THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

CIVIL APPEAL NO. 12 OF 2023

(Originating from Civil Case no. 06 of 2022 formerly Civil Case No. 11 of 2020 before the District Court of Momba at Chapwa)

LETSHEGO BANK TANZANIA LTD ..... 1ST APPELLANT

VITUS LONGINUS MGAYA ..... 2ND APPELLANT

VERSUS

FURAHA LAMSON SIAME ..... RESPONDENT

JUDGMENT

Date of last order: 27/11/2023
Date of judgment: 11/03/2024

NGUNYALE, J.

The facts of this case as extracted from the pleadings and evidence are basically that; the respondent was given a loan facility of 15,000,000/= by the 1st appellant in the loan agreement executed between them on 14th June 2017. A motor vehicle made Mitsubishi Canter with registration No. T843CAR was registered by the respondent as a collateral, he was to repay the loan on monthly basis for the period of 12 months till 15th June 2018. Unfortunately, the respondent defaulted payment of the loan the

fact which made him to return to the 1st appellant to seek rescheduling of the payment. The 1st appellant never responded to her request though the respondent alleged that the loan agreement was orally rescheduled. In May 2019 the 1st appellant took the collateral and sold it to the 2nd appellant to recover her money. The respondent complained that the 1st appellant had no legal justification to sell the collateral, he was in breach of the loan agreement. He filed Civil Case No. 11 of 2020 which was later struck out, and later he filed Civil Case No. 06 of 2022 before the trial court seeking redress under breach of contract.

Upon completion of the trial the matter was decided in favour of the respondent. The appellants were aggrieved with the decision of the trial court. They preferred the instant appeal based on eight grounds of appeal; -

1. *That the trial Magistrate erred in law by acting without jurisdiction when issued an interlocutory order of striking out the suit with leave to refile instead of dismissing the same following non-appearance of respondent in pre-trial conference.*
2. *That the trial Magistrate erred in law when he ordered the respondent to file a case without paying court fees.*
3. *That the trial court erred in law and facts when marked mediation failed by reason of nonappearance of the respondent instead of remitting the case file to the trial magistrate for dismissal order.*
4. *That the trial magistrate erred in law and facts by deciding that the 1st appellant breached the loan agreement while all the evidence on*

records proves that it is the respondent who breached the loan agreement.

5. *That the trial court erred in law and facts by failure to realize that the 1st appellant sold the disputed motor vehicle to the 2nd appellant in exercise of the contractual remedy following the default to the respondent to repay the loan.*
6. *That the trial court erred in law and facts by declaring illegal the sale of the disputed motor vehicle without specifying any provision of the law faulted by the 1st appellant.*
7. *That the trial court erred in law and facts by awarding specific damages of Tshs 50,000/= per day without any evidence to prove that the respondent suffered any specific damages.*
8. *that the trial court erred in law and facts by failure to analyse evidence adduced by parties hence reached wrongly and improper decision in favour of the respondent who failed to prove his case on balance of probabilities.*

Having read the records of the case I will consider only the first, second and third grounds of appeal for reasons which will be apparent in this judgment.

The appeal was heard by way of written submission; The appellants under the service of Isaya Zebedayo Mwanry strongly resisted the appeal basing on the principle that '*no man shall benefit from his own wrong'*. On the 1st ground of appeal in which the complaint is that the trial court acted without jurisdiction when it issued an interlocutory order of striking out the suit with leave to refile instead of dismissing the same following non appearance of the respondent in pre-trial conference, he insisted that it

was an error. He submitted that it is on record that initially the respondent instituted Civil Case no. 11 of 2020 before the trial court which was struck out with leave to refile on 31st March 2021 because the respondent did not appear during pretrial conference. The proper order when the plaintiff fails to appear during first PTC the consequence is dismissal of the suit and not otherwise. They wondered why the remedy of striking out the suit with option to refile came from. The remedy of dismissal of the suit is provided by Order VIII Rule 20 (1) (a) of **Civil Procedure Code** Cap 33 R. E 2019. He cited the case of **AFM Hash Company Ltd and Another versus Raphael Mwasoni Mwangole and Another**, Civil Appeal No. 13 of 2022 High Court at Mbeya (unreported) in which the court allowed the appeal due to among other reasons, for failure to comply with this provision that; -

> *"This provision was not complied with because the trial court was expected to either struck out the 2nd respondent's defence or enter judgment against her or make any orders as it found it fit in the interest of justice. This was not done"*

Therefore, it was improper for the trial court to strike out a case with leave to refile the same upon a nonappearance in the 1st PTC. It was supposed to be dismissed so as the respondent could have applied for an order of setting aside dismissal order if he had sufficient reasons to do so.

The appellants Counsel went on to submit that it was wrong again for the trial Magistrate to revise the order made by his fellow predecessor Magistrate no matter how per incuriam it was. The same is featured at page 1 of the first trial court proceedings of Civil Case No. 11 of 2020 that; -

> *"I have thoroughly passed through the court proceedings and discovered that the first pretrial conference was not conducted on the reason that the plaintiff was dismissing the suit under Order VIII Rule 20 (1) (a) of the* ***Civil Procedure Code*** *Cap 33 R. E 2019. I wonder how this court will proceed with the second PTC while the most important part of first PTC was skipped."*

The trial court continued to reverse the prior order made by predecessor Magistrate. This amounted to acting as appellate court over the order of his fellow Magistrate contrary to law. The court of appeal in the case of **John Barnaba Machera vs North Mara Gold Mine Limited**, Civil Appeal No. 204 of 2019 Court of Appeal at Mwanza (unreported) prohibited judicial officer of the same rank to act as appellate court to another judicial officer that;

> *"We say so because, had it been that the successor Judge abided by the order made by the predecessor Judge, …..This was not compatible with a sound policy to avoid multiplicity, duplicity and endless ligations. It is settled principle that litigation must come to an end - see: Abdon Rwegasira v. the Judge Advocate General, Criminal Appeal No. 5 of 2011 (unreported). Three, this was a misdirection of the successor*

Judge who sat as an appellate Court over the decision of his fellow Judge of the same court which was, with respect, irregular."

Therefore, this matter disserved to be dismissed for failure to attend on the first PTC by the respondent (plaintiff) as the intervention of the trial Magistrate over the order of his successor Magistrate was like adding salt into a wound.

On the second ground that the respondent filed a case without paying necessary court fees the appellants Counsel submitted that when the Magistrate gave an order of striking out the suit, the trial court Magistrate allowed the respondent to re file the suit without paying a court fee contrary to the law Section 3 of the **Court Fees Rules**, GN No. 247 of 2018 which provide for the obligation to pay court fees for a case like this at hand. This suit does not fall under an exception to pay court fee under part III of the Court Fees Rules, GN No. 247 of 2018. The court in the case of **Romania Malingumu vs Melkio Kiluka**, Misc. Land Appeal No. 7 of 2021, High Court at Sumbawanga (unreported) struck out the appeal for failure to pay court fees.

The 3rd ground of appeal that it was wrong to mark mediation failed by reason of nonappearance of respondent instead of remitting the case file to the trial Magistrate for dismissal the learned Counsel stated that it was contrary to Order VIII Rule 29 (a) of the Civil Procedure Code Cap 33 R.

E 2019. To bolster this point, he referred the court to the case of **M/S Cide Company versus Tanzania Forest Services (TFS) Agency and Another,** Land Case No. 65 of 2015, High Court at Dar es Salaam (unreported) where it was observed that; -

> *"In the event therefore, I have decided to invoke the provisions of section 29 (a) of the Civil Procedure Code (Amendment of the First Schedule GN. No. 381/2019) and proceed to DISMISS THE INSTANT SUIT, that is CIVIL CASE NO. 200 of 2018 accordingly on account of the Plaintiffs failure to attend the Mediation."*

The matter disserved to be dismissed for failure to attend mediation by the respondent.

The respondent appeared in person; he was not directly represented by an advocate in court. On the first ground of appeal that the trial court erred to strike out the case with leave to refile the respondent submitted that the trial court exercised its discretion to grant such order. It was done so because striking out happened because of the fault of the court and not the respondent. Order VIII Rule 20 (i) (a) of the **Civil Procedure Code** gives such a discretion by using the word may. Therefore, it was lawful for the respondent to refile the suit without paying court fees because the respondent was not condemned to the irregularities caused by the court. It is clearly that, before the respondent instituted Civil Case NO. 11 of 2020, he complied to all legal procedures needed to institute

the Civil Case to court according to Rule 3 of the Court Fees Rules GN No. 247 of 2018. The respondent paid court fees of 84,000/=. The case was struck out after the court noted irregularities thus it gave the respondent chance to refile without paying court fees. The case of **Romania Malingumu vs Melkio Kiluka** Misc Land Appeal No. 07 of 2021 High Court at Sumbawanga which has been relied by the appellant is distinguishable because in that case the appellant conceded that she did not pay filing fees and she prayed to be allowed to pay such fees but in this case the respondent did not commit any wrong but the irregularity was cause by the court. On the complaint that the suit ought to be dismiss when the respondent failed to attend during mediation the respondent said that he was denied a right to be heard because mediation started before the time which was allocated for the same. Public transport which he used could not enable him to be within the court premises at around 07:30 hours when the matter was called for mediation instead of 08:00 hours. He stated further that Order VIII Rule 29 is not a mandatory provision to dismiss the suit, the court still has a discretion to make any other order which the court deem just. The trial magistrate based on such discretional provision of Order 29 (c) of the Civil Procedure Code which allows the Judge or Magistrate to have an option to make any other order he deems just.

In rejoinder the appellant stated that the respondent submission contains documents which were not part of the exhibits during trial. That kind of practice is strictly prohibited. On the grounds of appeal, he reiterated his earlier submission while qualifying the stance of the respondent.

Having the grounds of appeal in place, the records of the case and the rival submission, I will proceed to determine the issue **whether the appeal has merit or not guided by law and practice**. I will start with the third ground of appeal which reads;

> *That the trial court erred in law and facts when marked mediation failed by reason of nonappearance of the respondent instead of remitting the case file to the trial magistrate for dismissal order.*

In arguing this ground of appeal, the appellant was of the view that the mediator acted without jurisdiction to mark mediation failed for nonattendance of the plaintiff, the proper procedure was to remit the record to the trial Magistrate to exercise his powers per Order VIII Rule 29 (a) of Civil Procedure Code. In reply the respondent was of the view that the mediator has a wide discretion to decide on the nonappearance of the plaintiff. Under Order VIII 29 (c) of the Civil Procedure Code he had power to make any other order, the order to by the trial Magistrate to proceed with hearing as ordered before was sound and proper.

In determining the controversy in this ground of appeal I wish to refer to the proceedings on the date when the mediator marked mediation has failed that; -

> *"Date; - 22/09/2022*
>
> *Coram; - M. M Kannonyele – SRM*
>
> *Plaintiff; - Absent*
>
> *Defendant; - Adv. Kisa Mwakilasa for both defendants*
>
> *C/Clerk: Joyce – RMA*
>
> *Adv Kisa Mwakilasa for Defendants; This Matter is for mediation and I am representing the 1st and 2nd defendants. The 2nd defendant is on safari and has allowed me to proceed on his behalf. The plaintiff is absent without notice; while being fully aware the matter comes for mediation. We also had the phone communication with him that we do settle the matter out of court, and on the way we had communicated with him; the defendants had no offer to on his favour contrary to what he demanded from us.*
>
> *Your honour, on that situation; and his absence today; it is obvious that the mediation cannot be successful, we therefore pray the court to mark the mediation failed that we proceed on other steps.*
>
> *We therefore pray for the final PTC.*
>
> *Court; - Since the parties were given 30 days for mediation pursuant to the orders made on 08/09/2022; and further following to the absence of the plaintiff and the submissions of the learned Advocate for the defendant Ms. Kisa Mwakilasa, it is likely that the mediation cannot be fortified even if the parties are granted more time on the remaining days for mediation.*

With that view in mind, I hence further mark this mediation has failed and I accordingly return the file to the trial Magistrate for the full trial to proceed accordingly to Section 29 of CPC Cap 33 R. E 2022.

Sgd-M. M. Kannonyele – SRM

22/09/2022

The proceedings above speak by themselves that the Mediator marked mediation to have failed because the respondent did not show appearance on the date of mediation on 22nd September 2022. There after the trial Magistrate proceeded with Final Pretrial Conference. The sub issue here is whether the Mediator had legal justification to mark mediation failed. In order to answer the sub issue, it is important to reproduce the relevant provision of Order VIII Rule 29 (a) of the **Civil Procedure Code** Cap 33 R. E 2019; -

Where it is not practicable to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator shall remit the file to the trial judge or magistrate who may-

(a) dismiss the suit, if the non complying party is a plaintiff, or strike out the defence, if the non complying party is a defendant;

(b) order a party to pay costs; or

(c) make any other order he deems just.

In the scenario of this case, I am in agreement with the appellant that the proper remedy was to dismiss the suit per Rule 29 (a) above as correctly

pressed by the appellant. The dismissal was to be done by the trial Magistrate and not the mediator. The mediator had no jurisdiction to mark mediation failed in a circumstance where the respondent did not attend. The Mediator was to take an obligatory role to return the record to the trial Magistrate to exercise his powers according to Order VIII Rule 29 of the Civil Procedure Code Cap 33 R. E 2019. The fact that the Mediator had already dismissed the suit, the trial Magistrate had no jurisdiction to proceed with the same as ordered by the mediator as noted in the quotation above.

I take that view because of the weight carried by mediation under the current legal regime as far as mediation is concerned and the fact that the powers under Rule 29 were exercised by the person without authority. The option suggested by the respondent that the court had justification under Rule 29 (c) to act the way it acted cannot serve the purpose because the mediator remitted the file after a fatal irregularity and Section 29 of CPC Cap 33 R. E 2022 mentioned by the mediator was misplaced. The provision was irrelevance to the circumstance of the matter.

Attendance during mediation is well stated under Section 27 of the Civil Procedure Code which provides; -

"(1) The party or his advocate or both, where the parties are represented shall be notified of the date of mediation and shall attend at the mediation session.

(2) Where a third party may be liable to satisfy all or part of a judgment in the suit or to indemnify or reimburse a party for money paid in satisfaction of all or part of a judgment in the suit, the third party or his advocate may also attend the mediation session, unless the court orders otherwise."

For efficient settlement of matters during mediation attendance of parties is very important as noted in the above provision. The above provision is read together with Rule 28 that for the mediation to be meaningful the parties with authority to settle need to attend the mediation session. Therefore, absence of the plaintiff or his advocate on the date of mediation was fatal thus a proper remedy was to be made by the competent authority i. e the trial Magistrate and not the Mediator as it happened in this case.

In the previous case, Civil Case No. 11 of 2020 between the parties as filed by the respondent before the trial court more less a similar mistake happened. The said mistake is the subject matter under scrutiny now under the 1st ground of appeal that the respondent did not appear on the date of first pre trial conference. The trial Magistrate opted to struck out the suit with leave to refile instead of dismissing the same per Order VIII Rule 20 (1) (a) of the Civil Procedure Code Cap 33 R. E 2019. The

argument of the partis in respect of the first ground of appeal reveal that there is no dispute that the suit was struck out upon failure of the respondent to attend during pretrial conference. They only differ on the proper remedy which was to be issued by the court after the respondent failed to attend pretrial conference. While the appellants rely to Rule 20 (1) (a) which require the suit to be dismissed, the respondent's stance is that the trial Magistrate was right to struck out the suit with leave to refile exercising his discretion under Rule 20 (1) (c) of the same law.

The relevant provision of Order VIII Rule 20 (1) as referred by both parties in their relevant submission provides; -

> *(1) Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the court may*
>
> *(a) dismiss the suit or proceedings if a defaulting party is the plaintiff;*
>
> *(b) strikeout the defence or courter-claim if a defaulting party is a defendant;*
>
> *(c) enter judgment; or*
>
> *(d) make such other order as it considers fit.*

The above provision is very clear about the circumstance when the parties fail to attend on the date of pre trial conference. In the circumstance when the plaintiff fails to attend the proper remedy is to dismiss the proceedings and, in the circumstance, where the defendant fails to attend the proper

remedy is to struck out the defence. If the legislature intended struck out may alternatively be used in the circumstance where the plaintiff defaulted it would have been said so. I therefore tend to differ with the respondent that the discretion under Rule 20 (1) (d) covers the option of struck out which has been expressly stated under Rule 20 (1) (b). The trial court ought to dismiss Civil Case No. 11 of 2020 per the above provision, other order under sub (d) exclude the orders of struck out and dismiss which have been expressly stated under part (a) and (b) of Rule 20. Having said and done, it will sound correct to state that Civil Case No. 06 of 2022 which was filed basing under the leave to refile was filed basing on an incompetent order because is originated from a fatal irregularity. Standing in the same premise it means the complaint about court fees melts. From that view the whole trial in Civil Case No. 06 of 2022 was a nullity because it was founded from an illegal order of refile dated 31st March 2021. Consequently, proceedings and judgment in Civil Case No. 06 of 2022 are hereby quashed and orders set aside.

So far it is apparent that dealing with the other grounds of appeal will only be an academic exercise which will not serve any legal purpose. Civil Case No. 11 of 2020 ought to be dismissed under Order VIII Rule 20 (1) (a) of the Civil Procedure Code R. E 2019 and the aggrieved party was to seek

remedy under the under Rule 20 (2) of the same law and not to file a new suit as directed by the trial court.

In the end result, the appeal is allowed to the extend explained above, I grant no order as to costs because the error was occasioned by the court. Order accordingly.

Dated at Dar es Salaam this 11th day of March 2024.

D. P. Ngunyale

Judge

11/3/2024

Judgement delivered this 11th day of March 2024 in presence of the respondent in person linked under the aid of video conference from Mbeya High Court.

D. P. Ngunyale

Judge

11/3/2024