

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL APPEAL NO. 122 OF 2023

SALUM SAID MPOYOKA APPELLANT

VERSUS

AIRTEL TANZANIA LIMITED 1ST RESPONDENT

MBUYU DIGITAL AND CONTENT LTD 2ND RESPONDENT

JUDGMENT

30/10/2023 & 24th/11/2023

CHUMA, J.:

The appellant, Salum Said Mpoyoka, is challenging the decision of the district court of Kinondoni in Civil Case No. 296 of 2021 delivered on 6th June 2023 which was entered against the Appellant and thus in favor of the Respondents. Before embarking on the merits of the appeal, let this court briefly state the background story that gave rise to this appeal.

Before the District Court of Kinondoni, the Appellant sued the Respondents jointly and severally for payment of Tanzania Shillings One Hundred Million only (Tzs. 100, 000, 000/=) being general damages for the 1st defendant's unlawful use of the Plaintiff's artistic work titled "Mtoto wa Haramu" to further her business without any consent from the Plaintiff. The 1st Respondent denied the entire appellant's claim that neither she entered into any agreement with the Appellant nor used her artistic work.

The matter was heard by calling witnesses. The Appellant's case was supported by two witnesses and for the 1st Respondent only one witness

was called. During the trial, the Appellant tried to tender as evidence the contents of the artistic work stored in compact discs and flash disks futile. Its admissibility was vigorously challenged by the 1st Respondent based on the admissibility principles of the electronic evidence. After the hearing, the trial court dismissed the suit on the ground that, the Appellant failed to prove her case on the required standard. The Appellant being aggrieved by the decision of the trial court preferred this appeal setting forth, in the amended memorandum of appeal, four grounds as hereunder:

- 1. That, the learned trial magistrate grossly erred in law and in facts for dismissing the appellant's case after refusing to admit the appellant's evidential documents (flash disk) as exhibits which was very important in determining the truth of the case.*
- 2. That, the learned trial magistrate grossly erred in law and facts for dismissing the Appellant's case while there was a procedural irregularity during the hearing.*
- 3. That, the learned trial magistrate grossly erred in law and in facts for dismissing the appellant's case based on a wrong interpretation of sections 66 and 67 of the Evidence Act and section 18(2)(c) of the Electronic Transaction Act (Cap. 442 R.E 2002).*
- 4. That, the learned trial magistrate grossly erred in law and facts for merging issues for determination leading to denial of justice as key facts were missed out.*

The Appellant is praying before this court that, the appeal be allowed the proceedings be quashed and the judgment be set aside.

In this appeal, **Mr. Mangiteni Marwa**, advocate represented the Appellant, and **Ms. Faiza Salah**, advocate represented the 1st

Respondent and the 2nd Respondent was absent she has never entered any appearance. The appeal was argued by way of written submissions.

Arguing on the first, second, and third ground of appeal, Mr. Marwa stated that, it was not proper for the trial court to entertain the preliminary objections since they were raised from the bar and hence not properly before the court as it contravened Order VIII rule 2 and 13 of the Civil Procedure Code, [Cap. 33 R.E 2019]. Mr. Marwa was of the firm view that, it was un-procedural for a court to entertain a preliminary objection that was not raised in the written statement of defense hence procedural irregularity which denied the appellant a chance to prepare for the same as he was taken by surprise by the 1st defendant's counsel.

Mr. Marwa submitted further that, the trial court failed to interpret the relevance of section 64A of the Evidence Act [Cap. 6 R.E 2022] and section 18 of the Electronic Transaction Act, [Cap. 442 R.E 2022]. Mr. Marwa expounded his point that section 64A of the Evidence Act directs into section 18(1) of the Electronic Transactions Act which excludes other sections of the Act which could cause such contradictions leading to misinterpretation of the sections. Mr. Marwa was of the firm view that, the Plaintiff had filed his affidavit of authenticity which was a notice to the defence side hence it was not proper for the trial court to dismiss his case without consideration of the effort made by the plaintiff.

