

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA TABORA SUB REGISTRY AT
TABORA CIVIL APPEAL NO. 9 OF 2023 (Originating from the decision of the District Court of
Igunga in Civil Case No. 02 of 2022) SEIF SAID GULAMALI..... 1st APPELLANT ZACHARIA
MARTINE JOHN..... 2nd APPELLANT VERSUS DAVID S. LU KU
MAY..... RESPONDENT

JUDGMENT

Date of Last Order: 17/09/2024 Date of Delivery: 23/10/2024 MANGO, J. The Appellants have lodged this appeal against the decision of Igunga District Court in Civil Case No. 02 of 2022. Brief facts that led to the present appeal are that, the Appellants filed a suit against the Respondent claiming among other things for Tshs. 105,000,000 /= being estimate value of the produced tailings, Tshs. 10,000,000/= being compensation for damaged compressor and Tshs. 18,000,000/= being compressor rental revenue. It is alleged that, the Appellants and the Respondent entered into an agreement for machine hire. In execution of the agreement, the Appellants i handled a compressor, two crusher machines, digger and 700 steel balls for mining activities to the Respondent. It was alleged further that, parties to this appeal agreed that mine tailings should be sold in presence of both parties and proceeds be shared. The Respondent claimed that, the business went down due to low production and damaged extraction equipment given by the Appellants. After a full trial the court ruled in favour of the Respondent. In its decision, the trial Court observed that, the names Seif Said Gulamali/Zacharia Martine John as appears in the contract do not entail either of the Appellants to be party to the same. In that regard, the Court found the 1st Appellant to be a stranger to the contract. The trial Court also observed that, original copy of the contract was not produced, rather its photocopy was produced contrary to the procedure of producing secondary evidence. Dissatisfied with the findings of the District Court, the Appellants filed the current appeal with five grounds of appeal which read as follows: -

1. That the trial magistrate erred in law for failure to compose all issues framed at the trial, for failure to determine the case according to the issues framed, for failure to be bound by pleadings, for failure to make consideration of the evidence testified during trial and for failure to determine the case according to the evidence testified.

2. That the trial magistrate erred in law in basing the decision of the case on the issue raised suo motu where the Appellants were not accorded a right to be heard.
3. That the trial magistrate erred in law and fact for holding that by holding that Exh.PI is not a contract but just a mere letter, for holding 2 that the Appellants relied solely on exhibit Exh.PI, for expunging exhibit Exh.PI from the record of evidence while relying on the same exhibit Exh.PI to make decision of the case,
4. That the trial magistrate erred in law and fact by raising matters suo motu that the first Appellant is a stranger to the purported agreement and holding that the 2nd Plaintiff name in the trial case is Zakaria Martine @John, matters which resulted into miscarriage of justice.
5. That the trial court's proceedings are nullity for self-contradicting, denying the Appellants advocate an opportunity to make closing arguments and leaving contested issues of fact unresolved. During hearing of this appeal, the Appellants were represented by Mr. George Mwandu, learned advocate while the Respondent enjoy services of Mr. Fadhil Kingu, learned advocate. In support of the appeal, Mr. Mwandu opted to submit on the 2nd and 4th grounds of appeal collectively and the remaining grounds were argued separately. On the first ground of appeal, he faulted the trial court for failure to determine all issues that were framed during trial. He argued that, four issues were framed, however the trial Court determined only one issue. He is of the view that, failure to determine all issues drawn for determination of the suit contravenes the provisions of Order XIV Rule 1(5) of the Civil Procedure Code. The learned counsel referred the Court to the case of Benjamin Mungo Vs Sisi Auction Mart and General Brokers and 3 3 others Land Appeal No. 1/2022 HCT MWANZA at page 6 and 9 in which the Court held that, failure to determine all drawn issues renders the judgment defective. He argued further that, the court also failed to take into consideration evidence tendered by the Appellants during trial and pleadings filed by the parties. He reminded the Court on a well-established principle that, parties are bound by their own pleadings. He referred this court to the case of James Frank Gwagiro Vs AG [2004] TLR 161 to cement his arguments. On the 2nd and 4th grounds of appeal, the Appellants challenge the trial Court for raising issues suo motto and determining the matter on the same issues without affording parties with the right to be heard. On this, the Appellants' advocate argued that, the trial Court ruled that Appellants are strangers to the agreement while both parties acknowledged to have entered into contract and the pleadings show that they had a contract. The contract, exhibit Pl, was admitted by the Court without any objection from the Respondent. Despite that, the trial Magistrate considered the Appellants to be strangers to the contract. The trial Court also observed that, the names in the contract do not relate to either the first or the second Appellant as it appears. He cited the case of Benjamin Mungo supra and the case of Abbas Sherally and another vs Abdul Sultan Haji Mohamed Fazalboy Civil Application No. 133 of 2002 in which the Court insisted on right to be heard on matters raised by the Court suo motto. 4 On the 3rd ground of appeal, the attorney faulted the trial court for expunging exhibit Pl while at the same time relying on

the same to determine the matter before it. It was his contention that since the exhibit had been expunged the same cannot be relied upon to make a decision against a party. He submitted that, the exhibit was wrongly expunged because the document was properly annexed to the plaint, properly tendered by the relevant witness, dully admitted by the Court and no party challenged its authenticity or genuineness, also each party to the case relied on the said document in examination in chief and cross examination and no prejudice or injustice was suffered by either party. He referred to the case of Standard Chartered Bank Tanzania Limited vs National Oil Tanzania Ltd Civil Appeal No. 98 of 2008 CAT at DSM page 6 and Order XIII Rule 7(1) of Civil Procedure Code. On the 5th ground of appeal, the Appellants challenge the trial Court proceedings for being nullity, Mr. Mwandu stated that, proceedings were unfair as they were limited to be conducted for only a single day and the advocate was not allowed to make final submission. He pointed out also that, the magistrate conducted mediation by herself after the first mediation has failed. He finally prayed the appeal be allowed with costs. On his part Mr. Kingu, learned advocate for the Respondent supported the fact that, the trial Court did not determined all issues that were framed. He opposed the rest of the grounds. He submitted that, it is the requirement of the law that all issues, need to be determined even if they cover same aspects. He cited the case of Sheik Ahmed Said vs Registered Trustees 5 of Manyema Masjid TLR [2005] 62 as an authority for his arguments. It was his view that, even if the trial magistrate found a single issue covers aspects in other grounds, it ought to have determined all issues raised. He urged this court to have the matter returned to the trial Court so that the remaining issues can be determined. He referred the Court to the case of Joseph Ndyamukama (Administrator of estate of Gratian Ndamukama vs NIC bank LTD and 3 others [2002] Vol. 2 TLR 497 on appropriate remedy where the Court did not determine all framed issues. He concluded that, Order XIV of the Civil Procedure Code and the authorities cited by the Appellants, are not applicable in the matter at hand. On the 2nd and 4th grounds, he submitted that, the Trial Court didn't raise the issue suo motto but it was findings of the Court after it considered evidence adduced by the parties. He is of the view that, findings does not require the Court to summon parties to address it. Advocate Kingu argued further that, admission of a document without objection does not mean the document is reliable, the Court has a duty to scrutinize and satisfy itself on the authenticity of the documents tendered by the parties. According to him, by its findings that the first Appellant is a stranger to a contract, the Court did not raise a new issue, it merely evaluated evidence and came up with its findings that the first Appellant is a stranger to the agreement tendered as exhibit. Pl. On the 3rd ground of appeal, he was of the opinion that, the trial Court correctly expunged exhibit Pl after it found out that is not an agreement but a mere letter which cannot be considered to be an agreement. Thereafter, 6 no other evidence remained in support of the Appellants' claims thus, the Court dismissed the suit for the Appellants' failure to prove their claims on the required standards On the 5th ground of appeal, the counsel for the Respondent submitted that, the allegations raised by the Appellants' Counsel are not borne by record and it is a new issue which has been raised during appeal stage. He argued that, having two separate mediation proceedings is not among the grounds of appeal raised before this court. The

