondent/ original defendant to attend mediation session.

I have perused the records. The appellant defaulted appearance on the mediation date. Advocate Rosemary John Mzee moved the Mediator Magistrate in terms of Order VIII rule 29 of the Civil Procedure Code, [Cap

33 R.E 2019] to strike out the defence. From there, the file was returned to the trial magistrate for necessary orders. On 11th May 2022 the trial Magistrate, ordered the suit to proceed *ex-parte*. The Trial court order on page 17 of the trial court records reads:

*"Since the defendant failed to appear for mediation. So this court do hereby order the case to proceed **ex-parte** for the plaintiff to produce evidence" (emphasis added)*

It is from that order that the plaintiff was led to adduce evidence that resulted in the impugned decisions subject of this appeal. As correctly argued by the respondent's counsel, under Order VIII rule 29 of the CPC the trial court has the discretion to decide on the appropriate order. The provisions read:

"Rule 29. Where it is not practicable to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator shall remit the file to the trial judge or magistrate who may-

(a) dismiss the suit, if the non-complying party is a plaintiff, or strike out the defence, if the non-complying party is a defendant.

(b) order a party to pay costs; or

(c) make any other order he deems just."

In this case, the trial court chose the hearing of the matter to proceed *ex-parte* without necessarily striking out the WSD. The appellant's query in this suit is on whether the trial court is permitted to refer to the WSD

of a party who has been barred from taking part in the proceedings by an *ex-parte* order. Respondent's counsel submissions are in support of the procedure adopted by the trial court. His contention is that having left the WSD intact, the trial court was justified to refer to the contents of the WSD when composing the judgment.

This question takes me to the definition of the word *ex-parte*. **“Ex parte” is a Latin phrase meaning “on one side only; by or for one party.”** An *ex-parte* proceeding occurs for the benefit of one party, usually without the participation of any other party (See: The Essential Law Dictionary, 1st edition Page 175). According to **Black's Law Dictionary, 9th Ed. on page 657**, the term *ex parte* means:-

"Done or made at the instance and for the benefit of one party only, and without notice to or argument by any person adversely interested; of or relating to court action taken by one party without notice to the other..." [Emphasis added]

In other words, *ex-parte* proceedings of the suit are the proceedings pursued in the absence of the defendant. The rule is that once the proceedings in the civil suit are ordered to proceed *ex-parte* unless the said order is set aside, the pleadings, documents, and evidence filed by the defendant in the suit shall not be considered by the court in deciding the suit.

The consequence of an *ex-parte* order is therefore to exclude the defendant(s) and all her pleadings from forming part of the trial. Whatever document entered in the court file by the defendant becomes redundant without any value. The practice has always been that courts in such a

situation take the evidence from the plaintiff(s) and an *ex-parte* judgment and decree is generated from the plaintiff's pleadings and evidence only. Thus, the mere fact that the WSD was not expressly marked as struck out does not make it legally valid for the court's consideration.

In this case, the trial court went amiss. Having heard the plaintiff's evidence, it went ahead to consider both the plaintiff's evidence and pleadings and the Defendants written statement of defence. In fact, the trial court's findings are premised on the unestablished written statement of defence by the defendant. See pages 5,6, 9, and 13 of the trial court's decision. On page 6 of the trial court judgment for instance the trial court said:

"...there is no single statement in the WSD that denies this fact. However, it seems to me that since the defendant did not specifically deny the fact of publication in his defense, this fact remains proved by the averment made by the plaintiff and repeatedly during the hearing of this matter. I, therefore, find that issue number one is answered in the affirmative. (Emphasis added)

This is a serious error vitiating the entire judgment and decree that emanated therefrom.

In the upshot, the third ground of appeal is found to have merit. The trial court's *ex-parte* judgment and decree in Civil Case No. 209 of 2021 dated 10th August 2022 by E. R. RWEHUMBIZA-PRM are hereby quashed and set aside. 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.

For the avoidance of doubt, the said judgment shall be composed by the same Magistrate who presided over the matter, unless there is a change of circumstances. As this ground suffices to dispose of the appeal, I will, on this sole ground, allow the appeal with costs.

DATED at DAR ES SALAAM this 8th day of SEPTEMBER 2023.



E. Y Mkwizu
Judge
8/9/2023