Mr. Marwa invited this court to admit the flash disk according to Order XXXIV rule 27(a), (b), and rule 28 of the Civil Procedure Code, Cap. 33 R.E 2019

In reply, Ms. Salah submitted that the appellant must distinguish between a preliminary objection raised in the pleadings and an objection raised in

the course of the hearing when tendering evidence. According to Ms. Salah, the objection on tendering of the flash disk was raised during the hearing of the Appellant's case because PW1 did not satisfy the court on the authenticity of the consent of the flash disk which was sought to be admitted as exhibit.

Ms. Salah submitted further that, the flash disk is inadmissible because in the affidavit there were no explanations on how the integrity of the document was maintained and that there was no explanation on how the originator was identified.

Ms. Salah submitted further that, the Appellant did not explain how the video was copied from the mobile to the flash disk. What mechanical process was involved to ensure that no tempering of the video? The affidavit did not show how the authenticity of the contents of the said video was maintained throughout the process.

Ms. Salah submitted further that, rules of admissibility of electronic evidence require the party tendering such evidence to observe the following; reliability of how the document was generated, stored, or communicated, reliability of the manner in which the document was maintained, and integrity of the document, reliability of how the originator was identified, any other factor relevant in assessing the weight of evidence. According to Ms. Salah, these guidelines are provided for under section 18(2) of the Electronic Transactions Act [Cap. 442 R.E 2002] and also in the case of **Mohammed Enterprises (Tanzania) Limited & Another v. Shishiir Shyamsingh, Civil Case No. 03 of 2021**, HC at Kigoma (unreported) on pages 8-10.

Ms. Salah submitted further that, Order XXXIV provides for special cases and has only five rules.

Having gone through submissions by the learned Counsels, this Court finds that, there is a distinction between a preliminary objection raised against the suit and an objection against tendering of the evidence during the admissibility process of the evidence. Preliminary objections against the suit are raised in the manner provided for under section 19 of the Civil Procedure Code Cap.33 where the law requires that objection be taken in the court of first instance at the earliest possible opportunity. This is different from the circumstances of the present suit, where an objection was raised against the electronic documentary evidence during the admissibility procedure of the evidence. It was, therefore, not un-procedural.

Turning to the gist of the preliminary objection raised against the admissibility of the flash disk being electronic evidence, this court finds that much as the trial court decided rules of admissibility of electronic evidence were not complied with. Section 18(2) of the Electronic Transactions Act [Cap. 442 R.E 2002] requires a party tendering electronic evidence to observe the reliability of how the document was generated, stored, or communicated, the reliability of the manner in which the document was maintained and integrity of the document, the reliability of how the originator was identified, any other factor relevant in assessing the weight of evidence. These prerequisite rules were retaliated in the case of **Mohammed Enterprises (Tanzania) Limited & Another v. Shishiir Shyamsingh, Civil Case No. 03 of 2021 (unreported) as rightly submitted by Ms. Salah.** Having perused the affidavit as to the authenticity of a flash dated 21st November 2022 and the Plaintiff's evidence on page 19 of the typed proceedings, it is clear that, the plaintiff

has never explained how the video moved from the WhatsApp number to the flash disk. It is not known what technology was employed to transfer such documents from the WhatsApp number to the flash disk. Thus, Plaintiff was not clear in explaining how the document was generated, stored, or communicated and the reliability of how the document was maintained which are relevant factors in assessing the admissibility and weight of evidence.

Secondly, the evidence in the records shows that the video was first recorded on the mobile phone and then transferred to the flash disk. That means the original version of the video in dispute was on the mobile phone. If that were the case, the plaintiff could have tendered the video store in the mobile phone. Since he opted to tender the video transferred from the mobile phone to WhatsApp and then to the flash disk, Plaintiff could have clearly abided with rules stipulated under section 18(2) of the Electronic Transactions Act [Cap. 442 R.E 2002].

This court has bothered to go through the provisions of Order XXXIV rule 27(a), (b), and rule 28 of the Civil Procedure Code, Cap. 33 R.E 2019 looking at the possibility of making an order for admissibility of the flash disk as requested by the Appellant, much as correctly submitted by Ms. Salah, such provision is nowhere to be found in the Civil Procedure Code. Order XXXIV of the Civil Procedure Code is on special cases and is made up of only five rules. Thus, the argument by the Appellant in respect of Order XXXIV rule 27(a), (b) and rule 28 of the Civil Procedure Code, Cap. 33 R.E 2019 is misconceived. For the foregoing reasons, the first, second, and third ground of appeal lacks merits and they are accordingly dismissed.

Submitting on the fourth ground, *whether the learned trial magistrate grossly erred in law and facts for merging issues for determination leading to denial of justice as key facts were missed out*, Mr. Marwa stated that, the first issue was not determined and thus remained un-answered. According to Mr. Marwa, the trial court did not declare the lawful owner of the artistic work titled "mtoto wa haramu". Mr. Marwa went further submitting that, the trial court showed interest in determining the 2nd and 4th issues jointly and the rest of the issues remained unresolved.

Mr. Marwa submitted further that, the trial court failed to answer whether the 1st Defendant did air or publish the plaintiff's artistic work with or without consent from the plaintiff. It was further submitted by Mr. Marwa that failure to determine issues as framed renders the judgment defective. In support of his argument the Plaintiff referred this court to the decision in the case of Joseph Ndyamukama (at the capacity of administrator of the estate of late **Gratian Ndayamukam**) **vs. N.I.C BANK LTD, and 2 others in Civil Appeal No. 239/2017 (unreported)** and the case of **Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji, Civil Appeal No. 25 of 2006 (unreported)** settled a principle to the effect that, *a trial court is required and expected to decide on every issue framed before it. Failure to do so renders the judgment defective.*

Mr. Marwa submitted further that, the 5th and 6th issues as to whether the plaintiff suffered general damages to a tune of Tzs. 100,000,000/= and to what reliefs are the parties entitled were not touched or determined by the trial court.

Mr. Marwa submitted further that, the appealed judgment has failed a test of being a judgment and according to him, the only remedy is for this court to allow the appeal and quash the trial court decision and order

remittance of the file to the trial court for all issues to be determined on merit. Further, Mr. Marwa referred this court to the decision in the case of **Mantra Tanzania Limited v. Joaquim Bonaventura, Civil Appeal No. 145 of 2018 (unreported)**, and the case of **Truck Freight (T) Ltd v. CRDB Ltd, Civil Application No. 157 of 2007 (unreported)** where in both two cases the court observed that;

"... When an issue which relevant to resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter".

In response to all that has been submitted by Mr. Marwa, Ms. Salah countered that the 1st Respondent has not submitted how the merging of the issues by the trial court occasioned injustice to the Appellant. Ms. Salah submitted further that, the trial court determined all issues which were framed. In expounding her argument, Ms. Salah stated, that the first issue *"whether the Plaintiff was the lawful owner of the artistic work titled "Mtoto wa Haramu"* was answered on page 8 of the trial court judgment as follows:

"Intellectual property includes copyright that an artist or an owner of the artistic work is endowed to enjoy and protected by the laws. The plaintiff produced a copyright certificate. Exhibit P1, to prove that he has obtained a valid certificate issued by the Authority duly recognized under the law".

Ms. Salah submitted further that, the second issue *"whether the 1st defendant used the plaintiff's artistic work titled "mtoto haramu" in the*

Airtel movie application to further his business” was answered on pages 8 and 9 of the trial court judgment. On page 8 the trial court stated;

“... I am of the view that, in the absence of agreement between the first and 2nd Defendant, there could be no accessibility of the 1st Defendant to upload the Plaintiff’s artistic work in its Airtel App”.

On page 9 the trial court stated that;

“...there was no further evidence given to prove that, his artistic work titled mtoto haramu was uploaded to the first Defendant’s app without his consent”

Ms. Salah submitted further that, the third issue *“whether there was a consent from the Plaintiff to the 1st Defendant to use the artistic work titled “Mtoto wa Haramu”,* was answered at page 9 and 10 of the trial court judgment. On page 9 the trial court stated that:

“All these remained as allegation because the issue of consent is subjective because the Plaintiff admitted that, he gave the second defendant his compact Disk containing his artistic work. So how come he gives his artistic work without first signing the contract”.

On page 10 the trial court stated that:

“In the subject case the issue as to whether consent was obtained or not before the uploading of the plaintiff’s artistic work remained without proof”

Ms. Salah was of the firm view that, the trial court did not skip any issue which was relevant to the determination of the parties’ dispute.

Furthermore, Ms. Salah submitted an alternative that, if there is any issue that was not determined, then the same did not occasion a miscarriage of justice since the trial court found the Appellant to have failed to prove his case on the required standard against the defendants. Bolstering her

submission, Ms. Salah referred this Court to the decision in the case of **Victor Raphael Luvena v. Magret Ephraim Kawa & Another, Civil Appeal No. 25A of 2021 Court of Appeal of Tanzania at Dar es Salaam** where the Court of Appeal of Tanzania held that;

"omission to decide on framed issues will occasion a miscarriage of justice when the dispute remains unresolved"

Replying to the 5th and 6th issues as to whether the plaintiff suffered general damages to the tune of Tzs. 100,000,000/= and to what reliefs are the parties entitled, Ms. Salah stated that the trial court held on page 10 of the judgment that, the Appellant has failed to prove his case on the required standard against the Defendants.

Regarding the proposed remedy by Mr. Marwa that the only remedy is for this court to allow the appeal and quash the trial court decision and order remittance of the file to the trial court for all issues to be determined on merit, Ms. Salah contested that, the case of **Mantra Tanzania Limited, Joseph Ndyamukama and Alnoor Sharrif Jamal** are distinguishable with the case at hand because the trial court decided all the issues that were framed in court.

Having considered submissions from both sides, this court observed that, the 1st, 2nd, 3rd, and 4th issues were not merged by the trial court but rather were answered jointly. On page 8 the first paragraph of the judgment by the trial court, the trial magistrate stated that *"it appears material to address the 1st, 2nd, 3rd and forth issues altogether as follows;"* this phrase implies that the listed issues were answered jointly. It was not harm for the trial magistrates to answer the issues together unless any issues remained unresolved. Looking on how the issues were dealt with, this court finds that, all issues including the 1st, 2nd, 3rd, and 4th were

accordingly answered by the trial court. The first issue *"whether the Plaintiff was the lawful owner of the artistic work titled "Mtoto wa Haramu"*, was answered on page 8 of the judgment *"The plaintiff produced a copyright certificate. Exhibit P1, to prove that he has obtained a valid certificate issued by the Authority duly recognized under the law"*. The second issue *"whether the 1st defendant used the plaintiff's artistic work titled "mtoto haramu" in the Airtel movie application to further his business"* was answered on page 9 last paragraph; *"Moreover, the plaintiff apart from bringing his copyright clearance certificate which was admitted as Exhibit P1 there was no further evidence given to prove that, his artistic work titled mtoto haramu was uploaded to the first Defendant's app without his consent"*.

The third issue *"whether there was consent from the Plaintiff to the 1st Defendant to use the artistic work titled "Mtoto wa Haramu"*, was answered on page 10 the second paragraph of the trial court judgment. On page 9 the trial court stated that *"In the subject case the issue as to whether consent was obtained or not before the uploading the plaintiff's artistic work remained without proof"*

The fourth issue *"whether there was an agreement between the plaintiff and the second defendant consented his artistic work titled "mtoto wa haramu" to be used by the first defendant"* was dealt with on page 8 paragraph 4 from the above judgment that *"The plaintiff alleges that, he was attended by the second with the contract who wanted him to sign and issued him with the compact discs to be used by the first defendant. Again, the evidence of PW1 told the court that he did not sign the said*

contract, yet the compact discs were already handled to the second defendant"

Having looked on how the trial magistrate dealt with the 1st, 2nd, 3rd, and 4th issues, this court finds that, all these issues were considered by the trial magistrate jointly. Since the case before the trial court was found to have not been proved to the required standard, the question regarding the payment of general damages to the tune of Tzs. 100,000,000/= crumbed automatically. Dealing with it could have saved no purpose since the outcome of the issue could have been rendered nugatory. In the premises, the fourth ground of appeal is also devoid of merits.

In the final analysis, the instant appeal lacks merits and stands dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 24th day of November 2023.



A handwritten signature in black ink, appearing to read "WILBERT CHUMA", is written over a horizontal line.

WILBERT CHUMA

JUDGE

24th November, 2023