learned advocate challenged the allegations that the case took short time. In this, he submitted that, the time spent in adjudicating the matter, did not anyhow prejudice any of the parties. On the issue of making final submissions Advocate Kingu argued that, it is not mandatory since there is no any legal provision that provide for mandatory closing arguments. He added that, even Court record does not indicate that the Appellants prayed to make final submissions. He prayed the appeal be allowed to the extent of their concession. In his brief rejoinder, the Appellants' advocate reiterated his submission in chief. I have considered submissions by the parties and Court record. I agree with parties to this appeal that, in composition of its judgement, the Trial Court did not determine all raised issues. The remedy for that, depending on circumstances of the case, is to return the matter before the trial Court for determination of the issues which have not been determined. Despite such 7 observation I noted that, part of the first ground of appeal challenges the decision of the trial Court to be contrary to the contents of the pleadings filed by the parties and the second ground of appeal challenges the trial Court decision for being found on the issue raised suo motto by the Court without affording parties with the right to be heard. I am of a considered view that, the two issues need to be determined so as to clear the alleged irregularities if they truly exist. As correctly submitted by the Appellants' counsel, the decision of the trial Court based on the discrepancies on the names that appear in the agreement which was tendered and admitted as exhibit P1 during trial and the construction of the agreement itself. On the construction of the agreement, the trial Court ruled out that, the same made the alleged agreement to be a mere letter. Court record establishes that, existence of an agreement, Exhibit P1 was not disputed by either party in their pleadings and their testimonies before the Court. Pleadings para 7 of Plaintiff and Para 2 and 3 of the Written Statement of Defence establish that, there is no dispute that parties to this suit had an agreement. In such circumstances, the decision of the Court though seems to be mere findings on the first issue raised during trial which reads, whether there was a contract between the first Plaintiff, second Plaintiff and the Defendant, the foundations of such findings was built on new issues which were neither raised nor deliberated during trial. The decision resulted from the issue of names that appear in the said agreement and whether the contents of the document tendered as exhibit P1 constitute an agreement in the eyes of law. 8 The Court ought to have afforded parties with the right to be heard on the two issues before determining the case based on the two new issues. Despite that, the only discrepancy that the Court noted is the names that appear in the agreement. It is my considered view that, the discrepancy does not go to the root of the case to the extent of contradicting the admitted fact that the Defendant and the Plaintiffs had an agreement. In reaching such findings, I considered a well-established principle that parties are bound by their pleadings and so do the Court. It is my observations that, the first issue that was drawn by the trial Court contravene a well-established principle that issues need to be drawn from the disputed facts as they appear in pleadings filed by the parties. As highlighted in this judgement, parties have not disputed the existence of the contract which was tendered as Exh. P1 without objection. With due respect to the trial Magistrate, the first issue which was drawn to ascertain existence of the said agreement was irrelevant in this matter. The Court

of Appeal when faced with similar circumstances in the case of Astepro Investment Co. Ltd vs Jawinga Co. Ltd (Civil Appeal No. 8 of 2015) [2018] TZCA 278 (30 October 2018), it observed that Tn the circumstances, we are constrained to subscribe to what was submitted by the learned counsel for the appellant that, the issues framed did not reflect the actual dispute which existed between the parties. As a result, the procedure offended the cherished principle in pleading that, the proceedings in a civil suit and the decision thereof, has to come from what has been pleaded, and so goes the parlance 'parties are bound to their own pleadings'! (Ephasis added) 9 With such observations, I agree with the Appellant that the Trial Court raised irrelevant issue since pleadings establishes that there is no dispute that parties to this appeal had an agreement. The only issue between parties before the trial Court was the alleged breach of the agreement and other remedies as contained in their pleadings. Having found so, I hereby return this matter to the trial Court for determination of the alleged breach of the agreement and other reliefs as prayed by the parties and reflected in the issues drawn by the Court. For avoidance of biasness, the matter should be heard by a different magistrate. Given circumstances in this appeal, I do not award costs
Dated at Tabora this 24th day of October 2024 Z. D. MANGO JUDGE 10

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