**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: MUGASHA, J.A., KEREFU, J.A. And MAIGE, J.A.)**

**CIVIL APPLICATION NO. 304/14 OF 2022**

**YUSUPH SHABAN LUHUMBA .....APPLICANT**

**VERSUS**

**1. HAPYNESS JOHN**
**2. BAVESH HINDOCHA**
**3. YOHANA NKWABI NTAKI ..... RESPONDENTS**
**4. JAMES JULIUS NDEKI**

**(Application for Revision against the Order of the High Court of Tanzania, (Shinyanga District Registry)**

**(Matuma, J.)**

**dated 31st day of May, 2022**
**in**
**Land Case No. 10 of 2017**
**.....**

## REASONS FOR RULING OF THE COURT

9th & 27th June, 2022

**MAIGE, J.A.:**

Yusuph Shaban Luhumba, the applicant, is working with Kahama Municipal Council as Authorized Land Officer. He is neither a party nor privy to the proceedings in the Land Case No. 10 of 2017 which is pending at the High Court of Tanzania, Shinyanga District Registry (the trial court). Hapyness John, the first respondent, is the plaintiff and Bavesh Hindocha, Yohana Nkwabi Ntaki and James Julius Ndeki, the respondents herein, are the defendants in that case. Before the trial

court, they are litigating on the ownership of a piece of land described as plot No. 196 Block "U" High Density situated at Nyasubi Kahama District (the suit property).

What connects the applicant with the above proceedings is an order of the trial Court dated 31st May, 2022 (Matuma, J) committing him to prison until on 21st July, 2022 for what turned out as deliberate refusal to appear before the court and adduce evidence in respect of the pending case.

Being aggrieved by the above order, the applicant moved the Court under section 4(3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and rule 65(1) of the Tanzania Court of Appeal Rules, 2009 to call for and examine the records of the proceedings of the trial court in respect thereof with a view to satisfying itself as to the correctness, legality and validity of the above order. The application is by a notice of motion which is substantiated by an affidavit deposed on the applicant's behalf by Mr. Simba Ngwilimi, learned advocate.

In view of the urgency of the matter, the hearing was conducted by way of video link. The applicant was represented by Messrs. Simba Ngwilimi and Gervas Gabriel Geneya, both learned advocate whereas

the second and fourth respondents were represented by Mr. Merdad Mutongore, also learned advocate. The first and third respondents appeared in persons and were not represented.

In his submissions, Mr. Ngwilimi having fully adopted the affidavit in support of the application,criticized the trial court in a number of areas. **First**, the applicant was committed in prison without his status being defined and as a result he was treated as a criminal prisoner. **Second**, the order though of penal nature, was imposed without the applicant being afforded a right to be heard. **Third**, the order was issued without the trial court being moved as the law requires. **Fourth**, the order was made without the mandatory procedure set out in order XVI being complied with. **Fifth**, the decision was not founded on any evidence as the summons to appear and testify was issued and served on a third party. In the circumstances, therefore, Mr. Ngwilimi urged the Court to nullify the order and relevant proceedings of the trial court and set the applicant free.

Mr. Mtongore, for the second and fourth respondents fully supported the motion. The first and third respondents did not have any useful comments apart from leaving the matter for determination by the Court.

After hearing the parties on 9th June, 2022, we granted the application, quashed the order of the trial court committing the applicant to prison and ordered for his immediate release from prison. We reserved the reasons for our decision, which we are now giving.

Before we give our reasons, we find ourselves unable to do without narrating, albeit briefly, the factual materials underpinning the background of the application. They are as hereunder.

On 22nd September, 2021, the applicant, while in office, was served with summons to appear in the trial court on 7th October, 2021 to give testimony in a dispute herein mentioned. As he was in Iringa to attend burial rites of his relative, he could not appear on the said date. Since then, he had never received any summons to appear as a witness in the said case. On 31st May, 2022, upon being informed that, the head of his department one Clemence Mkusa had been committed into prison for refusal to testify on the case in question, he entered appearance before the trial court. He was asked by the trial Judge while in a witness box why he did not appear to testify on the day he was summoned. The applicant informed the trial court that, on the respective day he was

bereaved. Eventually, the trial court made the following observations and committed the applicant to prison:

> *"Since the matter has been delaying in Court because of deliberate refusal of this witness (Yusuph Shabani Luhumba) to appear and give evidence, I do hereby remand him to prison until the hearing date.*
>
> *He shall be released after he has been given his evidence. Since Mr. Yusuph Shabani Luhumba has admitted that it is him who ought to have appeared and give his evidence, I order an imidiate release of Clemence Mkusa from remand custody. Even though he should be aware that the Court cannot tolerate any disobedience to its orders including Court summonses. He should therefore as the head of the department make sure that all his subordinates are obedient to Court orders.*
>
> *Mr. Yusufu Shabani Luhumba is remanded until 21/07/2022 when this case shall be heard."*

At the outset, we subscribe to the trial Judge that, courts of law have inherent powers to ensure obedience of their lawful orders. In exercise of such powers therefore, courts of law are mandated, where necessary, to impose penal sanctions to compel obedience of its orders, including, as rightly observed by the trial Judge, court summons. The rationale behind the law is not only to protect the orderly administration

of justice from being abused but to maintain public trust of the supremacy of the rule of law as well.

In civil proceedings, the power of the court to remand to prison a witness who deliberately refuses to appear in court to give testimony or to produce documents is provided for under section 27 of the Civil Procedure Code [Cap. 33 R.E. 2019], (the CPC) read together with orderb XVI rules 10,11,12,13 and 16 thereof. The former read as follows:

> *"27. The court may compel the attendance of any person to whom a summons has been issued under section 25 and for that purpose may-*
>
> *(a) issue a warrant for his arrest;*
>
> *(b) attach and sell his property;*
>
> *(c) impose a fine upon him not exceeding one thousand shillings; or*
>
> *(d) order him to furnish security for his appearance and in default commit him as a civil prison."*

It is clear from the above provision that, the motive behind committing a witness in default of appearance is not to punish him but to compel his attendance. Before the trial court issues such an order, it is a mandatory requirement under paragraph (d) of section 27 of the

CPC that, the respective witness must have been ordered to furnish security for his appearance. It is after his default to furnish such security that, the trial court can commit him or her to civil prison.

It is worth of note that, refusal to appear in court to adduce evidence is an offence which is committed outside the court. As a matter of law, therefore, it cannot, unlike a contempt which is committed in the face of the court, be dealt with by way of summary procedure as it was in the instant case. In respect to a stubborn witness, such a procedure, can be available under Order XVI rule 20 of the CPC where such a witness having been produced in court refuses, before the trial Judge or magistrate, without lawful excuse, to give evidence or produce documents. The provision read as follows:

> *"20. Where any party to a suit present in court refuses, without lawful excuse, when required by the court, to give evidence or to produce any document then and there in his possession or power, the court may pronounce judgment against him or make such order in relation to the suit as it thinks fit".*

We absolutely agree with Mr. Ngwilimi that, where, like in the instant case, the act of disobedience is committed outside the court, the power of the court to commit the recalcitrant witness to civil

proceedings is not automatic. It is upon application by either of the parties. This is in accordance with Order XVI rule 16 (2) of the CPC which provides as follows:

> *"On the application of either party and the payment through the court of all necessary expenses (if any), the court may require any person so summoned so attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained as a civil prisoner".*

In our opinion, before the court remands the witness in default to prison under the above provision, the procedural steps set out in rules 10, 11, 12 and 13 of Order XVI have to be observed. The steps are as follows. **First**, the court must ascertain if a witness summons was indeed issued and served on the witness. **Two,** once satisfied that the witness failed to attend and adduce evidence without lawful excuse, the court may issue a proclamation requiring him to attend in the manner set out in sub-rule (2) of rule 10 or in lieu thereof, it may issue a warrant of arrest whether with or without bail and may make an order for attachment of his property to such amount as it thinks fit. **Three**, where such person does not appear or comply with the order, the court

may give an order as to fine or attachment of any property of such witness, or sale of any attached property, as the case may be.

As the order contained in the said provision is penal in nature, the above procedure, we subscribe to Mr. Ngwilimi, must be followed religiously and that, imprisonment should come as a last resort. We are inspired on this by the following commentary of the learned jurist Mulla in his **Mulla, the Code of Civil Procedure,** 18TH Edition (Vol2) at page 2179:

> *"As O 16, r. 10 is penal in nature, action thereunder cannot be taken without the strict compliance with the requirements."*

In the same respect, we are also persuaded by the following pronouncement of the High Court of Tanzania (Tiganga, J) in **Mary Joseph v. Rachel Zephania**, Miscellaneous Land Application No. 37 of 2020, (High Court, Mwanza, unreported):

> *"The punitive jurisdiction of the court to punish for contempt is based upon the fundamental principle that it is for the good of the public and the parties that, such orders should not be despised or slighted.* ***Civil contempt does not require immediate imprisonment, for it is also punishable by***

***the imposition of a fine. The custodial penalty, comes in when the person found to have failed to show cause has failed to pay fine".*** (Emphasis supplied)

In this case, the trial Judge was not moved by either of the parties to issue the order. The order was based on his own motion. There was not, before the order, issued any proclamation under rule 10 nor any arrest warrant. When the applicant appeared in court in response of no summons, he was not ordered to adduce evidence and refused. To the contrary, the record suggests, he had, soon before being committed to prison, volunteered to give testimony.There is nothing on the record to suggest that he had ever been required to furnish a security for appearance and refused either. In the circumstances therefore, it cannot be said that the order committing the applicant to prison was within the parameters of section 27 of the CPC read together with Order XVI rule 16(2) of the CPC. We therefore, agree with Mr. Ngwilimi that, the trial Court improperly exercised its contempt jurisdiction when it committed the applicant to prison in total violation of the mandatory provisions of the law and without being moved.

To add salt to the wound, though the order imposed was criminal in nature, the applicant was not afforded a right to be heard.

We agree with Mr. Ngwilimi, that was a serious curtailment of the fundamental right to be heard. Therefore, in **Deo Shirima & Others v. Scandinavia Express Services limited**, Civil Application No. 34 of 2008 (unreported), this Court dealing with more or less a similar issue, stated as follows:

> *"We have already shown that the order of 8th June, 2007 was made suo motu. None of the parties had pressed for that order. None of the parties was heard at all before the order was made. As it turned out, the order, made in breach of the rules of natural justice, immediately adversely affected the plaintiffs in the suit and subsequently the current applicants who were the agents/ servants of the former. It is established law that any judicial order made in violation of any the two cardinal rules of natural justice is void from the biggining and must always be quashed, even if it is made in good faith".*

More to the point, the power of the trial court to commit a witness to prison for refusal to appear to give evidence in civil proceedings is limited to civil imprisonment. In this case, the trial Judge did not, in his order, make it clear whether the applicant was being remanded as a criminal or civil prisoner. As a result of this ambiquity, the applicant was treated as a criminal prisoner. That was not within the jurisdiction of the trial court.

As we understand the law, the trial court can, in civil proceedings, commit a non-party to criminal prison for contempt of court in two situations. **One,** when the contempt is committed in the face of the court. As we said above, in such a situation, the court has power to deal with the issue summarily. However, in doing so, the trial Judge is obliged, as a way of affording the accused a right to be heard, to frame the charge, read it over to the accused and give him an opportunity to show cause why he should not be committed as such. (See for instance, **Masumbuko Rashidi v. R** [1986] TLR, 212). **Two**, is where a person not a party to the suit, disobeys a lawful order of the Court. In such a situation, the person in default has to be formally charged under section 124 of the Penal Code [Cap. 16 R.E. 2019]. Thus, in **Habibu Juma & 3 Others v. R,** Criminal Appeal No. 314 of 2016 (unreported), the Court observed as follows;

> *"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 Code was invoked"*

It was in the light of the foregoing reasons that we revised, quashed and set aside the order and proceedings of the trial court and ordered for immediate release of the applicant from prison.

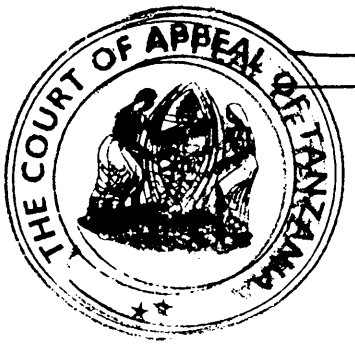
**DATED** at **DAR ES SALAAM** this 15th day of June, 2022.

S. E. A. MUGASHA.
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

The Reasons for Ruling delivered on 27th day of June, 2022 through video conference in presence of Mr. Gervas Gabriel Geneya, learned counsel for the applicant and 3rd Respondent who appeared in person, and in the absence of 1st and 2nd Respondent, is hereby certified as true copy of the original.




E. G. MRANGU
**DEPUTY REGISTRAR**
**COURT OF APPEAL**