

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

(CORAM: MUGASHA, J.A., KITUSI, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 324 OF 2019

FESTO JAPHET MKILANA APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE LIMITEDRESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Munisi, J.)

dated 16th day of August, 2019

in

Civil Case No. 121 of 2015

RULING OF THE COURT

4th & 21st November, 2022

RUMANYIKA, J.A.:

The appellant lost a suit before the High Court (Munisi, J.) on 16th August, 2019. He claimed general damages of TZS. 100,000,000/= against the respondent being damages for breach of contract and TZS. 12,000,000/=being the costs of the cargo lost and transport. His claims against Morocco Commission Agent and another are re stated here because he preferred no appeal against them and that explains why they are not parties to this appeal. Aggrieved, he has preferred the present appeal on five points of grievance, which grounds, for reasons that will come to light shortly, we will not reproduce.

A brief factual background of the matter is that the appellant obtained loan of TZS 45.0m from the respondent being 70% of the purchase price of a motor vehicle make of Mitsubishi Fuso sold by the said Morocco Commission Agent, (exhibit P1) which loan was repayable within thirty-six months of the agreement but he defaulted. As a result, the respondent impounded and sold the vehicle in April, 2011 for TZS 24.0m, almost half of TZS 55.0m, the amount due. He attributed his default with the respondent delivering a 1994, model motor vehicle instead of the agreed 2005 model vehicle a fact which allegedly caused the vehicle being involved in road accidents and therefore, resulted in loss of business on the part of the appellant. The loan agreement and letter of credit facility were admitted in evidence as exhibit P1 collectively.

However, when she was composing the judgment, the learned trial judgement found no stamp duty was paid, and on that basis expunged it. Therefore, it was the learned trial judge's conclusion that in the absence of exhibit P1, nothing remained to back up the appellant's case and claims. Thus, the case was dismissed. As above indicated, he is aggrieved and before us appealing that decision.

At the hearing of this appeal, Mr. Samwel Shadrack Ntabaliba and Joseph Ndanzi learned counsel appeared for the appellant and respondent respectively.

Before commencement of the hearing, the Court invited the learned counsel to address it on the propriety of expunging exhibit P1, in the course of writing a judgment on ground that it bore no stamp duty.

In his submission, Mr. Ntabaliba faulted the learned trial Judge for raising the issue of stamp duty in the judgment and deciding it without availing the parties, as she did, an opportunity to be heard, as she reached at the decision which adversely affected them. He concluded that as the exhibit was expunged, the resultant effect is no wonder the eight issues appearing at page 242 of the record of appeal were answered in the negative, which was detrimental to the appellant and was denied a hearing. Finally, he urged us to nullify the impugned judgment, remit the record to, and direct the trial Court to hear the parties on the issue of stamp duty.

Mr. Ndazi subscribed to Mr. Ntabaliba's prayer to remit the record to the trial Court for the parties to comply with the provisions of Stamp Duty Act, Cap 189 R. E. 2002 (the Act) as the exhibit was expunged from the record without hearing the parties.

Before us, the issue for consideration is whether the learned trial Judge properly expunged exhibit P1 from the record. The moment exhibit P1 was admitted as such and became part of the record, unless those proceedings were reopened, which is not the case, the learned trial Judge was *functus officio*, as is the case, to consider the admissibility or otherwise of the exhibit without hearing the parties. It is glaring at pages 278 – 279 of the record of appeal, that in the course of writing the judgment she expunged that exhibit for want of the stamp duty required under Section 47 of the Act. That:

*"...from the evidence presented by the parties ... ; a copy of the Lease Agreement together with **the Facility Letter were admitted collectively as exhibit P1. Upon perusal of the said exhibit, I have discovered that they lack the requisite evidential value as they lack the requisite stamp duty as required by the provisions of Section 47 of the Stamp Duty Act Cap 189 RE 2002 (Emphasis added)**".*

From the above noted passage therefore, it is clear to us that: **one**, whether or not stamp duty was paid for exhibit P1, the learned trial judge found herself on cross roads; **two**, the said issue was not raised by the parties but lately by the learned trial Judge on discovery and assumption

that no stamp duty was paid; **three**, she raised that issue suo motu, and expunged the exhibit without hearing the parties.

The foregoing, is what made us, at the outset to prompt the learned counsel to address us about the parties' right to be heard on exhibit P1 being expunged. They are at one, that the learned trial judge denied the parties an opportunity to be heard. As earlier indicated, the learned counsel urged the Court to quash the impugned judgment and accordingly remit that record to the trial Court for it to hear the parties in respect of the admissibility of exhibit P1 before composing its judgment.

Fundamental as it is, a right to be heard is an attribute of the cardinal principle of natural justice and clear manifestation of equality before the law, as enshrined under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977.

Time and again, the Court stressed that in determining the fate of the parties' rights, the Courts of law have no option but to hear them fairly as, failure of which renders the resultant decision ineffectual. ***See-Transport Equipment v. Devram Valambhia [1998] T.L.R. 89 and Mbeya Rukwa Autoparts and Transport Ltd v. Jestina Mwakyoma [2003] T.L.R. 251.*** For instance, in the latter case, we held, that:

... It is a cardinal principle of natural Justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard: and; alteram partem...

As the Court consistently decided in a number of cases, a denial of the fundamental right to be heard has, as the far-reaching effects as was held by the Court in **Sherally and Another v. Abdul Fazalboy**, Civil Application 33 of 2002 (unreported), quoted in our recent unreported decision in **Oysterbay Villa Ltd v. Kinondoni Municipal Council and Another**, Civil Appeal No. 110 of 2019. That:

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the Courts in numerous decisions. That right is so basic that a decision arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard". (Emphasis added).

Applying the above legal proposition to the present appeal, we are settled in our mind that the trial Courts' decision to expunge exhibit P1 from the record for want of stamp duty, as it happened, adversely affected the parties and abrogated the constitutional fundamental right to be heard. On that account, that decision was a nullity from its inception and it cannot be spared. That is sufficient to dispose of the appeal.

Consequently, we invoke our revisional jurisdiction under section 4(2) of the AJA and hereby nullify the impugned decision. We also set aside the trial Court's judgment, direct the case file to be remitted to the High Court for it to hear the parties on the admissibility of exhibit P1 before proceeding to compose a judgment.

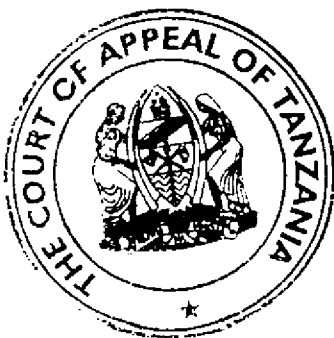
DATED at DAR ES SALAAM this 21st day of November, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 23rd day of November, 2022 in the presence of Appellant appeared in person/Unrepresented and Ms. Comfort Opuku, learned counsel for the Respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "J. E. Fovo", written over a horizontal line.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL