

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MBAROUK, J.A., MZIRAY, J.A. And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 314 OF 2016

1. HABIBA JUMA
2. SAIDI JUMA KIULA
3. KHALID JUMA
4. SAID JUMANNE MGWAO

}.....APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Massengi, J.)

dated the 28th day of April, 2016

in

Criminal Application No. 49 of 2015

JUDGMENT OF THE COURT

7th & 11th August, 2017

MBAROUK, J.A.:

The appellants, Habiba d/o Juma, Khalid s/o Juma, Said s/o Juma Kiula and Said s/o Jumanne Mgwao preferred this appeal against the Ruling in Misc. Criminal Application No. 18 of 2016 of the High Court of Tanzania sitting at Arusha

(Massengi, J.) dated 28th April, 2016. Before the High Court, the appellants filed an application for Revision against the decision of Hanang District Court Criminal Application No. 41 of 2015 dated 23rd September, 2015 which over-ruled the appellants' preliminary point of objection and dismissed it. At Hanang District Court, the appellants were charged with the offence of Disobedience of a lawful order contrary to section 124 of the Penal Code, Cap. 16 R.E. 2002. The charge against the appellants emanated after the appellants disobeyed a lawful order of the District Land and Housing Tribunal of Manyara Region sitting at Babati in Application No. 85 of 2014 dated 27th October, 2014.

In this appeal, the appellants were represented by Mr. Samson Rumende, learned advocate, whereas the respondent / Republic was represented by Mr. Diaz Makule, learned State Attorney.

Only one ground of appeal was preferred by the appellants, namely:-

"That the trial Court erred in law and in fact to dismiss the application and order the District Court of Hanang to continue with a trial while the Court has no jurisdiction to try."

At the hearing, Mr. Rumende started his submission by narrating the historical background which led to this appeal. He proceeded by submitting that even if the order of the District Land and Housing Tribunal was a lawful order of that Court, but the proper provisions to have been used was Order XXXVII, rule 2(2) of the Civil Procedure Code, Cap. 33 R.E, 2002 instead of section 124 of the Penal Code. He said, this is because, the matter arose from a Civil dispute and not Criminal matter. In support of his argument, he cited to us the decision of the High Court of Uganda in a case of **Kigorogolo v. Rueshereka** [1969] 1 E.A 426 where that

Court held that, “ when in a civil suit, an order has been made against a person and that person defaults in complying with the order, such default cannot be made the subject of proceedings under Penal Code, S.111.”

Mr. Rumende then urged us to find that the proper Court to deal with that charge of disobedience of that lawful order was the District Land and Housing Tribunal, Babati and not the District Court of Hanang. He said, this will be in compliance with the provisions of Order XXXVII, rule 2(2) of the Civil Procedure Code (CPC).

On his part, Mr. Makule opposed the appeal and concisely submitted that the appellants were correctly and rightly charged under section 124 of the Penal Code, before the District Court of Hanang, because they disobeyed a lawful injunction order of the District Land and Housing Tribunal Babati.

Mr. Makule added that, Order XXXVII, rule 2(2) of the CPC is deals with parties in a suit after one of them commits a breach of contract, but the appellants in this case were not parties in a matter before the District Land and Housing Tribunal, Babati. He therefore, urged us to distinguish the case of **Kigorogolo** (supra) as the facts therein showed that the appellant was a party in that suit, whereas in this case, the appellants were not parties in the matter before the District Land and Housing Tribunal.

For that reason, the learned State Attorney prayed for the appeal to be dismissed and the case be remitted back to the District Court, Hanang to proceed at the point where it had reached before the preliminary objection was entertained.

In his re-joinder submission, Mr. Rumende submitted that, even if the appellants were not parties to the matter before the District Land and Housing Tribunal but they were

the sons of the respondent in the matter before the trial Tribunal and the temporary restrain order (injunction) which was disobeyed was directed against the respondent, his agents, workmen, relatives or any other assignee. He then reiterated his earlier submission that the District Court has no jurisdiction to entertain a case of disobedience of an order which arose from a civil suit and invoke Section 124 of the Penal Code. For that reason, he prayed for the matter to be referred back to the District Land and Housing Tribunal, Babati and Order XXXVII, rule 2 (2) of the CPC to be invoked in dealing with the appellants' disobedience of the injunction order of that Tribunal.

It is our considered view that the source of the dispute in this matter arose from the ex-parte injunction order given by the District Land and Housing Tribunal, Babati dated 27th October, 2014 in Application No. 85 of 2014 which reads as follows:-

**"EX-PARTE INJUCTION
ORDER**

For the interest of justice the respondent, his agents, workmen, relative or any other assignee are hereby restrained temporary from entering the Suitland for the purposes of cultivating, cutting trees, developing the said land in any manner until the hearing and determining of the main suit pending before this Tribunal. So ordered.

Given under my hand and the seal of this Tribunal this 27th day of October, 2014.

**T.J. Wagine
Chairman
27/10/2014."**

The record shows that, the appellant disobeyed that lawful order of the Tribunal, hence charged with the charge

of Disobedience of the lawful order contrary to section 124 of the Penal Code in Criminal Case No. 41 of 2015 in the District Court, Hanang where a preliminary objection was raised but the same was dismissed. The Revision filed by the appellants before the High Court was dismissed, hence this appeal.

The main argument in this appeal is whether the District Court as a Criminal court had jurisdiction to entertain a charge of disobedience of lawful order which arose from a civil dispute.

Let us start by examining the provision of Order XXXVII, rule 1 & 2 (2) of the CPC relied upon by the learned advocate for the appellants as a proper enabling provisions to move the trial Tribunal. The same reads as follows:-

" 2- (1) in any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the

plaintiff may, at any time after the commencement of the suit and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right:

Provided that no application shall be made for a temporary injunction where the defendant is the Attorney – General but, in such case, the plaintiff may apply to the court for an order declaratory of the rights of the parties.

(2) In case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached

and may also order such person to be detained as a civil prisoner for a term not exceeding six months, unless in the meantime the court directs his release.” (Emphasis added).

Looking at that provision as a whole, it looks like that under sub rule 1 of Rule 2 of Order XXXVII of the CPC **first**, there should be a suit, **second**, there should be a restraint order against the defendant not to commit a breach of contract, or any other injury of any kind, etc. Whereas, under sub-rule 2 of Rule 2 of Order XXXVII of the CPC, in case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the **person guilty** of such disobedience or breach to be attached and may order such person to be detained a civil prisoner for a term not exceeding six months. That means, Order XXXVII of the CPC generally can be invoked in a suit where one is a party (defendant) and not any other person who is not a party to

that suit has disobeyed the injunction or restraint order of that court hearing that suit.

We are of the firm view just like the learned state Attorney that, where there is an order given by a court which has been disobeyed by a person who is not a party to a suit, the proper provision of the law to be applied is section 124 of the Penal Code in Criminal case as found in this case in the District Court, Hanang, where section 124 of the Penal Court was invoked. To appreciate the contents of that provision, we have found it prudent to reproduce it as follows:-

" S. 124. A person who disobeys any order, warrant or command dully made, issued or given by a court, an officer or person acting in any public capacity and duly authorized in that behalf, is guilty of any offence and is liable, unless any other penalty or mode or proceeding is expressly prescribed in respect of that

disobedience, to imprisonment for two years.”

In the premises, we fully agree with the learned State Attorney that as the appellants were not parties in a matter before the District Land and Housing Tribunal, Babati the proper provision to be invoked to charge them was section 124 of the Penal Code and not Order XXXVII, rule 2(2) of the CPC. Contrary to what have been submitted by Mr. Rumende, regardless of being a Civil matter before the trial Tribunal, as the appellants were not parties in the trial Tribunal hence Order XXXVII, of the CPC can not apply to charge the appellants for such disobedient of a lawful order. We just like the learned State Attorney distinguish the case of **Kigorogolo** (supra) with this case because in that case the respondent was a party, whereas in this case the appellants were not parties in Application No. 85 of 2014 before the District Land and Housing Tribunal, at Babati.

All said and done, we find this appeal devoid of merit, we therefore dismiss it and order the matter to be remitted back to the District Court, Babati to proceed with the matter at a point where it had reached before entertaining the preliminary objection. It is so ordered.

DATED at **ARUSHA** this 9th day of August, 2017.

M.S. MBAROUK
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL