IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB-REGISTRY

AT MUSOMA

CIVIL APPEAL NO. 2119/2024

BETWEEN

ERNEST MWITA @ NYAMHANGA.....APPELLANT

AND

MASINDA NG'ARITA GANJERU.....1ST RESPONDENT

BUMACO INSURANCE COMPANY LTD.....2ND RESPONDENT

EVARIST THOMAS MADAHA.....3RD RESPONDENT

09/05/2024 & 13/05/2024

JUDGMENT OF THE COURT

Kafanabo, J.:

This appeal and a subsequent cross-appeal emanate from the decision of the district Court of Bunda at Bunda in Civil Case No. 21 of 2020 (Hon. Sokanya, SRM) dated 28th May 2023. The Appeal was filed by the Appellant against the 1st and 2nd Respondents herein. The cross appeal was instituted by the 2nd Respondent (being the Appellant) against the 1st Respondent, the Appellant herein (being the 2nd Respondent in cross appeal) and the 3rd Respondent who was not a party in the main appeal. It was agreed by the parties that the appeal and the cross-appeal be consolidated and determined together because, currently, in the *eCase Management System*, two appeals could not be filed by using the same reference number of the original case

from a District Court. It was, thus, noted that the cross-appeal was filed via a window of subsequent documents.

A brief background of the matter is that the 1st Respondent herein is, supposedly, the administrator of the estate of the late Gitewita Masinda Ng'arita (hereinafter the 'deceased') appointed as such on 28th May 2020, by the District Court of Bunda. The 1st Respondent, the father of the deceased, on the 23rd day of December 2020, instituted a suit in the trial court against the Appellant, 2nd Respondent, and the 3rd Respondent. In the said suit, the 1St Respondent was claiming damages for careless driving arising from an accident that involved the Appellant's motor vehicle with registration number T489DDH which was being driven by the 3rd Respondent. The accident, allegedly, caused the death of Gitewita Masinda Ng'arita. The deceased was riding on a motorcycle with registration No. MC 912BNQ which was severely damaged (written-off) because of the said accident.

The said civil case subject matter of this appeal followed a conviction of the third Respondent based on his plea of guilty to the charge of careless driving in Traffic Case No.18/2019. He was sentenced to pay a fine of TZS 70,000/= or serve nine (9) months imprisonment.

In the trial court, the 1st Respondent (being the plaintiff) prayed for a declaration that the 3rd Respondent herein drove carelessly and thus caused the death of his son. It was further claimed that the Appellant was vicariously liable for being the 3rd Respondent's employer. It was also prayed that the court be pleased to find that the 2nd Respondent has a statutory duty and obligation to satisfy the judgment and decree of the court because she was

the insurer of the Appellant's motor vehicle. The 1st Respondent also claimed for payment of TZS 70,000,000/= being general damages for causing the death of Gitewita Masinda Ng'arita, payment of TZS 2,500,000/= being special damages for the deceased's written-off motorcycle, interest on the decretal sum at 12% from the date of the judgment to the date of payment in full.

The Appellant and the 3rd Respondent filed a joint defence. They did not dispute the occurrence of the accident, ownership of the motor vehicle that caused the accident, and the manner in which the accident occurred. However, they denied carelessness as a cause of the accident and blamed the mechanical defects of the vehicle as a cause of the accident. They also argued that since the Appellant's vehicle was insured by the 2nd Respondent then the liability is that of the 2nd Respondent

The 2nd Respondent on his part, denied the existence of the insurer-insured relationship between her and the Appellant and thus did not admit liability as insurer of the Appellant's vehicle.

The matter then was fully tried and the trial court found that the Appellant and the 2nd Respondent were liable and ordered them to pay TZS 2,500,000/= being specific damages for the written-off motorcycle and general damages of TZS 15,000,000/=.

The Appellant being aggrieved by the decision of the trial court preferred an appeal by filing a memorandum of appeal containing the following grounds:

1. *That the trial court erred in law and facts by delivering a judgment in favour of the 1st Respondent while he failed to prove his claim to the required standard;*
2. *That the trial court erred in law and facts in proceeding to hear and determine the matter in favour of the 1st Respondent while he had no locus standi (legal) standing to prosecute the same;*
3. *That upon finding that the Appellant and the 2nd Respondent had a valid insurance contract whose purpose was to cover for the risk which occurred, the trial court erred in law and fact by ordering the Appellant to pay the 1st Respondent instead of the 2nd Respondent.*

As indicated earlier hereinabove, there is a cross appeal. The 2nd Respondent's (Appellant in the cross-appeal) grounds of cross appeal are as follows:

