

**IN THE HIGH COURT OF TANZANIA
(IRINGA SUB-REGISTRY)**

AT IRINGA

CIVIL APPEAL NO 19 OF 2023

*(Appeal from the Ruling of the District Court of Njombe
at Njombe in Civil Case No. 06 of 2023)*

ISSA MKIMBILILE APPELLANT

VERSUS

EDWARD MBILINYI RESPONDENT

JUDGMENT

26th & 28th March 2024

LALTAIKA, J.

The appellant herein **ISSA MKIMBILILE** is dissatisfied with the decision of the Ruling of the District Court of Njombe at Njombe in Civil Case No. 06 of 2023. He has appealed to this Court by way of a Petition of Appeal containing two grounds namely:

1. *That the trial court erred in law to dismiss the suit that was not heard on merit.*
2. *That the trial court erred both in law and fact to dismiss the suit for reasons that the suit contains elements of a criminal case.*

When the appeal was called for mention on 19/02/2024, the appellant Appeared in person, unrepresented. The Respondent, on the other hand, enjoyed the legal services of Ms. Gloria Kessy Mwandelema, learned Advocate. Parties prayed that the appeal be heard by

way of written submissions. With approval of this Court, the following schedule was jointly agreed. Appellant's written submission on appeal: 4/3/2024; Respondent's reply to the submission: 18/3/2024; Rejoinder if any 25/3/2024; Mention for necessary orders to fix the date of this Ruling: 25/3/2024.

It appears in my records that the appellant who was hitherto unrepresented obtained legal services of **Mr. Abduel Abel Nking'wa, learned Advocate**. On the rival side, **Ms. Neema Chacha, learned Advocate**, fended for the Respondent. I take this opportunity to thank both parties for complying with the court order faultlessly. The next part of this judgement is a summary of the submissions by both parties.

Mr. Nking'wa, Counsel for the Appellant, argued that regarding the first ground of appeal, the dismissal order without the suit being heard on its merits had significant consequences. He referred to **BARCLAYS BANK OF UGANDA LTD VS LUGOBE** [1973] EA 461 at page 462, noting that a dismissal under Rule 19 precluded the plaintiff from initiating a fresh suit on the same cause of action, although the plaintiff could apply for an order to set aside the dismissal. He further emphasized the Court of Appeal of Tanzania's stance in **OMARY VS INSPECTOR GENERAL OF POLICE &**

OTHERS [2010]1 EA 318, stating that a competent suit should only be struck out if the court lacked jurisdiction to entertain it.

In the current appeal, Mr. Nking'wa argued that the trial court's conclusion that the suit contained elements of a criminal case should have led to its striking out rather than dismissal, as emphasized in **OMARY VS INSPECTOR GENERAL OF POLICE**. Consequently, he contended that the trial court erred in law by dismissing the suit without it being heard on its merits.

Regarding the second ground of appeal, Mr. Nking'wa pointed out that the court dismissed the suit based on its criminal elements and directed the appellant to pursue remedy through the criminal route exclusively. He emphasized the need to differentiate between criminal and civil cases, asserting that the appellant's intention was to seek compensation rather than criminalize the respondent. Moreover, he highlighted Section 4(3) of the **Criminal Procedure Act, [Cap 20 R.E 2022]**, which mandates exhaustion of civil remedies before resorting to criminal proceedings. He argued that as there was no evidence of a pending criminal case against the respondent, the trial court contravened this provision of the law. He prayed that the appeal be allowed with costs.

Ms. Chacha, Counsel for the Respondent, countered the above grounds of appeal by asserting that it is a well-established principle of law that in every application or suit presented before the court, if it pertains to a legal issue, such issue must be addressed before delving into the merits of the main application or suit. She referred to the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Co. Ltd** (1969) EA Pg. 696, wherein it was stated that a point of law that has been pleaded or arises by clear implication from the pleadings, if argued as a preliminary point, may dispose of the suit. Ms. Chacha argued that in the present case, the preliminary objection raised by the respondent was purely a point of law and succeeded in disposing of the case before the main proceedings were considered.

Additionally, Ms. Chacha cited the case of **Laibon @ Askofu vs Lemomo Mollel** Civil Appeal no. 42 of 2020, where His Lordship Gwae, J. elaborated on the legal meaning of a preliminary objection, stating that it consists of a point of law that may dispose of the main issue if argued as a preliminary objection. She also referenced the case of **Abri General Traders Ltd vs Abro Industries Inc** Civil case no. 41 of 2022 HC Dar es Salaam Registry, where His Lordship Kisanya, J. affirmed that an objection

on jurisdiction is sufficient to dispose of a matter as it strikes at the root of the case. Ms. Chacha concluded that since the scenario in their case revolved around a preliminary objection capable of disposing of the matter before reaching the main case, the trial magistrate was correct in rejecting the statement of claim defended by the appellant.

In response to the second ground of appeal raised by the appellant, Ms. Chacha argued that the trial magistrate correctly arrived at its decision based on the strong grounds presented by the respondent, indicating that the matter contained criminal elements, thus rendering the trial court without jurisdiction. She pointed out that the suit contained elements of a criminal case, citing section 296 of **The Penal Code Cap 16 R.E. 2022**, and referred to the case of **William Kundete vs The Republic** Criminal Appeal no. 186 of 2021 for precedence.

