IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

PC. CRIMINAL APPEAL NO. 35 OF 2021

(Appeal from Ruling of the District Court of Chato at Chato (Kagimbo, RM) in Civil Revision No. 7 of 2021 in the dated 29th of June, 2021.)

AMOS LUKINDO ..... APPELLANT

VERSUS

ANASTELA GERARD MLUNGA ..... RESPONDENT

JUDGMENT

14th September & 8th November, 2021

ISMAIL, J.

This is appeal arises from revisional proceedings which were conducted in the District Court of Chato (Kagimbo, RM). These proceedings were commenced *suo motu* on realization that illegalities existed in the trial proceedings presided over by Chato Urban Primary Court. These illegalities included failure to comply with Rules 18 and 19 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rule GN. No. 310 of 1964, relating to issuance of summons to a defendant once a suit is instituted; ordering that the trial proceedings should proceed *ex-parte* without any such prayer by a party; and non-compliance with Court Fees Rules, GN. No. 247 of 2018. The contention in the said matter is that fees paid were only in respect of an

application for execution. In the end, and exercising powers conferred on it by section 21 (1) of the Magistrates' Courts Act, Cap. 11 R.E. 2019, the trial proceedings were quashed and the ensuing orders were set aside. The matter was consigned back to the trial court for trial *de-novo*.

This decision irked the appellant, the respondent in the revisional proceedings, hence his decision to institute the instant appeal. The petition of appeal has five grounds, paraphrased as hereunder:

1. *That the District Court erred in law and fact by revising the trial court's decision without any formal application by the respondent.*
2. *That the District Court erred in law and in fact for not considering the fact that the respondent was not complaining about failure to serve a summons or non-payment of fees as held by the court.*
3. *That the District Court erred in law for not considering that no decision or order of a primary court can be reversed or altered on appeal or revision on account of error, omission or irregularity unless such error, omission or irregularity has occasioned a failure of justice.*
4. *That the District Court erred in law and in fact for decising the matter in the respondent's favour based on issues raised suo mottu without affording the parties the right to be heard.*
5. *That the District Court erred in law and in fact for quashing the trial court's decision which was fairly and legally procured.*

Hearing of the appeal was done by way of written submissions, duly filed by the parties.

In his brief submission, Mr. Joram Kuboja, counsel for the appellant, argued in respect of ground one that the guiding principle is that applications for revisions should be preferred by way of chamber summons, supported by affidavit. Mr. Kuboja noted that, in Civil Revision No. 7 of 2021, from which this appeal emanates, none of that application was preferred.

Submitting on ground two, counsel submitted that the respondent's complaint was not on failure to serve a summons or payment of fees. The appellant contended that the legal position is that once fees are paid, the applicant's responsibility ends there, and that the applicant cannot be penalized for inefficient committed by the court, or be made a scapegoat. He buttressed his contention by citing the decisions in ***Msasani Peninsula Hotel Ltd v. Barclays Bank Tanzania Ltd & 2 Others,*** CAT-Civil Application No.192 of 2006; and ***Spencon Service (T) Ltd v. Gradiators Investment Company Limited***, HC-Civil Appeal No. 21 of 2018 (unreported).

Submitting with respect to the sum due and unsatisfied, the appellant's counsel argued that the respondent still owed the appellant the balance sum of TZS. 1,500,000/-, and that it was wrong for the respondent to renege on

her undertaking under the contract. He argued that doing so was contrary to the requirements of the law. He relied on the decisions of the Court of Appeal and this Court in ***Simon Kichele Chacha v. Aveline M. Kilawe***, CAT-Civil Appeal No. 160 of 2018; and ***Muungano SACCOS Ltd & Others v. Lameck Daud Libeli***, HC-Land Appeal No. 22 of 2020 (both unreported).

With respect to ground three of the appeal, learned counsel argued that section 37 (2) of Cap. 11 bars appeals or revision against the decision of the primary court on account of error, omission or irregularity. Submitting on ground four, Mr. Kuboja held the view that an issue relating to payment or non-payment of fees was raised *suo motu*, without affording the parties right to be heard on the said issue. He argued that the court's conduct was an affront to article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (as amended).

With regards to ground five, the appellant's contention is that if the respondent was not served with a summons for the hearing of the matter, the proper course of action would be to set aside the *ex-parte* decision and not to order revision of the matter as was the case in the impugned decision.

The appellant urged the Court to allow the appeal with costs.

The respondent's submission was equally brief. Mr. Paul Bomani, learned counsel who represented the respondent confined his arguments on

the powers of the court to order revision. He argued that these powers are conferred on the court under section 22 (1) of Cap. 11, the purpose of which is to address the irregularities or illegalities that the revised proceedings carry. In this case, counsel contended, failure to issue and serve a summons, and or submit proof of payment of fees were irregularities that merited the exercise of revisional proceedings.

With respect to right to be heard, the counsel argued that such right was afforded and the parties appeared in person. They were also afforded an opportunity to address the court, after which the court made the appropriate findings. It was Mr. Bomani's contention that the court cannot be blamed for that. Finding no fault in the court's decision, Mr. Bomani urged the Court to dismiss the appeal with costs.

In his rejoinder submission, the appellant dwelt on what he considers to be a denial of the right to be heard. He maintained that the question of court fees and issuance of summons were never a subject of discussion when the parties addressed the court in the revisional proceedings. Counsel maintained that article 13 (6) (a) of the Constitution (supra) had been violated. He backed up his arguments with a trio of decisions. These are: ***Director of Public Prosecutions v. Shabani Donasian & 10 Others***, CAT-Criminal Appeal No. 196 of 2017; ***Mbeya-Rukwa Autoparts and***

Transport Ltd v. Jestina George Mwakyoma [2003] TLR 251; and ***Andrew Katema v. Simoni Ngalapa***, HC-(PC) Civil Appeal No. 106 of 2019; (all unreported).