1. *That the trial court erred in law and fact by awarding Specific damages to the tune of TZS 2,500,000/= to the plaintiff without establishing the basis of doing so;*
2. *That the trial court erred in law and fact by awarding general damages to the tune of TZS 15,000,000/= to the plaintiff(sic) which is to be paid by 1st and 3rd defendant (sic) without stating how is to be paid among the defendant;*
3. *The trial court erred in law and facts by ruling that there was a valid insurance contract between the appellant and the second respondent hence delivered judgment against the appellant;*
4. *That the trial court erred in law by ruling in favour of the plaintiff before*

it, despite the failure by the said plaintiff to prove her case on the standard required by law;

5. *That the trial magistrate erred in facts and law by failure to evaluate the evidence hence reached to an erroneous decision;*
6. *That the judgment is short of a judgment as per law hence the decree emanating from it is invalid.*

After reviewing all the grounds of appeal, this court deemed it prudent to commence with the second ground of appeal as set forth by the Appellant, as it is key in the determination of the appeal and the cross-appeal. The relevant ground of appeal has been couched thus:

> *'That the trial court erred in law and facts in proceeding to hear and determine the matter in favour of the 1st Respondent while he had no locus standi (legal) standing to prosecute the same'*

In support of the said ground of appeal, the Appellant submitted that the 1st Respondent prosecuted the suit against the Appellant and the 2nd Respondent without having the *locus standi* to prosecute the same. It was submitted that the 1st Respondent was granted the letters of administration of the deceased's estate on the 28th day of May 2020 by the Court of District Delegate of Bunda. Thus, upon the grant, he was duty-bound to finalize the administration of the estate within one year unless he could seek and obtain an extension of time, which he did not, for finalizing the administration of the estate.

Briefly, the Appellant argues that the 1st Respondent's mandate as an administrator of the estate expired when the suit was pending in the trial court. Section 107(1)(2) of the Probate and Administration of Estates Act

Cap 352 R.E 2002 and the case of Salum Mustapha Kilumbu (Administrator of the estate of the late Halid Hassan Kilumbi) vs. Kiyongwile Primary School & Two Others (Land Case no 06 of 2023) [2023] TZHC 22718 (3 October 2023) were cited in support of the submission.

Responding to the second ground of appeal, the 1st Respondent submitted that it is not in dispute that the issue of expiry of the 1st Respondent's mandate as an administrator of the estate is a new issue introduced in the appeal. It is an issue not raised before trial court, or pleaded in the pleadings for determination by the trial court. It was further submitted that it is trite law that a matter not raised before the trial court and finally determined by the trial court cannot be raised and determined in the appellate court. The case of Frank M. Marealle vs Paul Kyauka Nyau (1982) T.L.R. No.32 was cited supporting the submission.

After hearing the parties' submissions in respect of the 2nd ground of appeal, this court embarked on scrutinizing the relevant letters of administration with a view to making sense of the parties' submissions. Moreover, this being the 1st Appellate court, it resolved to re-evaluate the evidence as it is permissible under the law. The case of **Khalife Mohamed vs Aziz Khalife & Another (Civil Appeal 97 of 2018) [2020] TZCA 33** (28 February 2020) is relevant.

Conversely, after a thorough scrutiny of the trial court's dossier, this court could not find the relevant letters of administration on record.

Taking into account the above finding, the evidence on record, and the proceedings of the trial court, it is this court's view that the determination of

the appeal, in general, rests on whether the suit was properly instituted by a person authorized in law to institute a suit. That is whether the 1st Respondent had proved his *locus standi* to institute the suit subject matter of this appeal, without tendering the relevant letters of administration of the deceased's estate.

At this juncture, the paradigm as regards the issue of *locus standi* in this matter now shifts. That is to say, the scope of determination is now wide, it is no longer as argued by the Appellant that the letters of administration had expired, but there is no proof on record that the 1st Respondent was appointed as an administrator of the estate of the deceased. Since this was a matter raised by the court, the parties were invited to address the court on the same. The parties were notified to come and address the court on whether it was proper for the trial court to determine the suit on merits in the absence of an exhibit proving that the 1st Respondent is the administrator of the estate of the deceased.

On 9th May 2024, the Appellant (2nd Respondent in the cross-appeal) entered an appearance through his advocate Emmanuel Paul Mng'arwe. The 1st Respondent (in both appeal and cross-appeal) appeared in person, and Mr. Ditrick Ishabairu, Advocate entered appearance for the Appellant in the cross-appeal and the 2nd Respondent in the Appeal. The third Respondent was absent.

Mr. Mng'arwe submitted that it was wrong for the 1st Respondent not to tender the letters of administration to prove his standing in instituting a suit in the trial court. It was also not proper for the court to determine the

suit on merits whilst the 1st Respondent (the plaintiff in the trial court) did not tender the letters of administration as an exhibit in court. He supported his submission by citing the case of **Kulwa Saimon vs Matatizo Mpale (Administrator of the estates of the late Laiton Mpale) & Another (Land Appeal 31 of 2022) [2022] TZHC 12485** (31 August 2022).

The first Respondent, Mr. Masinda, submitted that he was appointed by the District Court of Bunda and he tendered the letters of administration as an exhibit in the trial court.

Mr. Ishabairu, on his part, submitted that the trial court was not right in deciding the case on merits without the letters of administration being tendered as evidence in court and taking into account the fact that the case was instituted by a person alleging to be an administrator of the estate. The letters of administration are supposed to give the 1st Respondent a *locus standi* of instituting a suit in court. It was further submitted that the failure to tender the same would result in quashing the proceedings of the trial court and a party with interest in pursuing his rights shall process the claim afresh. The learned counsel prayed for the nullification of the proceedings of the District Court.

Now, therefore, the parties having addressed the issue raised by the court it is high time that the same be determined in light of the submissions made by the parties.

Paragraph 6 of the plaint is a good starting point. The Plaintiff (the 1st Respondent herein) averred that on 28th May 2020, he was appointed the

administrator of the estate of the deceased in Probate Cause No. 02 of 2019, and attached a copy of the letters of administration as annex P2 to the plaint.

However, after turning all the pages of the trial court's proceedings and the record in general, it is noted that the purported letters of administration are not part of the trial court's proceedings. The purported letters of administration were neither tendered nor admitted as exhibits in the trial court. This means that it remained as an annex to the plaint but not part of the court's record as evidence.

It is settled in our jurisdiction that for a document to be part of the court's record for purposes of proving a particular fact, the said document must be tendered and admitted as an exhibit during the trial of the matter. In the case of **Patrick William Magubo vs Lilian Peter Kitali (Civil Appeal 41 of 2019) [2022] TZCA 441** (18 July 2022) the Court of Appeal held that:

> *"Therefore, that document was required to be tendered and admitted in evidence.* ***It is trite law that annexures are not evidence for the court of law to act and rely upon****. In* ***Sabry Hafidhi Khalfan v. Zanzibar Telecom Ltd (Zantel) Zanzibar, Civil Appeal No. 47 of 2009*** *(unreported), the Court stated that:*
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> > *'We wish to point out that* ***annexures attached along with either the plaint or written statement of defence are not evidence.*** *Probably It is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or the*

written statement of defence is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annexures are not evidence."

Likewise, even in this case, what was contained or annexed to the petition could not have been treated as evidence…"

Striding with the above position of the law, and reverting to the present case, pages 4-8 of the trial court's typed proceedings cover the 1st Respondent's case in which PW1, PW2 and PW3 testified. The said proceedings do not indicate that the letters of administration were either tendered or admitted as an exhibit. The same remained as an annex to the plaint.

The law as to whom burden of proof lies is unambiguous, Section 110 **Evidence Act, Cap. 6. R.E. 2019** provides that:

***"**(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Section 112 of **Evidence Act, Cap. 6. R.E. 2019** also provides that:

***"**The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person."*

Applying the above provisions of the law to the facts of the present case, it is clear that the 1st Respondent was supposed to tender the relevant letters of administration in court. This is because he is the one who asserted

to be the administrator of the estate of the deceased and he is the one who wanted the court to believe that he was the administrator of the deceased's estate. He did not do the needful and thus failed to prove a relevant fact.

Moreover, it is noted, however, that the first paragraph of the judgment of the trial court simply referred to the 1st Respondent as an administrator of the estate of the deceased. The basis on which the learned trial Magistrate was satisfied that the 1st Respondent is the administrator of the estate is not stated. It is clear from the proceedings of the trial court that the 1st Respondent did not provide any evidence be it oral, or written proving that he is the administrator of the deceased's estate.

Since the 1st Respondent did not adduce any evidence to prove that he was the administrator of the estate of the deceased, it goes without saying, but let it be said anyway, that he did not prove his *locus standi* and thus could not prove that he had a lawful authority to institute a suit for the benefit of the deceased's estate.

In the case of **Kulwa Saimon vs Matatizo Mpale (supra)** his Lordship Ngunyale, J., held that:

> *'I am convinced with the above precedent that annexures are not evidence for the Court to act and rely upon.* ***The fact that the 1st respondent attached without tendering the letters of administration as evidence means he failed to establish before the tribunal his capacity to sue.*** *The letters of administration as instruments in which the applicant traces his standing to initiate the proceedings, it was an essential ingredient in filing a case as an administrator of the deceased estate. Failure to prove his standing*

renders the suit incompetent.'

Also, the Court of Appeal of Tanzania in the case of **Suzana S. Waryoba vs Shija Dalawa (Civil Appeal 44 of 2017) [2019] TZCA 66** (11 April 2019) observed that:

> *'We are of the considered view that the fact that Suzana Waryoba was suing in her capacity as an administratrix of the estate of the late Stanslaus Waryoba should have been reflected in the title of the case. However, we haste the remark that the omission is not fatal given that it was clear throughout that she was suing in that capacity and* ***the judgment of the Primary Court which appointed her as such, was tendered in evidence at the very outset****.'*

In addition, section 63 of the **Evidence Act, Cap. 6. R.E. 2019** provides that the contents of documents may be proved either by primary or secondary evidence. This means that the proof of the contents of the document is not by averments in the pleadings or by oral testimony, but rather by tendering the relevant document, and letting it speak for itself. This means that it was important for the letters of administration to be tendered as evidence in order to enable the court satisfy itself as to its contents.

The above authorities, undoubtedly, make it clear that letters of administration, or decisions of the court proving that a party to the case is the administrator of the estate, must be tendered as evidence in court for purposes of proving the party's capacity to sue as the administrator of the estate of the deceased. Otherwise, the court cannot act on mere statements

of the parties which cannot be relied upon as sufficient proof of, and cannot replace a court order.

Moreover, and generally speaking, it is important to point out categorically two segments of proceedings in suits instituted by the administrators of the estate of the deceased. First, before the person alleging to be an administrator of the estate of the deceased is allowed to address the court on preliminary issues of the case, the court must satisfy itself that the plaintiff or applicant, as the case may be, pled in the pleadings that they are suing as administrators of the deceased estate, and the documents purporting to prove such fact are attached to the relevant pleadings. The case of **Ramadhani Omary Mbuguni vs Ally Ramadhani & Another (Civil Application 173 of 2021) [2022] TZCA 267 (12 May 2022)**, is relevant. If there is none, the court shall raise the issue for the parties to address and shall make necessary orders as it deems fit.

Second, the court, before proceeding to determine, on merits, a case instituted by a person contending to be an administrator of the deceased's estate, must be satisfied that there is on record, and admitted as an exhibit, a formal proof of appointment of the person suing as the administrator of the estate of the deceased. This is important for the purpose of avoiding unnecessary controversies and preventing a possibility of entertaining a suit filed by undeserving person. In the absence of the said proof at a stage of the closure of the plaintiff's/applicant's case, and after according the parties a right to be heard, the matter before the court should either be struck out for want of *locus standi* of the plaintiff/applicant; or the court may make necessary orders as it deems appropriate given the circumstances of the

matter.

Reverting to the present case, and in light of the foregoing observations, it is clear that the trial court committed a serious irregularity in proceeding to hear and determine the suit on merits in favour of the 1st Respondent whilst he had not established his *locus standi.*

It is also important to enlighten that parties would be tempted to argue that the parties did not dispute the fact that the 1st Respondent was appointed the administrator of the deceased's estate. However, it is a duty of the court, and the court should not allow it be abducted, to ensure that the persons accessing the scales of justice alleging an infringement of their rights are legally recognized, and they should prove that they have legal interest in the claims they make. Otherwise, time and resources would be wasted for no public good.

Under the circumstances of this case, and in light of the foregoing, this court finds that the trial court's proceedings were vitiated by failure of the 1st Respondent to prove his *locus standi*. Therefore, the court invokes its revisionary powers over the district court when exercising its original jurisdiction under section 44(1)(a)(b) of the **Magistrates' Court Act, Cap. 11, R.E 2019.**

The proceedings of the trial court are hereby quashed, the purported judgment and decree of the district court dated 28th May 2023, are hereby nullified and set aside for lack of the plaintiff's/1st Respondent's *locus standi.*

The party or person with a legal interest is at liberty to process his claim afresh in accordance with the law, if he so wishes.

Since the matter that led to determination of the appeal was raised by the court *suo motto*, no costs are awarded.

It is so ordered.

Dated at **Musoma** this 13th day of May 2024.

K. I. Kafanabo
Judge

The Judgment delivered in the presence of Emmanuel Werema, Advocate h/b for Mr. Emmanuel Paul Mng'arwe, Advocate, the 1st Respondent and in the absence of the 2nd and 3rd Respondents.

K. I. Kafanabo
Judge
13/05/2024