

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
IN THE SUB-REGISTRY OF MTWARA
AT MTWARA**

DC CIVIL APPEAL NO. 07 OF 2023

*(Original Civil Case No. 1 of 2022 of the District Court of Masasi before Hon. B.K.
Kashusha, SRM)*

YUSUPH ATHUMANI NAMKUKULA @NYERERE.....APPELLANT

VERSUS

MOHAMED ALLY MOHAMED @NANDULE.....RESPONDENT

JUDGMENT

26th March, & 15th April, 2024

DING'OHI, J;

This appeal has its historical background. It attempts to challenge the judgment and decree which is at the final stage of its execution as I will briefly show in this judgment. The facts generated from the Complaint made by the respondent against the appellant in the trial court are to the effect that, On 21st August 2021, the parties herein entered into an oral agreement whereby the latter agreed to and did take 31 tons of pigeon peas from the appellant at Masasi. It was further agreed that the appellant would sell the transported peas in Dar es Salaam and thereafter would pay the respondent

herein the total sum of Tshs. 45,000,000/=, the market value of the peas. In breach of the agreement, the appellant only paid the sum of Tshs. 5,000,000/= to the respondent leaving the sum of Tshs. 40,000,000/= unpaid, hence the suit in the trial court for the payment of the remaining sum, compensation, and costs. To be specific, the respondent, **MOHAMEDI ALLY MOHAMEDI @ NANDULE** successfully sued the appellant, **YUSUPH ATHUMANI NAMKUKULA @ NYERERE** vide civil case No. 01/2022 in the District Court of Masasi at Masasi(the trial court) for the payment of the total sum of Tshs.115,861,666/= as itemized hereunder;

- (i) Payment of Tshs 40,000,000/= as a principal sum;
- (ii) Payment of Tshs. 55,000,000/= as for a loss of profit from 21/8/2021 to the date of payment in full,
- (iii) Payment of Tshs. 10,000,000/= as for general damages
- (iv) Payment of interest at the court's rate from the date of the filing of the suit to the date of judgment, and
- (v) Costs of this suit.

Aggrieved with the judgment and decree of the trial court as above, the appellant made the present appeal which he filed after a successful application for an extension of time by this court (**LALTAIKA, J**) made on

29.09.2023 in Misc. Application No.11 of 2023. By then, If I may hint here, the execution of the decree had reached an advanced stage. The two houses, the property of the appellant one located at Mbagala-Mgeninani, Dar es Salaam, and another located at Mtandi within Masasi District had already been sold by order of the trial court to settle the respondent's decreed sum of Tshs. 115,861,666/=.

The appellant's appeal rests on the following grounds, namely;

- 1. That, the trial court gross erred in law and in facts for entertaining a defective plaint which had no proper jurisdiction clause reflecting the alleged subject matter of the suit and non-existence pleading filed by the respondent known as 'rejoinder'.*
- 2. That, the trial court gross erred in law and in facts for admitting exhibit P1 and P2 and give weight to the two exhibits which are nullity for not qualified to be acted upon by the trial court.*
- 3. That, the trial court's judgment and finding lack reasoning and awarded damages which were not proved by the respondent.*
- 4. That, the whole trial at trial court is nullity for being characterized by high level of procedural irregularities and including judgment and decree was issued on public holiday, Revolution Day (Mapinduzi Day)*

on the 12th January, 2023 which was not a working day in the presence of the learned magistrate, the court clerk and the respondent without any justifiable reason.

Based on the foregoing grounds, the appellant prays that the appeal be allowed; the whole proceedings, judgment, and decree of the trial court be quashed and set aside.

At the hearing of this appeal, the appellant was represented by **Mr. Hashim Bakari Mziray**, the learned advocate. The respondent enjoyed the legal service of **Mr. Robert Kayenze Dadaya**, the learned advocate.

Mr. Mziray, for the appellant, started his submissions by arguing the fourth ground of appeal. He submitted that the trial court proceedings and judgment were characterized by a high level of procedural irregularities in several aspects; **First**, according to the learned advocate, the trial court never fixed the date of the first pre-trial conference (1st PTC) and the said 1st PTC was never conducted. That, Mr. Mziray, submitted, is against the requirements of the provisions of Order VIII Rule 18 (1), Rule 19 (1) of the Civil Procedure Code Cap 33 R.E. 2019. He referred this court to pages 4 and 11 of the trial court-typed proceedings, where the mediator was appointed

before the conduct of the first pre-trial conference (1st PTC). That was not the end at that corner, Mr. Mziray further argued that even the time frame for mediation was disregarded as it was taken over four months. It is learned advocate's submission that since the first PTC was not conducted, it is automatically that the speed track was not set as required by Order VIII Rule 22 of the Civil Procedure Code. **Second;** the final pre-trial conference was also never conducted by the trial court. Mr. Mziray referred me to pages 11 and 13 of the trial court-typed proceedings. **Third,** the judgment and decree were issued on a public holiday (Mapinduzi Day). According to the learned advocate, if we allow this irregularity even the lower courts may set a hearing date on public holidays.

Regarding the third ground of appeal, Mr. Mziray assailed the trial court magistrate for not evaluating how the respondent deserved general damages of Tshs. 10,000,000/=. He stressed that even the sum of Tshs. 55,000,000/= awarded to the respondent as a loss of profit was ordered without any lawful justification. According to him, that is against the provision of Order XX Rule 4 of The Civil Procedure Code.

As to the second ground of appeal, it is submitted that the procedure of admitting exhibits P1 and P2 was not adhered to. According to the learned

advocate, these two documents were not even read over to the other party; the appellant was denied a right to be heard. To support his argument, he cited the case of **Mohammed Enterprises (TANZANIA) Limited & Another vs Shishir Shyam Singh**, (Civil Case No. 3 of 2021) [2023] TZHC 19872. Mr. Mziray added that exhibit P1 was not stamped in contravention of section 25 (b) 47 (1) of the Stamp Duty Act CAP 189 of 2019.

When came to arguing against the first ground of appeal, the learned advocate mainly faulted the respondent's plaint which initiated the suit subject to this appeal, in the trial court. He submitted that the plaint was defective for lacking a proper jurisdiction clause. It is Mr. Mziray's stance that under paragraph 12 of the plaint, the respondent claimed the payment of the total sum of Tshs. 100,000,000/= (One Hundred Million) which is different from his principal sum of Tshs. 40,000,000/=.

In reply, Mr. Robert Dadaya Counsel for the respondent opposed the appeal following the way/order the appellant started. He started with the fourth ground of appeal. According to the learned advocate, the trial court was proper to proceed the way it did because the appellant did not appear on the date of mediation thus marking the mediation as failed. As to the complaint that the judgment was delivered on Mapinduzi Day, the learned

advocate has the view that the complaint is baseless because it did not cause injustice.

On the third ground, Mr. Dadaya contended that the respondent pleaded and proved the principal sum and specific damages awarded by the trial court. As to the complaint that the general damages awarded were without justification, the respondent's counsel argued that the respondent had testified how he suffered a loss for the act done by the Appellant. According to him, the trial court's findings are well-reasoned.

Submitting against the second ground of appeal, the learned advocate contended that it is an afterthought for the appellant to question the issue of the admissibility of the evidence at this stage. According to him, that had to be done during the process of tendering the disputed exhibit at the trial and not at this appellate stage. He added that the appellant was given a chance of cross-examination when he could object to the admissibility of Exhibits P1 and P2 by way of asking questions. To support his submissions the learned advocate cited the cases of **Herman Muhe vs Republic** (Criminal Appeal 113 of 2020) [2022] TZCA 781, and **Ramesh Rajput vs Mrs. Sunandra Rajput**, [1988] TLR 96.

Lastly, the learned advocate submitted that the plaint has all the ingredients required by the law. He argued that the respondent's claim against the appellant was for the payment of Tshs. 40,000,000/= as pleaded under paragraphs 8, 9, and 10 of the plaint.

That was the end of the submissions of the counsels by both sides in this appeal. The relevant issue for determination at this juncture is whether the instant appeal has merits.

For the apparent reason and as adopted by the counsel for both parties, I will start considering the fourth ground of appeal. The relevant issue here is whether the pre-trial conference was conducted.

Admittedly, among the essential stages in the civil proceedings is the conduct of the pre-trial conference. In law, we have the first pre-trial conference and the final pre-trial conference. The first pre-trial conference should precede the final pre-trial conference otherwise, it is out of the intended purpose in law. The court has to direct parties to attend and participate in the pre-trial conferences.

It is provided under the provisions of Order VIII B Rule 18 of the Civil Procedure Code Cap.33 R.E. 2019 that;

"Without prejudice to rule 17 of Order VIII, at any time before any case is tried, the court may direct parties to attend a pre-trial conference relating to the matters arising in the suit or proceedings.

It is further provided under Order VIII D Rule 40 of the Civil Procedure Code that;

"Where a suit is not resolved by negotiation, conciliation, mediation or arbitration or other similar alternative procedure it shall revert to the trial judge or magistrate for a final pre-trial settlement and scheduling conference, to enable the court to schedule the future events and steps which are bound or likely to arise in the conduct of the case, including framing of issues and the date or dates for trial."

It is my settled view that those procedures, to wit, the first pre-trial conference and final pre-trial conference are there to be applied in entertaining civil proceedings. It is not expected that those stages are

skipped or carelessly applied. The trial court must properly direct parties to the suit on the required procedures at any stage of the hearing of the case. Where the case comes for the pre-trial conference, for example, the record should expressly show so including what parties are required to do at that stage. Failure of which, may confuse parties in complying with the law and, in turn, may vitiate the whole proceedings.

In this case, after the completion of the pleadings by the parties the trial court's record shows that;

'Coram:

Date: 10/5/2022

Plaintiff: present

Defendant: Present

B/Clerk: Upendo

Mr. Jackson for plaintiff, and defendant is

present: *We have both completed to file pleadings,
we pray for mediation.*

Defendant: *I have no objection*

Court: *Since parties have filed all pleadings, let suit be scheduled for mediation and **Hon. Rehema**- RM is nominated to chair mediation resolution."*

On **5/7/2022** (about two months later) the learned RM in charge still held the case file. He gave the administrative directives as follows:

"Court: *Pleadings are complete, let case be scheduled to Chairperson for mediation, and therefore **Hon. Rehema** is nominated to hold mediation between parties. It is so ordered"*

On my careful visits to the trial court's record, I have noticed some anomalies. **First**, the first pre-trial conference had not been conducted as required by the provisions of the law cited herein above. **Second**, the mediation took a long time from **5/7/2022**, the date of the first mediation, to **7/10/2022** when the mediation was marked failed. That was more than 90 days. The law mandatorily requires the mediation to be conducted within 30 days from the date of the first mediation. The provision of Order VIII Rule 33 (c) of the Civil Procedure Code, provides that;

"A mediation shall come to an end when thirty days expire from the date of the first session of mediation."

Third, the final pre-trial conference was not conducted at all. What the trial court did was to proceed with the trial without drawing up the path by framing the issues of the case as mandatorily required by the law. That is to say, in that civil suit, no issue was framed before the hearing started. The Court of Appeal of Tanzania in the case of **Celina Michael vs Mtanzania Newspaper & Others** (Civil Appeal 320 of 2017) [2020] TZCA 1900 observed *inter alia* that;

"We wish to emphasis that framing of issues is an important step in the conduct of civil cases as it ensures just determination of controversies between the parties. Failure to frame the issues arising out of the pleadings has the danger of leaving the parties' controversy unresolved which may lead to false outcome of the case and wastage of time as it has happened in this case...."

In another case of **Bunda Town Council & Others vs Elias Mwita Samo & Others** (Civil Appeal No.309 of 2021) [2023] TZCA 17315. The Court of Appeal of Tanzania had this to say:

".....the trial Judge or magistrate must conduct a final pretrial conference for setting out future events and steps towards the actual trial, including framing of issues."

Under the circumstances, I have to agree with Mr. Mziray that the trial court proceedings and judgment were characterized by a high level of procedural irregularities in several aspects as observed herein above. In other words, the whole trial was a nullity.

As a result, I hereby quash and set aside the proceedings, judgment, and decree by the trial court. I, however, direct that Civil Case No. 1 of 2022 is to be heard afresh before another Magistrate with competent jurisdiction.

Under the circumstances of this appeal, I find no need to consider other grounds for appeal. The 4th ground alone disposes of the entire matter the way I have just done, out of merit.

The appeal is allowed to that extent. Parties shall bear their sides of the costs.

DATED at MTWARA this 15th day of April 2024



A handwritten signature in blue ink, appearing to be "S. R. DING'OHI".

S. R. DING'OHI

JUDGE

15/04/2024

COURT: Judgement delivered this 15th day of April 2024 in the presence of Mr. Issa Chiputula, the learned Advocate, holding brief of Mr. Hashimu Mziray and Mr. Robert Dadaya, the Learned Advocates for the Appellant and Respondent respectively.



A handwritten signature in blue ink, appearing to be "S. R. DING'OHI".

S. R. DING'OHI

JUDGE

15/04/2024