IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: WAMBALI, J.A., KOROSSO,J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 143 OF 2019

MRS. FAKHRIA SHAMJI.....APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF THE KHOJA SHIA ITHNASHERI (MZA) JAMAAT.....RESPONDENT

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

(Rumanyika, J.)

dated the 26th day of March, 2016

in

Civil Case No. 22 of 2016

.....

JUDGMENT OF THE COURT

16th & 25th February, 2022.

FIKIRINI, J.A.:

The appellant, Mrs. Fakhria Shamji, sued the respondent, The Registered Trustees of the Khoja Ithnasheri (Mza) Jamaat, before the High Court in Mwanza. The applicant sought the following orders:-

1. All the confiscated appellant's belongings and Tzs. 58,000,000/= seized during the unlawful eviction,be returned .

2. Payment of special damages to the tune of Tzs. 350,000,000/=plus interests,
3. Costs of the suit be provided for.
4. And any other reliefs deemed fit by the court.

The respondent contested the claim, and after a full trial, the suit was dismissed. Dissatisfied with the High Court's decision, the appellant lodged this appeal in the Court, on the following grounds of appeal:-

1. That, the Honourable trial Judge erred in law and fact by dismissing the appellant's preliminary objection and proceeding to rule that the respondent written statement of defence was properly and timely presented.
2. Upon being admitted that the confiscation letter originated from the respondent, the High Court Judge erred in law and in fact by failure to hold that the respondent being the occupier of the premise possessed a duty of ensuring appellant's belongings remain safe and sound.
3. The High Court Judge erred in law and fact by relying on the respondent testimonies that it was the court broker who took the appellant belongings and handed over the same to the appellant's husband while no actual proof of such assertion.
4. The High Court Judge erred in law and, in fact by failure to hold that the appellant was entitled to reliefs as claimed in the plaint.

On 16th February, 2022, Mr. Sylivanus Mayenga, learned counsel appeared for the appellant at the hearing. Mr. Kassim Gilla, also learned counsel appeared for the respondent.

After hearing the counsel for the parties, we find this appeal can require us to determine the first ground of appeal, only, as it will be revelead later in this judgment.

However, in arguing the appeal, Mr. Mayenga, prefaced his submission by adopting his written submissions filed on 18th July, 2019, and proceeding from there, he dwelt extensively submitting on the first ground of appeal by highlighting the brief history of the case. It was his submission that as per the record of appeal, as reflected on page 10, the plaint was filed on 15th September, 2016; and on page 44, that the Judge signed the initial notice and the same was served and received by the respondent on 23rd September, 2016. The affidavit of service of summons, as shown on page 45 of the record of appeal, confirmed the assertion that service was effected on 23rd September, 2016.

The respondent, nonetheless, never appeared nor filed any written statement of defence until on 11th October, 2017 when Mr. Alex Luoga

entered appearance on behalf of the respondent, praying for additional time to file written statement of defence on the pretext he had just been engaged the very week. The Deputy Registrar of the High Court (Deputy Registrar) granted the application. Mr. Mayenga contended further that from the 23rd September, 2016 up to when Mr. Luoga appeared in court and sought for extension of time, the time to file a written statement of defence had already elapsed.

Referring us to Order VIII Rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC) before the current amendment, Mr. Mayenga, contended that the provision stipulated what is to be done when served with a summons and a plaint, that within twenty one (21) days, the respondent has to file a written statement of defence and if more time is needed then within another twenty-one (21) days to do so.

Bemused with the order granting leave to file written statement of defence on 11th October, 2017, the appellant filed a notice of preliminary objection (PO). The counsel submitted that as indicated on page 56 of the record of appeal on 27th March, 2018, while the matter came for mention, the Judge proceeded to determine the PO in the absence of the appellant and dismissed it. Also, the Judge proceeded to fix a schedule for filing

written submissions to argue the PO raised by the respondent. This opportunity was seized, as the appellant in her submission opposing the respondent's PO, as reflected on pages 84-86 of the record of appeal, once again submitted on her dismissed PO. The Judge as shown on page 109, ignored the appellant's submission.

Fortifying his submission that the PO was dismissed on the mention date, Mr. Mayenga referred us to the case of **Mr. Lembrice Israel Kivuyo v. M/s DHL Worldwide Express, DHL Tanzania Limited**, Civil Appeal No. 83 of 2008 (unreported). He stressed that the appellant was not heard on her PO.

