

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
AT SHINYANGA**

(APPELLATE JURISDICTION)

**CIVIL APPEAL NO. 19 OF 2016**

(Arising from Kahama District Court in Civil Case No. 37 of 2015 (I.D. Batenzi, RM))

**MAIGE CHARLES MAKANZA..... APPELLANT**

**VERSUS**

**KERENGE MAGIGE.....RESPONDENT**

Date of Last Order: 11.10.2018  
Date of Judgment: 07.12.2018

**JUDGMENT**

**V.L. MAKANI, J**

This is an appeal by KERENGE MAGIGE. He is appealing against the decision of Kahama District Court in Civil Case No. 37 of 2015 (I.D. Batenzi, RM).

At the trial court the respondent (then plaintiff) brought a suit against the appellant (then defendant) claiming special and general damages to the tune of TZS 20,566,500/= and TZS 8,000,000/= respectively. The respondent had to seek court's intervention after the appellant allegedly misused funds given to him for milling business. The appellant was given TZS 18,000,000/= as capital for the business and there was a profit of TZS 2,566,500/= earned from the business he

was supervising. In his defence the appellant denied misusing the sums of money entrusted to him. He otherwise said the money was distributed to other people who were collecting rice for milling purposes. He said he only owed the respondent TZS 3,106,500/= and was ready to repay in instalment of TZS 800,000/= per month.

On the basis of the evidence presented by the parties, the trial court's finding was that the respondent was entitled to the amount of TZS 20,566,500/= and TZS 2,000,000/= as specific and general damages respectively.

The appellant was dissatisfied with the decision of the trial court hence this appeal.

The appellant filed a main Memorandum of Appeal but his Advocate Mr. Audax Constantine prayed for leave of the court to file supplementary Memorandum of appeal which prayer was granted. The grounds in the main Memorandum of Appeal were withdrawn except for the first one. The supplementary Memorandum of appeal had four grounds of appeal. Therefore five grounds of appeal remained and I will reproduce the said grounds of appeal for ease of reference as follows:

- 1. That the learned Resident Magistrate erred both in law and facts by condemning the appellant to pay the decretal sum whilst the respondents' claims against the appellant were not substantiated in the required standards.*

2. *That the trial Resident magistrate erred in law and fact in holding that the respondent was entitled for the payment of Tshs. 20,566,500/=.*
3. *That the trial Resident Magistrate erred in admitting in evidence Exh.P1 contrary to Order XVII Rule 4 (a)-(d) of the Civil Procedure Code (CAP 33 2002)*
4. *That the trial Resident Magistrate erred in law in admitting Exh.P1 as omnibus.*
5. *That the trial Resident Magistrate erred in law for drawing and determining issues which were irrelevant to the issues raised by the parties in their pleadings.*

As I have said herein above, Mr. Audax Constantine, Advocate represented the appellant and Mr. Machaba represented the respondent.

Mr. Audax on the first ground of the main petition, submitted that a look at the judgment of the trial court revealed that the appellant was ordered to pay TZS 20,566,500/= but the entire evidence led by the respondent did not establish in a balance of probability that the respondent was entitled to the said sum of money. He said there was therefore no evidence upon which the trial magistrate could base his findings. For that reason he prayed the court to fault the trial magistrate.

As for the third ground of appeal, Mr. Audax submitted that the record of the trial court showed that the respondent tendered several documents which were admitted contrary to Order XIII Rule 4(a)-(d)

of the Civil Procedure Code CAP 33 RE 2002 (**CPC**). He said the documents do not form part of the record in terms of Order XIII Rule 7(1) and (2) of the CPC. He cited the case of **Japanese Corporation vs. Khaki Complex Limited [2006] TLR 343 (CA)** the court insisted that documents tendered in evidence must be admitted in evidence as required under Order XIII Rule 4 (a) to (d) of the CPC to make them part of the record otherwise the documents maybe rejected or disregarded when the court appraises the evidence.

As regards the fourth ground of appeal, Mr. Audax submitted that the Exhibit P1 comprised of many documents but they were admitted as a single exhibit. He said this kind of admission of an exhibit is not allowed by virtue of the case of **Anthony M. Masanja vs. Penina (Mama Mgesi) & Another, Civil Appeal No. 118 of 2014 (CAT-Mtwara)** (unreported) where the court stated that where documents are admitted in an omnibus manner the other party is denied the right to be heard hence unfair trial. He prayed that Exhibit P1 be expunged from the record by virtue of the case of **Anthony M. Masanja** (supra).

As for the last ground, Mr. Audax said the trial court framed irrelevant issues. He said the respondent was claiming TZS 18,000,000/= being money for milling business which the appellant had misused for luxurious matters. But the appellant essentially denied the facts and he only admitted that he was indebted to the respondent the sum of TZS 3,106,500/= only. He said according to

the pleadings the relevant issues would have been whether the defendant was entrusted with the sum of TZS 18,000,000/= by the respondent for milling purpose. But he said the trial court's central issue was whether the defendant distributed monies claimed to other businessmen or peasant. He said this issue was not contentious and so the main issues were left undecided. He said when issues framed were irrelevant and calls for a re-trial as was stated in the case of **Stanslaus Rugala Kasusura vs. Attorney General and Phares Kabuye [1992] TLR 338**. Mr. Audax said for that reason the judgment was fatally defective. He said if this ground has merit then they are praying for a re-trial but if the other grounds have merit then the appeal be allowed and the order of the trial court be reversed.

In response Mr. Machaba was of the view that the trial magistrate was correct in ordering payment to the respondent of TZS 20,566,600/= and the decision was based on balance of probabilities as per section 110 of the Evidence Act. He said the respondent was able to prove his case and he tendered documents in evidence as Exhibit P1 and there was no objection and this was the basis of the cause action.

As for the third ground, Mr. Machaba said in the Supplementary Memorandum of Appeal there is cited Order XVIII Rule 4(a) to (d) of the CPC, which does not exist. He said learned Counsel tried to amend this during the submissions but there was no prayer to that

effect. In any case, he said the trial magistrate properly admitted Exhibit P1.

As for the fourth ground Mr. Machaba said learned Counsel for the appellant did not mention any specific law that was contravened save for the cited case of **Anthony M. Masanja** (supra). He went on saying that in the cited case it states that it is unfair to admit several documents if a party is not heard but in the present case, according to Mr. Machaba, the appellant was given an opportunity to be heard. He said omnibus law does not apply to the admission of documents but in applications where there are two or more prayers. He said Exhibit P1 contained 8 deposits slips and formed part of the cause of action and was marked collectively and was intended to mean the same thing.

As for the last ground Mr. Machaba stated that pleadings are not evidence and cannot be the basis of evidence unless they amount to admission. He said Order XIV Rule 1(5) and (6) of the CPC imposes a duty on the trial court to frame issues based on the pleadings after examining the defence unless the defendant makes no defence. He said the appellant in the trial court was given an opportunity to be heard. Mr. Machaba cited the case of **Odd Jobs vs. Mubia [1970] EA 476 at 479** where it was held that the duty of the court to frame issues is where there is a controversy between the parties and in **Agro Industry Limited vs. Attorney General [1994] TLR 43** the court may decide on un-pleaded issue if it appears that the issue has been left to the court for decision provided the parties were

heard on the said issue. He said the trial court was aware and the issues framed were correct and parties were given an opportunity to be heard. For the reasons given Mr. Machaba prayed for the appeal to be dismissed with costs.

In rejoinder Mr. Audax reiterated his main submissions. As regards the first ground he emphasized that the appellant strongly contested the suit by way of evidence. As for the third ground, he admitted the error in the citation of the provision in the petition of appeal but he said his intention was to cite Order XIII Rule 4 of the CPC. He prayed the court to take on board the arguments in respect of this ground in terms of Order XXXIX Rule 2 of the CPC that the court has implicitly allowed the submissions by Counsel. He said Counsel for the respondent did not object and so his prayer was for the court to hold that the documents tendered were not part of the record as per Order XIII Rule 4(a) to (d) of the CPC.

As for the fourth and last ground Mr. Audax reiterated his main submissions and emphasized that in the case of **Anthony M. Masanja** (supra) the court stated that documents should be admitted singly and not collectively. He also emphasized that the issues drawn did not resolve the dispute and prayed the court to be guided by the case of **Stanlaus R. Kasusura** (supra). He reiterated his prayers for a re-trial or the appeal to be allowed and the order of the trial court to be set aside.

I have heard the rival submissions by learned Advocates representing the parties herein. I will consider the grounds of appeal separately starting with the third ground of appeal.

As submitted by Mr. Machaba, Order XVIII Rule 4(a) to (d) of the CPC does not exist and that Mr. Audax did not pray to amend the said ground but proceeded to submit his arguments on the basis of Order XIII Rule 4(a) to (d) of the CPC. On the other hand, Mr. Audax admitted that the cited provision was wrong but relied on Order XXXIX Rule 2 of the CPC, which states:

*"The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:*

*Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground".*

It is apparent from the above provision that the appellant cannot argue an appeal on a ground that is not set out in the memorandum of appeal without leave of the court. But the court's hands are not confined to matters in the Memorandum of Appeal. The court may as well consider other issues not that are not raised as long as both parties had an opportunity of addressing the said issue. In the present case, indeed, Mr. Audax submitted on Order XIII Rule 4(a) to (d) which was not cited in the Supplementary Memorandum of Appeal. He did so without asking for leave of the court to amend and

or correct the existing ground which cited a non existing provision, that is, Order VIII Rule 4(a) to (d) of the CPC. But on the other hand, Mr. Machaba did not object to what Mr. Audax was submitting, he instead raised this issue in the course of his submissions and went on stating that the Exhibit P1 was properly admitted. This means though there was no leave granted to Mr. Audax to argue the ground on the basis of Order XIII Rule 4 (1) (a) to (d) of the CPC Mr. Machaba had an opportunity to be heard by the court on the issue. Since all the parties were heard and for the ends of justice, the court shall proceed to consider the argument as argued on the basis of Order XIII Rule 4 (1) (a) to (d) of the CPC, which states:

*"Subject to the provisions of the sub-rule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:-*

- (a) the number and title of the suit;*
- (b) the name of the person producing the document;*
- (c) the date on which it was produced; and*
- (d) a statement of its having been so admitted;*
- (e) and the endorsement shall be signed or initialed by the judge or magistrate."*

I have perused the original file, and clearly, the trial magistrate did not adhere to the above provision. While the respondent was led to tender, and the exhibit was actually admitted by the court but what appears on the exhibit is only a mark "**Exh. P1**" and this misses out the requirements enumerated in Order XIII 4(1) (a) to (e) of the CPC as the exhibit does not bear endorsement on the number and title of the suit, the name of the person producing such documents, the date when the documents were produced and is not signed or initialed by the trial magistrate. With the said shortfall one cannot safely state

with certainty that the Exhibit P1 was properly admitted in evidence by the trial magistrate and thus could have formed part of the record. In the case of **Japan International Cooperation Agency** (supra), the Court of Appeal among other things held:

*"This Court cannot relax the application of Order XIII Rule 7(1) that a document which is not admitted in evidence cannot be treated as forming part of the record of suit."*

Subsequently, since there was an obvious mishandling of the admission of Exhibit P1 in evidence at the trial court the omission is fatal and it renders the said Exhibit P1 not to be part of the record of the suit (see also **Ismail Rashid vs. Mariam Msati, Civil Appeal No. 75 of 2015 (CAT-Dar es Salaam)**(unreported)).

Having established that Exhibit P1 does not form part of the record of the suit, it would be an unnecessary exercise to consider the ground whether it was proper for the trial court to admit the said Exhibit P1 collectively. Subsequently, I will consider the first ground and the last ground together.

Order XIV Rule 1 of the CPC governs framing of issues. And Rule 1(5) of the said Order states:

*"At the first hearing of the suit the court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."*

In the present case, on 23/02/2016 the trial court adopted the issues that were framed by the parties. According to the proceedings the record is reflected as follows:

*"Court: Since the parties concede to each other on the issues proposed, this court adopts the same as court's issues."*

The record is quite clear that the participation of the trial magistrate in the framing of issues was very minimal though he was the one who was supposed according to Order XIV Rule 1 of the CPC to guide the parties so as to arrive at a just decision. The trial magistrate merely adopted the issues that were framed by the parties and to be concise it was only the plaintiff who drew the issues because the defendant had no objection to what was proposed by the plaintiff. The rationale of framing of issues by the court with the assistance of the parties is to enable the court to direct its mind to the issues that are at controversy between the parties. And that is why under Order XIV Rule 5 of the CPC the court may at anytime before the passing of a decree amend the issues or frame additional issues on such terms as it thinks fit to enable determination of matters in controversy between the parties. The court has also the powers before the passing of a decree to strike out issues that appear to be wrongly framed or introduced.

According to the plaint the respondent was claiming from the defendant TZS 20,566,000/= entrusted to the appellant for milling business. The appellant denied to owe the respondent the said sum and only admitted to the sum of TZS 3,106,500/=. The sum in controversy was therefore TZS 17,449,500/=. In that respect

therefore the fundamental issue that the court ought to have focused as rightly submitted by Mr. Audax, would have been whether or not the appellant was entrusted with the sum of TZS 20,566,000/= as alleged. The issues that were framed in essence were not the main matters in dispute between the parties they were only issues to assist in determination of the main issue, which issue was not framed. In essence therefore the judgment of the trial court does not clearly analyse the evidence to cover the fundamental issue at controversy between the parties. In other words, the evidence by the trial court was not well evaluated to arrive at a just decision.

Briefly stated, there were procedural irregularities in the proceedings. The handling of the Exhibit P1 did not comply with the law and the framing of the issues by the trial magistrate was equally not proper. With these irregularities the subsequent remedy available is to order re-trial as rightly prayed by the appellant's Advocate so that a just decision is made.

In the end result, the appeal is allowed. The proceedings of Kahama District Court in Civil Case No. 37 of 2015 are hereby quashed and the judgment and decree set aside. The case file is to be remitted back to the trial court for re-trial before another magistrate of competent jurisdiction. There shall be no orders as to costs.

 *V. L. Makani*  
**V. L. MAKANI**  
**JUDGE**  
**12/12/2018**