

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)  
AT ARUSHA**

**CIVIL APPEAL NO. 33 OF 2020**

*(Originating from the Resident Magistrates' Court of Arusha, Civil Case No. 20 of 2020)*

**JORAM EMMANUEL GAGALA ..... APPELLANT**

*Versus*

**EMMANUEL MKONGO ..... RESPONDENT**

**JUDGMENT**

*3<sup>rd</sup> December, 2021 & 11<sup>th</sup> February, 2022*

**Masara, J.**

In the Resident Magistrates' Court of Arusha ("the trial court"), **Joram Emmanuel Gagala** ("the Appellant"), preferred a suit against the Respondent claiming damages arising from a tort of defamation and negligence. Specifically, the Appellant claimed for specific damages to the tune of TZS 55,269,000/= due to financial losses arising from unpaid monthly salaries, remuneration allowances and ancillary cost entitlements connected with his transfer from his duty station to another duty station. He also claimed to have incurred loan arrangements for his survival after he was not paid his salaries and other entitlements for a period of one year. The Respondent was by then the Meru District Executive Director, but he was sued in his personal capacity for negligent acts and defamation which exposed the Appellant to injuries above stated. Apart from the claim

of specific damages, the Appellant also prayed for other several reliefs as reflected under paragraph 13 of the Complaint filed in the trial court.

In the written statement of defence filed in the trial court, the Respondent raised four points of preliminary objections, which were conveyed in the following terms:

- a) That, the trial court was not seized with jurisdiction to entertain the suit;*
- b) That, the Complaint is incurably defective for non-joinder of the necessary party to the suit;*
- c) That, the Complaint is incurably defective for contravening the mandatory provision of Order VI Rule 4 of the Civil Procedure Code, Act No. 49 of 1966 [Cap. 33 R.E 2002]; and*
- d) That, Complaint contravene (sic) the provision of Order VI Rule 15(1), (2) and (3) of the Civil Procedure Code, Act No. 49 of 1966 [Cap R.E 2002].*

In her decision, the trial magistrate only deliberated on the first preliminary point of objection. At the end, the trial Court sustained the first preliminary objection, holding that it was not seized with jurisdiction to entertain the suit because the claim was a labour dispute based on employer employee relationship. The Appellant was aggrieved by that decision. Through the services of his advocate, he has preferred this appeal on two grounds as reproduced hereunder:

- a) That, the trial magistrate grossly erred in law by abdicating from her legal duty of subjecting the entire arguments and legal authorities supplied by the defendant's counsel to an objective scrutiny, she*

*ended to an indistinct and unprecedented findings as to the competence of the court to entertain the suit before her; and*

*b) That the learned trial magistrate erred in law by her failure to appreciate and consider the legal issues raised in the plaintiff counsel on the specific cause of action reflected in the plaint and the settled legal position on personal liability of civil servant for tortious claim, brought against him in personal capacity. He relied on the disputed and non-existing employer/employee relationship to dispose off the case at the preliminary stage in blatant abuse to cardinal principles of law henceforth the indistinct and unfounded decision which occasioned to injustice.*

For the above reasons, the Appellant prays that the ruling and drawn order of the trial Court be quashed and set aside, costs of the appeal be provided by the Respondent and any other relief(s) that this Court deem just and necessary to grant.

At the hearing of the appeal, the Appellant was represented by Mr. Asubuhi John Yoyo, learned advocate, while the Respondent was represented by Mr. Moses Mahuna, learned advocate. The appeal was heard through filing of written submissions.

Before determining the merits of the appeal, and following what was submitted by the parties' advocates, it is noted that the ruling of the trial Court does not contain consequential or final order, after it was ruled that it had no jurisdiction. Notably, in his reply submissions, Mr. Mahuna

contended that the decision of the trial court is vague as it does not indicate whether the suit was dismissed or struck out, after the preliminary objection was sustained. In his view, this appeal cannot be based on the ruling. That an appeal being a creature of statute, cannot lie against every order. He made reference to section 74 and Order XL of the Civil Procedure Code, Cap. 33 [R. E 2019] (hereinafter referred to as "the CPC"). Mr. Mahuna further fortified that since it was not made clear whether the Plaint was returned under Order VII Rule 10(1) or rejected under Order VII Rule 11 of the CPC, it is hard to tell upon which rule the impugned order is founded on. However, Mr. Mahuna was quick to point out that owing to the fact that the trial magistrate concluded that the court had no jurisdiction to entertain the same since it was based on labour dispute, logically it cannot be said that the plaint was returned under Order VII Rule 10(2). He concluded that the appeal was filed prematurely since there is no order of the trial Court indicating whether the suit was dismissed or struck out.

On his part, Mr. Yoyo conceded that the order appealed against does not fall within the ambits of appealable orders as provided for under section 74 and Order XL of the CPC. However, he argued that the above provisions cannot be read in isolation, they are to be interpreted in

conjunction with other provisions of the law, since section 74(2) of the CPC acknowledges appeals from orders which have the effect of determining the case to its finality. Mr. Yoyo was of the view that the order of the trial Court determined the case to its finality, therefore appealable in terms of section 74(2) of the CPC.

I have scrutinized the ruling of the trial court; I have also considered the rival submissions of the counsel for the parties on the issue. The pertinent issue for consideration is whether the appeal is competent before this Court, considering the inadequacy in the trial court's ruling.

I agree with the learned advocates that not every order can be appealed against. Appeal against orders emanating from the District Court and Resident Magistrate Courts is governed by section 74 and Order XL of the CPC. Equally, I agree with Mr. Yoyo that section 74(1) and Order XL Rule 1 of the CPC are not exhaustive on the orders or decisions that are appealable to this Court. Section 74(2) takes cognizance of appeals against decisions/orders which have the effect of finally determining the suit. The provision provides:

*"(2) Notwithstanding the provisions of subsection (1), and subject to subsection (3), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District*

*Court, Resident Magistrate's Court or any other tribunal, **unless such decision or order has effect of finally determining the suit.***" (Emphasis added)

The question is whether the order in the ruling of the trial Court subject of this appeal in Civil Case No. 20 of 2020 is appealable in this Court. For the purpose of clarity, the last part of the said ruling reads:

*"With that established position of the law which my learned brother have (sic) taken and which I have no other reasons to depart from then, I do hereby uphold the defendant's first preliminary objection and concludes (sic) that, the suit is not properly filed before this court and this court orders each party to bear its own costs."*

Having scrutinized the above ruling, I am settled in my mind that the ruling of the trial Court was ambiguous as correctly submitted by Mr. Mahuna. It was not spelt out succinctly whether, having found that the court had no jurisdiction, the suit was dismissed or struck out. I hold this view considering that remedies available for an aggrieved party differ between the two. The distinction between 'dismissal' and 'striking out' of a suit was substantiated by the Court of Appeal in the case of **Mabibo Beer Wines & Spirits Limited Vs. Fair Competition Commission and 3 Others**, Civil Application No. 132 of 2015 (unreported), while citing a decision of the defunct Eastern Africa Court of Appeal in the case of **Ngoni Matengo Cooperative Marketing Union Ltd Vs. Alimahomed Osman** [1959] EA 577, which held as follows:

*"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent; rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."*

The remedy available to an aggrieved party whose case has been dismissed is to appeal to a higher court, while the remedy available to a party whose case has been struck out, is to refile the case within the same court after rectifying the anomalies that led to it being struck out. This position was further deliberated by the Court of Appeal in the case of **MM Worldwide Trading Company Limited and 2 Others Vs. National Bank of Commerce Limited**, Civil Appeal No. 288 of 2017 (unreported), while citing its previous decision in **Olam Uganda Limited suing through its Attorney United Youth Shipping Company Limited Vs. Tanzania Harbours Authority**, Civil Appeal No. 57 of 2002 (unreported), where it was held:

*"In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same court or on appeal or revision by this Court..." (at page 10 and 11)."*

The ruling of the trial court was vague, as it did not inform the parties in clear terms whether the aggrieved party had room to appeal or to refile the suit in the same court or even to amend the plaint. Invariably, Mr. Mahuna submitted that the ruling does not specify whether the plaint was returned under Order VII Rule 10(1) or rejected under Order VII Rule 11 of the CPC. I agree with him that since the final orders were not made apparent in the ruling, it was difficult for the aggrieved party to decide whether he had a room to appeal or not.

Mr. Yoyo suggests that failure to indicate whether the suit was dismissed or struck out by the trial court cannot take away the Appellant's constitutional right to appeal. He maintains that the order of the trial court is appealable since the case of the plaintiff against the defendant was once and for all closed. Although the arguments sound convincing, I find it difficult to entirely subscribe to this line of argument. While it may be true that the trial Court intended to dismiss the suit before it for lack of jurisdiction, that conclusion cannot be easily discerned from the Ruling subject of this appeal. As pointed out earlier, an appeal is a statutory creature. The absence of the final or consequential orders in the trial court's decision manifestly affected the filing of this appeal. The decision is so confusing to the extent that in his submission in chief Mr. Yoyo used



the word “dismissed” in some instances and in other instances he used “struck out”. This confusion can only be answered by the trial magistrate.

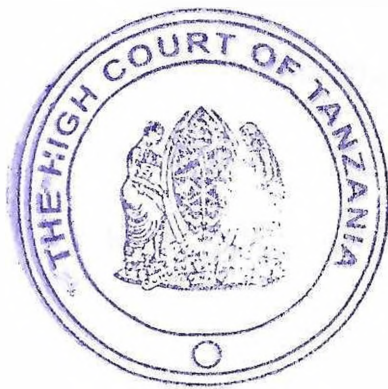
Consequently, since the trial magistrate did not state in clear terms whether the suit was dismissed or struck out, the Appellant’s right to appeal may be said to have been prematurely exercised. The right to appeal would only accrue were it lucidly stated that the suit was dismissed. Short of that, the appeal cannot be determined on merits without having a proper ruling from the trial court. In order to determine whether the Appellant had a right to appeal or not, the ruling should be clear on the final orders. The irregularities in the ruling need to be rectified.

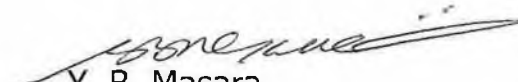
From what I have endeavoured to discuss above, I hereby invoke revisional powers conferred to this Court under section 44(1)(b) of the Magistrate Courts Act, Cap. 11 [R.E 2019], to order the file to be remitted back to the trial Court so as to finalize the ruling by making consequential orders as appropriate. The exercise should be expedited. Meanwhile, determination of the merits of this appeal is stayed. It shall only proceed on merits depending on the consequential orders that will be issued by the trial court. Since the parties are represented, their advocates shall

abide to the law on the remedies available in case they are aggrieved.

Considering that the anomaly above stated cannot be attributed to any of the parties herein, I make no orders as costs at this stage.

Order accordingly.



  
Y. B. Masara

**JUDGE**

11<sup>th</sup> February, 2022