With regards to ground three, the counsel reiterated that the district court lacked jurisdiction to revise a primary court decision where the error is a pure point of law. Overall, he urged the Court to allow the appeal.

For reasons that will be apparent soon, I will confine my analysis to ground four of the appeal. This ground decries the district court's handling of the revisional proceedings. The contention is that the point that eventually turned out to be decisive did not feature in the hearing, meaning that the parties were not called upon to address it. This is where the argument of failure to observe the right to be heard stems. The question that should detain us is whether such right was observed by the court.

Quest for the answer to that question takes me to 15th June, 2021, the date on which the parties were summoned for the hearing of the revisional proceedings. On this day, both parties were in attendance and were allowed to present their cases. Neither the question of court fees nor the issue of issuance of summons featured in the proceedings for the day. It surfaced in the course of composing the ruling that is now under the cosh. This, as the appellant's counsel has rightly submitted, denied the parties the benefit of

getting to know what the learned Magistrate intended to raise as a concern against the decision of the primary court. Clearly, the parties were not heard and the decision of the court was not bred from the parties' positions.

Had the magistrate taken time to invite the parties to address him on the point of concern, the said magistrate would have conformed to one of the cardinal principles of natural justice, known in Latin, as *audi alteram partem,* which literally means, ***hear the other side***. This principle obligates courts or quasi-judicial bodies to ensure that parties to the controversy be informed of any adverse point, and invite them to state their case. This position is in line with the scintillating reasoning made by Lord Diplock in the ***Hadmor Productions v. Hamilton*** [1982] 1 ALL ER 1042 at p. 1055, wherein he remarked as follows:

> *"Under our adversary system of procedure, for a Judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what is his answers to it".*

The reasoning in the foregoing case has been adopted across jurisdictions, in a multitude of decisions that came after it. In our jurisdiction,

the Court of Appeal of Tanzania has been in the forefront in abhorring arbitrariness and exclusivity adopted by judicial and quasi-judicial officers. In ***Scan – Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu***, CAT-Civil Appeal No. 78 of 2012 (ARS-unreported), the upper Bench held:

> *"We are of the considered view that in line with the audi alteram partem rule of natural justice,* ***the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit*** *- See* ***Shomary Abdallah v. Hussein and Another*** *(1991) TLR 135;* ***National Housing Corporation versus Tanzania Shoes and Others*** *(1995) TLR 251 and* ***Ndesamburo v. Attorney General*** *(1977) TLR 137.* ***The right to be heard is emphasized before an adverse decision is taken against a party.*** *"*[Emphasis added].

Underscoring the significance of having the parties heard on matters that determine their fate, was the decision in ***Director of Public Prosecutions v. Shabani Donasian & 10 Others*** (supra), wherein the apex Bench guided:

> *"We should hasten to add that affording a party the opportunity of being heard before a prejudicial order is made is not merely a judicial practice: It is, so to speak, a fundamental constitutional right...."*

See also: ***Mire Artan Ismail & Another v. Sofia Njati***, CAT-Civil Appeal No. 75 of 2008 (unreported).

Consequences of denial of the right to be heard are dire, and this Court and the Court of Appeal have countlessly emphasized the fact that such failure renders the proceedings discrepant and a mere parody which should not be left to see the light of the day. Such decisions include: ***Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma*** (supra), quoted in ***Ausdrill Tanzania Limited v. Mussa Joseph Kumili & Another***, CAT-Civil Appeal No. 78 of 2014 (MZA-unreported); and ***Margwe Erro & 2 Others v. Moshi Bahalulu***, CAT-Civil Appeal No. 111 of 2014 (ARS-unreported).

In ***Director of Public Prosecutions v. Shabani Donasian & 10 Others*** (supra), the upper Bench guided on the consequence of such infraction, in the following words:

> *"In similar vein, we unhesitatingly hold that the revisional order under our consideration is void and of no effect."*

The stance taken by the superior Court is a reiteration of its position, espoused in its earlier decision ***Abbas Sherally & Another vs Abdul S. H. M. Fazalboy,*** CAT-Civil Application No. 33 of 2002. It was held:

"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. ***That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.*** *"*[Emphasis supplied]

Inspired by these astute decisions, I hold that the District Court's conduct was nothing short of a wanton disregard to the parties' fundamental rights. It has rendered the revisional proceedings a mere parody that can hardly stand any test of fair proceedings. They deserve nothing better than a nullification.

In consequence of the foregoing, I hold that the appeal is meritorious and I allow it. Accordingly, I hold that the revisional proceedings were void, of no effect and the same are nullified as are the ensuing orders and decisions.

Order accordingly.

DATED at **MWANZA** this 8th day of November, 2021.

THE HIGH COURT OF TANZANIA MWANZA

M.K. ISMAIL

JUDGE

Date: 08/11/2021

Coram: Hon. M. K. Ismail, J

Appellant: Mr. Kuboja, Advocate

Respondent: Mr. Paul Bomani, Advocate

B/C: P. Alphonce

Court:

Judgment delivered in the virtual attendance of Counsel for both sides, this 08th day of November, 2021.

THE HIGH COURT OF TANZANIA MWANZA

M. K. Ismail

JUDGE

At Mwanza

08th November, 2021