

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**(CORAM: NDIKA, J.A., FIKIRINI, J.A. And KIHWELO, J.A.)**

**CIVIL APPEAL No. 39 OF 2019**

**PILI ERNEST.....APPELLANT**

**VERSUS**

**MOSHI MUSANI.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania  
at Mwanza)**

**(Makaramba, J.)**

**dated the 13<sup>th</sup> day of October 2016**

**in**

**PC Civil Appeal No. 23 OF 2014**

**.....**

**JUDGMENT OF THE COURT**

9<sup>th</sup> & 14<sup>th</sup> July, 2021

**KIHWELO, J.A.:**

In the High Court of Tanzania sitting at Mwanza the appellant Pili Ernest lodged an appeal, PC Civil Appeal No. 23 of 2014 against the decision of the District Court of Sengerema in Civil Appeal No. 68 of 2012 which upheld the decision of the Bupandwa Primary Court in Civil Case No. 28 of 2012 pronounced in favour of the respondent Moshi Musani. The appellant lost the second appeal at the High Court of Tanzania and unhappy with that decision of the High Court the appellant has lodged this appeal seeking to challenge the decision of the High Court.

The appellant filed a Memorandum of Appeal with five grounds of complaint faulting the appellate Judge mainly for entertaining the appeal on merit having found that the appellant's appeal at the District Court was not time barred instead of allowing the appeal and ordering the District Court to re-admit and determine it inter partes. We have for reasons that will become apparent later on in this judgment chosen not to reproduce the grounds of appeal.

Before this Court and the courts below the appellant and the respondent appeared in person unrepresented. The appeal before this Court was heard by way of written submissions which were earlier on filed by the parties in support of their respective positions which they asked the Court to adopt.

When probed by the Court on whether the issue of time bar was raised by the first appellate Court and addressed by the parties, it became apparent that none of the parties and even the first appellate Court had at any time during the hearing of the appeal, raised the issue of time bar and indeed, the record of the proceedings bears out that when the matter came for hearing and parties did not have much to address, the learned magistrate set down a date for judgment. In the course of composing the

judgment the learned magistrate *suo motu* found the appeal before him was barred by period of limitation and for this reason he dismissed it. The appeal was therefore not heard on merit.

As hinted at the beginning the appellant preferred five grounds of appeal, however, as this issue which was raised by the Court *suo motu* and not addressed by the parties is sufficient to dispose of this appeal, we shall not make a painstaking inquiry into the grounds of appeal raised by the appellant.

It is not in dispute that the learned magistrate who heard the first appeal in the District Court decided the matter on an issue he had raised and answered *suo motu* in the course of composing his judgment. We wish to let record of appeal, speak for itself. At page 53 of the record the learned magistrate recorded:

**"HEARING**

***Court:*** *Patties (sic) are asked if they have anything to add.*

***Appellant:*** *Your Honour the case of Primary Court was fixed (sic) for me but I did not took (sic) those things.*

***Respondent:*** *Your Honour there is evidence in file that the appellant took all those things from me. That's all.*

***Appellant:*** *Your Honour it is not true. That's all.*

***Order: Judgment on 26/8/2013***

While composing his judgment the learned magistrate at page 58 posed the following question:

*"Whether the appeal is reasonable to be filed out of time (sic)?"*

Having posed the above question, he answered it *suo motu* at page 59 as follows:

*"...this court has found no reasonable grounds to allow this appeal. Since the appeal has filed (sic) out of time Country (sic) to part II of the limitation Act Cap 89."*

This Court has in numerous decisions emphasized that courts should not decide matters affecting rights of the parties without according them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned unheard. See for example **D.P.P. v. Sabina Tesha & Others** [1992] TLR 237, **Transport Equipment v. Devram Valambhia** [1998] TLR 89 and **Mbeya-Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251, **ECO-TECH (Zanzibar) Limited v. Government of Zanzibar**, ZNZ Civil Application No. 1 of 2007 (unreported), just to mention a few.

The right to be heard is one of the fundamental constitutional rights as it was religiously stated in the case of **Mbeya-Rukwa** (supra) at page 265 thus:

*"In this country, natural justice is not merely a principle of the common law, it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard among 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 the above case the Court stressed that a party does not only have the right to be heard but to be fully heard. The right of a party to be heard was similarly discussed in the case of **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) in which the Court among other things observed as follows:

*"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by 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."*

See also- **VIP Engineering and Marketing Limited and Others v. CITI Bank Tanzania Limited**, Consolidated Civil References No. 5, 6, 7 and 8 of 2008, **Samson Ng'walida v. The Commissioner General of Tanzania Revenue Authority**, Civil Appeal No. 86 of 2008 and **R.S.A Limited v. Hanspaul Automechs Limited and Another**, Civil Appeal No. 179 of 2016 (all unreported). In the latter case, the respondent faulted the learned trial judge for dismissing the points of objection without hearing the parties in violation of the fundamental constitutional right to be heard and the parties were prejudiced. The Court declared the entire judgment a nullity.

As hinted earlier on, the learned magistrate on the first appeal, in the course of composing his judgment posed a question *suo motu* on whether it was reasonable to entertain an appeal which to him was out of time. He did not invite the parties as he ought to have done, in order to address him on this crucial point which he found necessary in the determination of the appeal before him. Instead he went ahead and dismissed the appeal on

the strength of that point he raised *suo motu*. Unfortunately, the judge on a second appeal did not notice this anomaly.

Thus, in view of what we have endeavoured to discuss, we are satisfied that the parties were denied the right to be heard on the crucial question that the first learned appellate magistrate had raised and we are further satisfied that the denial was in violation of the fundamental constitutional right to be heard and the parties were prejudiced. This renders the judgment of the District Court a nullity. In the event the judgment and decree of the High Court dated 13<sup>th</sup> October, 2016 emanating from a nullity is equally nullified.

Consequently, we invoke our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 to nullify the judgment of the District Court as well as the impugned judgment of the High Court. We direct that the case file be remitted to the District Court and be assigned another magistrate who will proceed from the proceedings of 26/8/2013 when the matter was set down for judgment. Should the assigned magistrate 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 matter was raised by the Court *suo motu* we will make no order as to costs. Order accordingly.

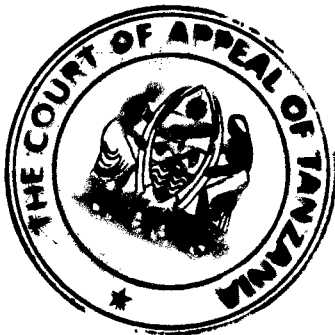
**DATED** at **DAR ES SALAAM** this 13<sup>th</sup> day of July, 2021.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

P. S. FIKIRINI  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

The Judgment delivered this 14<sup>th</sup> day of July, 2021 in the presence of both appellant and respondent in person-unrepresented is hereby certified as a true copy of the original.



  
G. H. Herbert  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**