Ms. Chacha emphasized the importance of basing a suit on the elements constituting the matter at hand and choosing the appropriate forum, including jurisdiction and type of case, based on those elements. She dismissed the appellant's argument regarding discretion to choose the type of suit regardless of the elements of the matter, citing the case of **Nuridin Issa Nambilanje vs Elicius Emmanuel Lukamba** PC Criminal

Appeal Case no. 04 of 2022 HC Mtwara, where the appellant was acquitted due to wrongful prosecution. Ms. Chacha prayed for the court to dismiss the appeal with costs and uphold the proceedings and decision of the trial magistrate court in their entirety.

Having dispassionately considered the written submissions in the light of the grounds of appeal. I have also keenly observed the court's records. Let me say outrightly that I enjoyed reading the learned trial Senior Resident Magistrate's Ruling. It is eloquently written and almost free of typographical and grammatical errors. I am also impressed by his insightful discussion on the rationale of **The Magistrate Courts (Small Claims Procedure) Rules** Government Notice No 159 of 2023.

Without prejudice to the above and with so much due respect to the learned Senior Resident Magistrate, I think he should have considered the PO raised by the Respondent from a much wider perspective. As correctly argued by the learned then Claimant (now Appellant) the parties were a lessee and a lessor. Only a civil litigation environment can provide both parties with the platform needed to assert their rights and prove liability against each other on preponderance of evidence.

It is also worthy of consideration that misuse of the criminal law machinery in our country is rampant. A party who chooses to pursue civil litigation must have thought through. This Court in **EMMANUEL MABULA NGELELA v. REPUBLIC** CRIMINAL APPEAL CASE NO 60 OF 2022HCT, Mtwara gave the following illustration to expound on the problem of overcriminalization:

*To show that the mindset of members of our larger society is fixated towards criminalization, an artist called **YONA CHILOLO** has composed a song depicting this way of thinking. In that song with over 1.2 million viewers on YouTube within 24 months, the artist's prayer to God is, among other things, to give him a lot of money so he can lend it to his adversaries. Should the "wazushi" fail to pay him back, he would take them to the police. The aim of taking them to the police, Mr. Chilolo suggests, is not "to jail them" but to teach them a lesson. The verse goes like this:*

"Nipe pesa nyinginyingi niwakopeshe wazushi, Wakini kopa wasipo lipa niwapeleke polisi Sintawafunga ila nataka waijue kanuni: kutoka chini Kwenda juu siyo kazi rahisi, Kutoka juu kushuka chini hilo ni jambo jepesi..."

That is a great song from Yona Chilolo. As an artist he is a mirror of the larger Tanzanian society that is to say, he is "kioo cha jamii." The song is great. It carries a profound message. However, the police should be left to deal with

public wrongs such as robbery, armed robbery, rape, and the list goes on. Our criminal statute books do not contain any entry coming closer to "Wakini kopa Wasipo lipa Niwapeleke Polisi". Those are contractual issues.

Coming back to the matter at hand, I agree with Ms. Chacha that some elements of crime can be gleaned from the claim. Nevertheless, had the learned Senior Resident Magistrate subjected the PO to some deeper reflection, he would have considered it a form of escapism. As argued by Mr. Nking'wa the Appellant wanted compensation for his items that were allegedly confiscated by the Respondent. This should have been sufficient to accord both parties to the right to be heard to find out whether such a taking was a form of lien or not. Assuming that such a taking was not justified, I think the criminal track would lead to unjust enrichment.

I am inclined to spend a few more paragraphs to emphasize the need to avoid outright dismissal of a suit without hearing it on its merits. As established in precedents such as **BARCLAYS BANK OF UGANDA LTD VS LUGOBE [1973] EA 461** and **OMARY VS INSPECTOR GENERAL OF POLICE & OTHS [2010]1 EA 318**, a dismissal without due consideration of the merits precludes the plaintiff from bringing a fresh suit on the same cause of action. However, the plaintiff may apply to set aside

the dismissal. I am alive to the persuasive cases of this Court cited by Ms. Chacha, but I think care must be taken to ensure that technicalities are not used to the detriment of substantive justice.

In the matter at hand, the appellant came to this Court without legal representation and was largely in dark on what exactly transpired in the trial Court. He lamented bitterly that he approached the Court because he believes that his rights would be restored. As an illiterate person and a layman, his right to be heard should have been given uttermost consideration.

In my opinion, the dismissal of the appellant's case without due consideration of the contextual issues discussed earlier and dispose the same on its merits sets a dangerous precedent that could have far-reaching implications for the administration of justice. This is because the parties herein were in a lessor and lessee relationship. Allowing courts to dismiss cases of this nature without affording parties the opportunity to present their arguments and evidence not only erodes public trust in the legal system but also undermines the integrity of the judiciary.

If care is not taken, **the "haves" (the rich minority)** will continue to misappropriate properties of **the "have-nots" (the poor)** and do away

with the same by simply suggesting they reported to the police or pursue criminal law. In case of insufficient evidence, the poor would always lose. To this end, since as the saying of the wise goes;**it takes two to tangle**, striking out of an incompetent suit would be appropriate to allow a claimant to pursue both criminal and civil options.

In the upshot, I allow the appeal. I set aside the ruling of the District Court and hereby order that the suit be heard on merit. Each party bears their own cost.

It is so ordered.




E. I. LALTAIKA
JUDGE
28.03.2024

Court:

Judgement delivered this 28th day of March 2024 in the presence Mr. Frank Mpiluka, learned Advocate holding brief for Ms. Glory Mwandelema, learned Counsel for the Respondent and the Appellant who has appeared in person, unrepresented.




E. I. LALTAIKA
JUDGE
28.03.2024

Court:

The Right to Appeal to the Court of Appeal of Tanzania is fully explained.




E. I. LALTAIKA
JUDGE
28.03.2024