

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 118 OF 2017

**(Original RM's Civil Case No. 395 of 2012 of Dar es Salaam Region at
Kisutu)**

UMOJA AUDIO VISUAL (E.A) LTD APPELLANT

VERSUS

MICHAEL.E. MREMA t/a

HAMAK DRAMA GROUP RESPONDENT

JUDGEMENT

Date of last Order: 7/5/2018

Date of Ruling: 29/5/2018

Munisi, J.

The appellant, Umoja Audio Visual (E.A) Ltd was sued by the respondent before the Kisutu RM's Court for a number of reliefs following an alleged breach of contract. The said contract revolved ground distribution of Digital Video Discs (DVDs) together with infringement of copy right material. Specifically, before the trial court respondent was seeking the following reliefs from the appellant:

- (a) A declaration that the unilateral act of the Defendant to infringe the Plaintiff's copyright material styled Dhambi haina siri is utterly illegal and unlawful,

- (b) Declaration that the Defendant has breached the contract with the Plaintiff on account of the impugned infringement,
- (c) Defendant to pay the Plaintiff Tshs 12,000,000/= being principal sum for already supplied Digital Video Discs (DVDs) by the Plaintiff to the Defendant.
- (d) Defendant to pay the Plaintiff Tshs 60,000,000/- being compensation for the impugned infringement, breach of contract, inconvenience and loss of income.
- (e) That the defendants pay to the plaintiff Interest on item (c) herein above at a rate of 31% per annum from the date of default to the date of judgment.
- (f) That the defendants pay to the plaintiff Interest on item (c) and (d) above at the court's rate of 12% from the date of judgment to the date of payment in full.
- (g) The Defendants pays to the plaintiff costs of this suit
- (h) Any other relief as this Honourable Court may deem fit and just be granted.

In the initial judgment, the trial court found for the respondent Umoja Audio Visual (E.A) Ltd. Upon an appeal to the High Court filed by the appellant, the appellate court found that the judgment of the trial court was tainted by irregularities and declared it fatally defective ordering the trial magistrate to compose a fresh judgment according to law. It is notable that in the 2nd judgment, testing the same evidence, the magistrate changed her initial stance and found for the respondent. Aggrieved by the recomposed judgment appellant has preferred the present appeal challenging the same on the following grounds:

1. The trial magistrate erred in law and fact for her failure to comply with the order of the High Court of Tanzania by judge Mwandambo in Civil Appeal No 84 of 2015 of 25th November 2016.
2. The trial magistrate revised her own decision.

When the appeal was called on for hearing on 7/5/2018, Mr. Symphorian Revelian Kitare and Mr. Elisaria Moshia, learned counsel appeared for the appellant and the respondent respectively.

Mr. Kitare prayed to argue the two grounds together on the ground that they overlapped. The learned counsel submitted that the trial magistrate failed to comprehend the direction issued by the High court in Civil Appeal No 84 of 2016 which instructed her to compose the judgment afresh according to law. He argued that instead of complying to the order, she reviewed her initial judgment and amended her reasoning on the two issues thus coming up with a different decision. To support his stance, he relied on the case of **Paulo Lema V Wilson Chuma (1987) TLR 130**. He thus prayed for the decision to be struck out since it did not comply with the High Court's direction and consequently the appeal to be allowed.

On his part, Mr. Moshia, learned counsel dismissed as baseless the claim that the magistrate reviewed her decision arguing that Mr. Kitare had failed to argue his ground of appeal. He elaborated that what the learned counsel submitted amounted to inviting the court to discuss the judgment of Hon Mwandambo, J. which directed the trial magistrate to compose a fresh judgment upon rejection of the initial one. He argued that since the magistrate had complied with the order, she cannot be faulted for so doing as she was just implementing the direction. He thus prayed for the appeal to be dismissed with costs.

I have given due consideration to the counsel's respective submission and have also duly studied the record of the proceedings. It is common that through Civil Appeal No. 84 of 2016, Hon. Mwandambo, J. directed the magistrate to recompose her judgment afresh. The last paragraph of his judgment states:

"Having found that the judgment of the trial court in this appeal is fatally defective, I likewise reject it and order that the trial Resident Magistrate compose judgment afresh according to law..."

It seems the counsel's point of departure is whether the order was complied with to the letter. I have gone through the two judgments to establish whether the complaint by Mr. Kitare is justified. It is apparent that the initial judgment was partly rejected because it did not determine some of the issues framed by the trial court for determination. From the proceedings it is notable that on 5/3/2014, the court recorded the following agreed issues:

1. "Whether there was an agreement or not on supply and sale of Digital Video Discs between Plaintiff and Defendant.
2. With what terms.
3. Whether the Defendant was in breach of the said agreement with the Plaintiff.
4. What the relief of the parties entitle to."

While the court recorded the above four issues at the beginning of the hearing on 5/3/2014, in its judgments dated 3/7/2015 and 3/3/2017, the magistrate recorded only three issues omitting the 2nd issue. In the impugned judgment before this court, the issues recorded at page 3 of the judgment are as follows:

1. "Whether there was distribution contract between the plaintiff and the defendant.
2. Whether the defendant breached the said agreement.
3. What reliefs parties are entitled."

From the above extract of issues, I have no doubt the trial magistrate re-casted the framed issues and gave them her own wording some of which gave a complete different meaning to the agreed issues. While the 1st issue was specific on supply and sale of the said DVDs, the one recorded in the instant judgment relate to a distribution contract. It is thus not clear whether the judgment relate to the same facts and issues.

From the above factual situation, I agree with Mr. Kitare's view that the judgment dated 13/3/2017 did not strictly comply with Justice Mwandambo's direction as it substituted the 1st issue to another general issue and made a finding on it. This omission has made me

wonder what was intended by the magistrate. All in all, I agree that by introducing a different issue which was not among the four initially agreed upon coupled with omitting one issue, the magistrate failed to comply with the order to compose the judgment according to law. While not necessarily agreeing with Mr. Kitale that the magistrate reviewed her judgment, I subscribe to the view that the judgment complained about fall short of meeting the direction issued by Justice Mwandambo in his judgment dated 25/11/2016.

The issue now, is what should be done in view of the glaring omission. Having considered the issue critically, I do not think it will be to the interest of justice to return the file back to the magistrate with a direction to recompose the judgment for the 3rd time. In my assessment, the trial magistrate has failed to appreciate the evidence which amounts to mishandling the trial. The Court of Appeal in the case of **Ismail Rashid V Mariam Msati, Civil Appeal No 75 of 2015** (unreported) restated its principle set in the case of **Shemsa Khalifa and two others V Suleiman Hamed, Civil Appeal No 82 of 2012** (unreported) where it said:

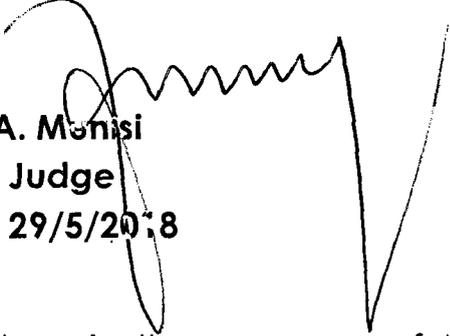
“...it is trite law that judgment of any court must be grounded on the evidence properly adduced during trial otherwise it is not a decision at all....”

In my view, the fact that the magistrate has kept on changing the issues framed in the two judgments she composed is a clear indication of mishandling the trial and also of failing to appreciate the evidence presented before her by the parties. Under the circumstances, I do not consider it prudent to send the file back to the same magistrate to compose yet a 3rd judgment or even task a different magistrate who has not handled this case to reccmpose a judgment. Under the circumstances of this case, consequent to the finding that the 2nd judgment was not composed in line with the directions issued by the High Court, prudence dictates that the only option available so as to ensure credibility of the process is to declare a nullity the whole proceedings and the judgment thereof.

In my view, this cause of action is necessary for the interest of justice so as to pave way for a fresh trial to afford parties a credible trial.

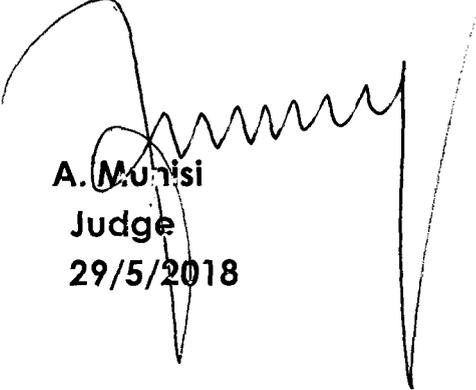
From the foregoing discussion, I invoke revisional powers and nullify the proceedings and the judgment of the trial court. Since the resulting omission was not occasioned by the parties but rather by the court, I order the trial to be conducted afresh before a different magistrate of competent jurisdiction.

In the final analysis, the appeal succeeds to the extent explained herein above. I make no order as to costs.



A. Munisi
Judge
29/5/2018

Judgment delivered in Chambers in the presence of Miss Glory Venance, learned counsel for the Respondent, also holding brief of Symphorian Revelian Kitare, learned counsel for the Respondent, this, 29/5/2018.



A. Munisi
Judge
29/5/2018