

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., KAIJAGE, J.A. And MUSSA, J.A.)

CIVIL APPEAL NO 111 OF 2014

**MARGWE ERRO
BENJAMIN MARGWE
PETER MARWE** }**APPELLANTS**

AND

MOSHI BAHALULU.....RESPONDENT

**(Appeal from the judgment of the High Court
of Tanzania at Arusha)**

(Mugasha, J.)

dated the 11th day of October, 2013

in

Land Appeal No. 39 of 2009

.....

JUDGMENT OF THE COURT

19th & 25th February, 2015

KILEO, J.A.:-

This appeal emanates from the decision of the High Court of Tanzania sitting at Arusha in Land Appeal No 39 of 2009. The appeal was heard by way of written submissions. When the filing of the written submissions had been completed the learned judge set down a date for judgment. In the course of composing the judgment the learned judge suo motu found that the appeal before her was barred by period of limitation

and for this reason she dismissed it. The appeal was therefore not heard on merit.

It is noteworthy that none of the parties had at any time raised the issue of time bar.

At the hearing of the appeal the appellants were represented by Mr. John Materu, learned advocate while Mr. Ephraim Koisenge appeared for the respondent. Both advocates had filed written submissions in support of their respective positions which they asked us to adopt.

Initially four grounds of appeal were preferred. The fourth ground is in the alternative and it concerns the fundamental right of being heard. As this ground is sufficient to dispose of this appeal we shall not concern ourselves with the other grounds.

Mr. Koisenge at first resisted the appeal, however upon reflection he conceded that the appellants' constitutional right to be heard was violated. He opined that the High Court judgment should be nullified and quashed. He asked us to remit the matter to the High Court for it to proceed with it in accordance with the law.

The matter need not detain us. It is not in dispute that the learned judge who heard the appeal in the High Court decided the matter on an issue she had raised and answered suo motu in the course of composing her judgment. At page 119 of the record of appeal she posed the following question:

"But the question to be answered is whether the exclusion of period of obtaining the Decree can be dealt in the appeal....."

Having posed the question above she answered it suo motu as follows:

"Enlargement of time can only be sought in a requisite application as the Court cannot automatically exclude the time used to obtain copies of Judgment and Decree....."

This Court has held time and again that a denial of the right to be heard in any proceeding would vitiate the proceedings. See for example, **ECO-TECH (Zanzibar) Limited vs Government of Zanzibar**, ZNZ Civil Application No. 1 of 2007 (unreported), **Mbeya-Rukwa Auto Parts & Transport Limited vs Jestina George Mwakyoma**- Civil Appeal No. 45 of 2000 (unreported), **D. P. P. vs Sabina Tesha & Others** [1992] T. L. R. 237, **Dishon John Mtaita vs D. P. P.**- Criminal Appeal No. 132 of 2004 (unreported) to mention just a few.

Referring to the right to be heard as enshrined in the Constitution the Court in the **Mbeya- Rukwa** case (supra) held:

"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law and declares in part:

(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."

In another case, **Abbas Sherali & Another vs Abdul S. H. M. Fazalboy** – Civil Application No 33 of 2002 (unreported) the Court 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."

As indicated earlier, the learned judge in the present appeal, in the course of composing her judgment posed a question suo motu on whether the exclusion of period of obtaining the Decree can be dealt in the appeal

(sic!). She did not invite the parties (as she ought to have done), to address her on this question which in the light of things she found to have been necessary in the determination of the appeal before her. Instead she went ahead and suo motu ruled that.....*"The court cannot in an appeal automatically exclude the time used to obtain copies of Judgment and Decree...."*

The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that in the circumstances of this case the denial of the right to be heard on the question of time bar vitiated the whole judgment and decree of the High Court.

Without much ado we find there to be merit in this appeal which we accordingly allow. We find the judgment of the High Court to have been a nullity for violation of the right to be heard. In the event the judgment and decree of the High Court dated 11th October 2013 is declared to be null and void. We accordingly, in the exercise of powers conferred upon us under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R. E. 2002 quash and set aside both the said judgment and decree that emanated there from. We order that the case be remitted to the High Court and be assigned to another judge who will proceed from the proceedings of

12/09/2013 when the matter was set down for judgment. Should the assigned judge consider that there is need to look into the question of period of limitation then he/she should invite the parties to address the court on that question.

Considering the circumstances of the case and the fact that the respondent did not resist the appeal we will make no order as to costs.

Order accordingly.

DATED at ARUSHA this 24th day of February, 2015.

E.A. KILEO
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL