IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 335 OF 2019

MASHISHANGA SALUM MASHISHANGA ..... APPELLANT

VERSUS

1. CRDB BANK PLC.
2. KIMBEMBE AUCTION MART LTD .....RESPONDENTS
3. MSIPAZI FARM LTD.

(Appeal from the decision of the High Court of Tanzania (Land Division) at Sumbawanga)

(Mgetta, J.)

dated the 12th day of April, 2019
in
Civil Appeal No. 03 of 2016

.....

JUDGMENT OF THE COURT

23rd February & 8th March, 2021

MWANDAMBO, J.A.:

The appellant was aggrieved by a judgment of the High Court sitting at Sumbawanga in Civil Case No. 03 of 2016 dated 12th April, 2019. He has preferred this appeal premised on 7 grounds of appeal through Mr. Mathias Budodi, learned advocate.

For reasons which will become apparent later, we have found it unnecessary to state the facts which resulted into the suit in the High Court and ultimately the impugned judgment in detail. We shall only

state what is material to the determination of ground 7 which contends that the judgment issued is tainted with illegality because the "judgment issued" included issues which were not in the judgment which was delivered. The immediate impression appears to suggest existence of two judgments in the same case. We shall come to that later. In the meantime, we shall state what we think is necessary for our purpose.

The appellant instituted a suit in the High Court against the respondents largely, for a declaration that the purported sale by auction of his mortgaged Farm No. 30 comprised in title No. 13151 MBYLR situate at Nkasi District, Rukwa region to the third respondent by the second respondent on the instructions of the first respondent was illegal. He also prayed for general damages, interest and costs. For a better appreciation, the appellant had mortgaged his properties to the first respondent as security for a loan it had advanced to him. The sale of the mortgaged property was precipitated by the appellant's default in repayment of the loan necessitating enforcement of the security by way of sale through a public auction conducted by the second respondent in which the third respondent was declared the purchaser. Naturally, the appellant's suit was contested by all respondents which resulted into a trial involving 3 issues framed before the commencement of the trial.

After hearing evidence from the plaintiff and the defendants (now appellant and respondents), that trial terminated on 16th July, 2018 on which date, by consent, the learned advocates for the parties were ordered to file their final written submissions by 30th July, 2018. The record shows that on 30th July, 2018 the advocates for the parties appeared before the trial judge for necessary orders after filing their respective closing submissions. Satisfied that the order for filing the submissions had been complied with, the trial judge reserved his judgment to 10th August, 2018 at 1:00 p.m. However, for reasons which are not apparent from the record, the judgment was not delivered on that date. That notwithstanding, it would appear that the appellant's suit was dismissed sometimes later which prompted his advocate lodging a notice of appeal on 24th April, 2019 against the whole decision of the High Court shown to have been delivered on 12th April, 2019 before Hon. Mbuya, Deputy Registrar. Thereafter, the appellant instituted the appeal as alluded to earlier.

In compliance with the provisions of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the appellant's advocate lodged in Court his written submissions in which he raises three issues. One of the issues is whether or not the learned judge had jurisdiction to alter

the judgment having signed the same and delivered to the parties. Mr. Mika Tadayo Mbise, learned advocate for the first and second respondents and Ileth Mawalla, learned advocate for the third respondent filed their respective submissions in reply. We are grateful to the learned advocates for the industry but, as highlighted earlier on, we shall be excused for not referring to them. This has been necessitated by the nature of the issue we find compelled to address ourselves premised on ground 7 which, as it will become apparent later, is sufficient for the disposal of this appeal.

Mr. Budodi appeared before us during the hearing of the appeal to highlight on the contents of the written submissions he had filed earlier on. Specifically, he canvassed ground 7 in which the impugned judgment is faulted for being tainted with illegalities. The learned advocate submitted from the bar that although the record does not indicate the date on which the impugned judgment was delivered, he contended that the judgment was delivered by the Deputy Registrar on 12th April, 2019. He asserted further that although the judgment delivered in his presence by the Deputy Registrar confined to the issues framed, a copy of the judgment supplied to him subsequently had an additional issue relating to *locus standi* which was not one of the three

issues framed for the trial court's determination before the commencement of the trial. In effect, the learned advocate brought to the fore existence of two judgments signed on the same date by the trial judge but with contents which are not identical although one of the signed judgments is labelled as a draft.

In the course of his submissions, the learned advocate invited the Court to hold that, despite his earlier contention that the impugned judgment was delivered by the Deputy Registrar on 12th April 2019, no valid judgment was pronounced in terms of Order XX rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC). On that basis, he invited the Court to nullify the impugned judgment with an order for composition and delivery of a fresh judgment according to law.

Mr. Mbise for his part, was candid that he never received any notice for the delivery of the judgment considering that it was not pronounced on the date scheduled; 10th August 2018. Mr. Mbise was not unprepared to agree with the learned advocate for the appellant that in the absence of any indication in the record, no valid judgment was delivered as required by the law. The learned advocate took his argument further and indeed surprising contending that since no valid judgment was delivered, no valid decree could have been extracted.

Under the circumstances, Mr. Mbise invited us to hold that the decree in the record of appeal is defective rendering the appeal incompetent and liable to be struck out. On second reflections after some exchange with the Court, Mr. Mbise was prepared to agree that going forward, the peculiar circumstances obtaining in the appeal warranted making an order for the composition and delivery of a fresh judgment according to law.

For his part, Mr. Mwakolo appearing for the third respondent felt compelled to subscribe to the submissions made by Mr. Mbise.

Before we address the issue raised for our determination, we find it compelling to make one clarification at this stage. According to the memorandum of appeal, the appellant's complaint in ground 7 is directed to the illegality of the judgement by reason of the alleged addition of an issue which was neither framed nor addressed in the judgment said to have been pronounced on 12th April 2019. Innately, that presupposes that the trial court delivered any judgment to the parties on the date shown in the notice of appeal. Despite the assertion from the bar that the Deputy Registrar delivered a judgment prepared and signed by the trial judge on 12th April 2019, Mr. Budodi had difficulties in persuading us to accept it because that assertion is not

supported by the record before us. Logically, the Court cannot determine the issue in the manner the appellant's learned advocate had framed in the context of ground 7. Consequently, our determination of the appeal turns on a different angle of illegality that is to say; whether in the circumstances of the appeal, the impugned judgment was delivered to the parties warranting the instant appeal.

The answer to the issue posed can only be obtained from the examination of the provisions of Order XX rule 1 of the Civil Procedure Code [Cap 33 R.E. 2002] (the CPC) which stipulate:

> *"The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocates."*

Luckily, the above rule has been a subject of the Court's discussion in some of its previous decisions that is to say; **Dr. Maua Abeid Daftari v. Fatma Salmin Said**, Civil Appeal No. 88 of 2008, **Robert Edward Hawkins & Another v. Patrice P. Mwaigomole,** Civil Appeal No. 48 of 2006 and **Awadhi Idd Kajass v. Mayfair Investment,** Civil application No. 281/17 of 2017 (all unreported). The facts in the first case involved delivery of a judgment by a Senior Deputy Registrar but bore a signature of the trial Judge who composed it. On

appeal to the Court, a preliminary objection was taken challenging the validity of the judgment incorporated in the record of appeal. One of the issues for the Court's determination was whether the judgment was pronounced in accordance with Order XX rule 1 of the CPC. The Court had no difficulty in answering it in the negative holding as it did that there was in law no validly pronounced judgment. Having so held, the Court found the appeal incompetent and struck it out on account of want of a proper judgment in the record of appeal. The Court stated: -

> *"With the judgment being appealed against incompetently pronounced and dated, there is therefore no valid" statement given by a judge of the grounds for a decree" (see, section 3 Civil Procedure Code). What was intimated to the parties by the Senior Deputy Registrar High Court on 14.11.2007 is inoperative in law as an effective and valid judgment...."* [at page 10].

Apparently, the impugned judgment in the instant appeal appears to have been signed by the trial judge. The extracted decree shows that the judgment was delivered by the trial judge on the date it was signed. Be it as it may, the record does not indicate what transpired on the date fixed for judgment or any date subsequently. Indeed, the record of proceedings ends there. The only thing which

appears to be undisputed is that the learned judge composed his judgement which he signed on 12th April, 2019 dismissing the appellant's suit. In **Awadhi Idd Kajass v. Mayfair Investment** (supra), the trial judge had reserved his judgment to a date to be notified. However, no such notice was made to the parties as ordered by the trial Judge. After a long wait for the notice, the applicant's advocate learnt that the long-awaited judgment had been delivered in chambers on 29th December, 2015 by a Deputy Registrar of the High Court in the absence of the parties to the suit and/or their advocates. The plaintiff (applicant) successfully challenged the validity of the judgment on revision to the Court on the ground that the judgment of the trial court was never pronounced to the parties in terms of Order XX Rule 1 of the CPC.

The position in the instant appeal is no better. The trial court did not pronounce judgment on 10th August 2018 pursuant to its order made on 30th July 2018 for reasons which are not apparent on the record. Worse still, it did not notify the parties the date on which the judgment signed on 12th April 2019 was delivered. Not surprisingly, all advocates are at one on this that there was no validly pronounced judgment on the date shown in the decree to have been delivered. With respect, we endorse their submissions premised on our previous

decisions referred to above holding that no operative, valid and effective judgment was delivered in the presence of the parties who had no notice of the date of its delivery as required by Order XX rule 1 of the CPC. In **Robert Edward Hawkins & Another v. Patrice P. Mwaigomole** (supra), the Court agonized with the validity of a judgment delivered in chambers instead of an open court consistent with the dictates of Order XX rule 1 of the CPC. The Court did not agree that the judgment was not delivered in open court but it subscribed to a decision of the Court of Appeal for Eastern Africa in **Gillani's Modern Bakery v. F. J Kuntner** (1954) 21 EACA 123 on the effect of a judgment not delivered in accordance with the law, that is to say; no judgment comes into existence capable of being appealed against.

To make matters even worse, worth for what it is, the decree appearing at pages 269 and 270 of the record does not indicate that the trial judge delivered the judgment in the presence of the parties and/or their advocates.

Arising from the foregoing, once again we are inclined to agree with the learned advocates that there was no valid and competent appeal from an inoperative and invalid judgment. We likewise find it

inevitable to accept the invitation by the learned advocates that the circumstances of this appeal warrant an order quashing the purported judgment and decree of the High Court signed on 12th April 2019 as we hereby do. The appeal is in consequence found to be incompetent and is hereby struck out. Having so done, the position remaining will be that preceding the purported delivery of the impugned judgment.

It will be noted that in **Maua Daftari's** case (supra), we sustained the respondent's preliminary objection which had challenged the competence of the appeal on account of the invalid judgment and decree incorporated in the record of appeal. We struck out the incompetent appeal without more. In **Awadh Idd Kajass's** case (supra) we exercised the revisional power at the instance of the applicant under section 4(3) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] as amended (henceforth the AJA) the AJA. In this appeal, the validity of the judgment was a ground of appeal although our determination is not, as alluded to above, confined to the appellant's complaint. We will not resort to revisional power. Instead, we shall act under rule 38 of the Rules by remitting the proceedings to the High Court as we hereby do. To ward off the appellant's misgivings on the signed copies of the draft judgment appearing at pages 248 through 255 of the record as against the copy appearing at pages 256 to 283, we

entertain no doubt that justice will triumph if we make an order directing the trial High Court to compose a fresh judgment by a different judge and pronounce the judgment in accordance with the law.

As the learned advocates are agreeable that none is to blame for the events leading to the order we have made, we make no order as to costs.

It is so ordered.

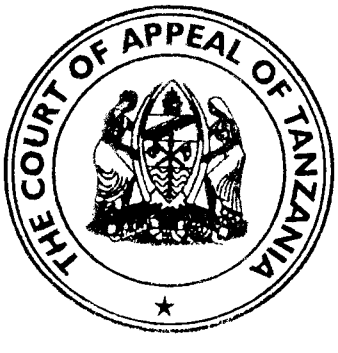
DATED at **DAR ES SALAAM this** 4th day of March, 2021

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

Judgment delivered this 8th day of March, 2021 Via Video Conference in the presence of Mr. Mathias Budodi, learned counsel for the Appellant and Mr. Mika Mbise counsel for the 1st and 2nd Respondents and Mr. Simon Mwakolo counsel for the 3rd Respondent, is hereby certified as a true copy of original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL