IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB-REGISTRY

AT IRINGA

CIVIL APPEAL CASE NO. 28268 OF 2023

(Originating from the decision of the District Court of Iringa at Iringa in Civil Case No. 06 of 2023)

SUN ACADEMY PRE-PRIMARY AND SECONDARY SCHOOL .....APPELLANT

VERSUS

GOOD VICTORY PRIMARY SCHOOL ..... RESPONDENT

JUDGMENT

Date of last Order: 09/05/2024
Date of Judgement: 30/05/2024

LALTAIKA, J.

The Appellant here in **SUN ACADEMY PRE-PRIMARY AND SECONDARY SCHOOL** is dissatisfied with the decision of the District Court of Iringa at Iringa in Civil Case No. 06 of 2023. She has appealed to this Court by way of a Memorandum of Appeal containing the following grounds:

1. *That, the trial magistrate error in law and facts by infringing the right to be heard against the Appellant for raising and discussing*

a new issue in suo motto without inviting the Appellant to submit on the same.

2. *That, the trial magistrate erred in law and fact by holding that the applicant who is currently the appellant had no cause of action against the defendant.*
3. *That, the trial magistrate erred in law and facts by procuring the judgment without assessing properly and considering the strong evidence adduced by the Appellant and his witness.*
4. *That, the trial magistrate erred in law and facts by dismissing the case based on ground of the Appellant having no course of action.*

When the appeal was called on for hearing on 04/04/2024 the **Appellant appeared through Mr. Emmanuel Chengula (learned Advocate).** The Respondent on the other hand, enjoyed legal services of **Mr. Moses Ambindwile** (learned Advocate). Parties opted for exchanging written submissions as the convenient mode of hearing. With leave of this Court, the following schedule was ordered: Filing of Appellant's written submissions: 18/04/2024, Filing of Respondent's Reply 2/5/2024, Filing of Appellant's Rejoinder (if any) 9/5/2024, mention for necessary orders to fix the date of judgement: 9/5/2024.

I hereby register my commendation to the learned Counsel for spotlessly complying with the above scheduled court order. The next part of this judgement is a summary of submissions by both parties.

Mr. Chengula started by indicating that he had consolidated grounds number 1 and 4 to be argued together, while the remaining grounds would be argued independently. Regarding the 1st and 4th grounds of appeal, Mr. Chengula argued that the trial court raised a new issue of the cause of action suo moto without inviting the Appellant to address it, and dismissed the case based on this ground. He asserted that this denied the Appellant the right to be heard, a fundamental principle of natural justice, as articulated in the case of **Mbeya-Rukwa Autoparts and Transport Limited v. Jestina George Mwakiyoma** [2003] T.L.R. 251. He emphasized that decisions made in violation of this principle are void and cited the need for fair procedures where both sides should be heard.

Mr. Chengula submitted further that the adverse decision of the trial Magistrate to proceed with determining the new issue of the cause of action without allowing the Appellant to argue on it was illegal and violated the fundamental right to be heard, rendering the entire ex parte judgment a nullity. He further contended that a decision reached in violation of this right

is nullified, even if the same decision would have been reached had the party been heard.

He highlighted that the issue of the cause of action raised by the court informed the final decision, as evidenced in the typed judgment where the court stated that there was no cause of action against the Defendant. He cited the case of **Blue Rock Limited & Another vs Unyangala Auction Mart Ltd Court Broker** (Civil application No. 69/2 of 2023) [2024] TZCA 8 (19 January 2024) and explained that the violation of the right to be heard must be relevant to the decision in question, which was fatal in this case.

Mr. Chengula also referenced the case of **Anthony Leonard Msanze and Another vs. Juliana Elias Msanze and 2 Others**, (supra) emphasizing that where the plaint does not disclose a cause of action, the remedy is to reject the plaint, not dismiss it. He quoted Order VII Rule 11(a) of the Civil Procedure Code, CAP 33 R.E 2019, which states that the plaint shall be rejected where it does not disclose a cause of action. Despite this, Mr. Chengula reasoned, the trial court proceeded to raise the new issue of the cause of action suo moto and dismissed the case, which he argued was unprocedural and illegal, rendering the judgment null.

For the 2nd ground of appeal, Mr. Chengula argued that the trial court misled itself by failing to thoroughly assess the plaint, which disclosed the cause of action through clear allegations of professional negligence by the Defendant. He cited the case of **John M. Byombalirwa v. Agency Maritime Internationale** (T) Ltd [1983] TLR 1, stating that the presence of a cause of action is determined by looking at the contents of the plaint and its attachments. He criticized the trial court for not properly scrutinizing the entire pleadings, which would have shown the professional negligence committed by the Respondent.

Mr. Chengula referred to the case of **Iddi Babu vs Grace Sillo Wawa & Others** (Civil Appeal 79 of 2016) [2018] TZHC 2724 (10 July 2018), which defined a cause of action as a bundle of facts that gives the plaintiff the right to relief against the defendant. He noted that the trial court, in its judgment, implied that students were attending the Respondent's school without proper transfer procedures, indicating professional negligence. He argued that the trial court failed to recognize the wrong acts done by the Respondent, which constituted a cause of action.

Mr. Chengula emphasized the duty of care required in negligence cases, citing **Caparo Industries plc vs. Dickman** [1990] 2 AC 605 and

Marc Rich & Co v. Bishop Rock Marine Co. Ltd [1996] AC 211, and argued that the Respondent breached this duty by admitting students without following transfer procedures. He further cited the case of **Muganga Lusambo vs. TICTS** [2011] TLR 256, highlighting the standard of care required to avoid unreasonable risks of harm.

Regarding the 3rd ground of appeal, Mr. Chengula argued that the trial court procured the judgment without properly assessing the strong evidence adduced by the Appellant and his witnesses. He noted that the trial court failed to discuss or assess the admitted documentary evidence and ignored strong evidence provided by the Appellant, such as testimony from the Office of Primary Education. He contended that the trial court invented assumptions instead of addressing the actual pleadings, leading to an unjust dismissal of the case.

In conclusion, Mr. Chengula prayed that the Honorable Court allow the appeal, quash the entire ex parte judgment, and either assess the adduced evidence on record or order a reassessment by another Magistrate with competent jurisdiction.

Mr. Masimo, Counsel for the Respondent, responded to Mr. Chengula's submission by stating that the appellant had chosen to argue the first and fourth grounds together, summarizing these grounds as alleging that the trial Magistrate erred in law and fact by raising a new issue suo moto, thereby denying the appellant the right to be heard and concluding that the appellant had no cause of action. Mr. Masimo contended that while the appellant's main submission was well-argued and supported by many authorities, it was irrelevant to the current case.

He explained that the appellant misunderstood the concept of raising a new issue suo moto. He asserted that for an issue to be new, it must not have been raised by any party during the proceedings and must introduce a new question that needs addressing. However, Mr. Masimo reasoned, this does not mean that any question posed by the court to itself constitutes raising a new issue suo moto. In making its decision, he emphasized, the court must ask questions to base its judgment on all facts and evidence presented. In this case, the trial Magistrate asked questions to guide her decision based on the respondent's evidence since it was an Exparte Judgement. One such question was whether the appellant had a cause of

action against the respondent, which cannot be seen as raising a new issue suo moto.

Mr. Masimo pointed out that the trial Magistrate's question aimed to render a sound judgment based on the appellant's evidence. He emphasized that this was clear from the framing of the question in the Exparte Judgement, where the Magistrate asked whether the plaintiff had a cause of action against the defendant after considering the testimony and documentary evidence.

Mr. Masimo further argued that the appellant's claim that the trial Magistrate erred in dismissing the case based on the lack of cause of action against the respondent was misleading. He asserted that the Magistrate concluded that the appellant had no cause of action against the respondent, not that the appellant had no cause of action at all. Clarifying his point, Mr. Masimo argued that this was supported by the Magistrate's statement that having a cause of action is different from having a cause of action against a specific party.

Addressing the second ground of appeal, Mr. Masimo noted that the appellant claimed to have a cause of action against the respondent for

professional negligence but failed to establish the duty of care owed by the respondent. Without such a duty, Mr. Masimo argued, the respondent could not be held accountable for any breach or resultant damages. He cited the evidence of PW2, an authority on student transfer procedures, which placed the responsibility on the parent, not the school being transferred to, thus absolving the respondent of any duty of care.

Regarding the claim for compensation for unpaid school fees by 15 students now attending the respondent's school, Mr. Masimo argued that the appellant had not shown how the respondent was responsible for these fees. He emphasized that there was no agreement or fiduciary relationship between the appellant and the respondent that would make the respondent liable. The status of the unpaid fees, Mr. Masimo reasoned, would have remained unchanged regardless of where the students attended school, making the appellant's suit against the respondent unfounded.

Lastly, on the third ground of appeal, Mr. Masimo asserted that the trial Magistrate had thoroughly examined and assessed all the evidence presented by the appellant. He refuted the appellant's claim that the Magistrate merely mentioned the exhibits without proper assessment, pointing out that the Magistrate had considered all testimony and

documentary evidence. In conclusion, Mr. Masimo prayed that the appellant's appeal be dismissed with costs due to lack of merit.

I have dispassionately considered the rival submissions in the light of the grounds of appeal. I will confine my analysis to two issues namely whether a cause of action had been disclosed and secondly whether the decision of the trial court to dismiss the suit was proper.

ORDER VII Rule 1 of the **Civil Procedure Code** (Supra) "the CPC" requires that the plaint contains "the facts constituting the cause of action and when it arose." The next relevant question would be what is a cause of action? The CPC does not define the phrase "cause of action." In the case of **John M. Byombalirwa v. Agency Maritime Internationale** (Supra) the Court of Appeal of Tanzania intervened to fill the gap by expounding on the phrase to mean essential facts which a plaintiff in a suit has to plead and later prove by evidence if he wants to succeed in the suit.

In the matter at hand, the controversy can be explained in jargon-free style as follows: School A (the Appellant) is suing School B (the Respondent) because pupils hitherto registered by School A decided to transfer to School B without clearing their outstanding fee. School A, however, had all her

services paid by the parents of the students and not School B. Moving on to another level of analysis, School A is suing School B for "professional negligence" that resulted into "unprocedural" transfer of students hitherto studying in School A to School B. Noteworthy, both School A and School B are "legal persons" that is to say they are not "natural persons" with educational qualifications and a professional designation. This makes it very painful to start arguing at that extremely low level of legal reasoning in formulating the cause of action. I make a finding that there was no cause of action disclosed even after reading through the attachments.

This brings me to the second issue namely whether outright dismissal of the suit was justifiable. Admittedly, the procedure obtained in our jurisdiction, as correctly stated by Mr. Chengula, is not to dismiss a suit in the event a cause of action is not disclosed but rather to reject a plaint. This means to strike out the suit. Without prejudice to this position, I am inclined to take a different pathway and uphold the trial court's decision. Lord Denning MR in **Jones v. National Coal Board** [1957] 2 QB 55 stated:

> *"It is very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or*

prejudice, but clear to see which way lies the truth..."

The truth in the matter at hand is that no matter what is done to the plaint as it reads, no cause of action is even remotely conceivable against the Respondent. I know this sounds patronizing, but courts of law are moving from the old-fashioned impassivity also known as blind justice to actively intervene, albeit cautiously to spare litigants from chasing the wind. A Kenyan learned author Steve Ouma ***A Commentary on Civil Procedure Act***,2nd Ed. (Law Africa: 2015) provides as follows on developments in that common law jurisdiction:

> *"Certainly, the above cannot be true post 2010 Kenyan Judicial System. A judge in the Kenyan system is to be regarded as failing to exercise his jurisdiction and thereby discharging his judicial duty, if in the guise of remaining neutral, he opts* ***to remain passive to the proceedings before him.****" (Emphasis added)*

I have considered and strongly support the Appellant's arguments for the right to be heard as emphasized in **MBEYA-RUKWA AUTOPARTS AND TRANSPORT LIMITED V. JESTINA GEORGE MWAKYOMA** (supra) However, this right to be heard must be exercised in accordance with the

legal procedures. Unless court fee and other expenses will be paid by the learned Counsel and not the Appellant, I think a turn back is the best choice.

Legal principles and the specific facts of the case which include contractual relationships between the Appellant and her former clients (or their parents/guardians) makes it plainly clear that the decision of the trial court to dismiss the suit does not, in any way, close the doors to deny the appellant the right to be heard. As correctly put by counsel for the Respondent Mr. Masimo, it does not mean the Appellant has no cause of action at all, it only means she has no cause of action against the defendant as per the pleadings.

In the upshot, this Court finds no merit in the Appellant's appeal. The decision of the trial Magistrate is upheld, and the appeal is dismissed with costs.

It is so ordered.

E.I. LALTAIKA
JUDGE
30.05.2024

Court

This judgement is delivered this 30th day of May 2024 in the presence of Bazila Olomi for the Appellant and Mr. Cosmas Masimo.

E.I. LALTAIKA
JUDGE
30.05.2024

Court

The right to appeal to the Court of Appeal of Tanzania is fully explained.

E.I. LALTAIKA
JUDGE
30.05.2024