Furthering his submission and highlighting on the confusion apparent on page 53 of the record of appeal, he contended that after a considerable passage of time without written statement of defence being filed, on 6th December, 2016, the matter came for mention. The appellant entered appearance. Knowing that no written statement of defence has been filed, she prayed for her case to proceed *ex parte.* The Deputy Registrar before whom the matter was placed, intimated that the Judge would be the one to decide on the prayer, and proceeded to fix the case to come for mention on 27th March, 2018. The appellant did not enter appearance on that day,

while Mr. Luoga did. After hearing from Mr. Luoga that the matter was coming for hearing of the PO and the appellant was absent, the Judge proceeded on his own to dismiss the PO. Mr. Mayenga faults' the Judge's inattention for failure to examine the records, resulting in the dismissal of the appellant's PO, while there was another pending order.

Concluding on this point, he urged us to see that the act of the Judge determining the PO without hearing the appellant is tantamount to denying the appellant the right to be heard. He thus prayed this ground to be allowed, and the Court declare the proceedings tainted with irregularity a nullity.

The rest of the grounds of appeal canvassed together, Mr. Mayenga criticized the Judge for not directing himself to the framed issues shown on page 248. And also, he did not examine exhibit P3, and other evidence to the court not adequately evaluated; otherwise, the Judge would have come to a different conclusion.

Considering the appellant's prayer to proceed *ex parte* was not entertained, Mr. Mayenga invited us, on the strength of his submissions, to order the record be remitted back to the High Court to allow the appellant to prove her claim *ex parte* under Order VIII Rule 14 (1) of the CPC.

On the other side, in his reply submission on the dismissal of the PO on the "mention, date Mr. Gilla, contended that the CPC had no term "mention," so according to him, both the Judge and Mr. Luoga were correct to say the matter was coming for hearing. And thus, correctly, the Judge dismissed the PO in the appellant's absence.

Addressing the remaining three grounds of appeal, the 2nd, 3rd, and 4th, which he argued together, Mr. Gilla also challenged the submission that there was abundant evidence and that the Judge did not evaluate the evidence. Referring us to page 65 of the record of appeal, he stated that the evidence of PW1 and PW2 contradicted each other to render it not credible to prove the appellant's case. This hindered the appellant from proving her claim as required, under sections 110 and 112 of the Evidence Act, Cap. 6 R. E. 2019, that the one who alleges must prove, which led the Judge to dismiss the plaint for not being proved on the balance of probability.

Despite the above, Mr. Gilla candidly admitted that the right to be heard was not afforded to the parties, as even the respondent was not heard on 27th March, 2018. And since the right to be heard is so basic, denying the parties that right rendered the proceedings a nullity.

Mr. Mayenga, in rebuttal, on dismissal order submitted scorn the order to be a serious punishment to the appellant; moreover, Mr. Luoga did not move the court applying for the dismissal of the PO. He prayed for the proceedings to be nullified. As for the submission related to the rest of the grounds of appeal, Mr. Mayenga reiterated his earlier submission.

We have carefully considered the learned counsel submissions. As intimated earlier that our focus will be on determining the sole ground of appeal, that is, whether the trial Judge order dismissing the appellant's PO was appropriate.

On that issue, we find it pertinent to recapture what transpired on 6th December, 2016, when the matter came for mention. On that day, the matter was placed before the Deputy Registrar for mention. Bearing in mind that no written statement of defence has been filed, the appellant pressed on the court that she be allowed to proceed *ex–parte.* The Deputy Registrar informed the appellant the record would be placed before the Judge for decision. This, unfortunately, did not take place. Meanwhile, the appellant came to learn that on 11th October, 2017, another Deputy Registrar granted leave for the respondent to file a written statement of defence.

The appellant, not amused with the move, filed a notice of PO. On 27th March, 2018, about three (3) weeks after the appellant lodged her PO, the Judge dismissed the PO raised undetermined. To depict exactly what transpired on that day, let the record speak for itself:

> *"**Mr. Alex:** My Lord, the matter comes up for hearing of the preliminary point of objection raised by the plaintiff, that the WSD was filed out of time. However, the plaintiff is absent.*
>
> ***Court:** The last order by the DR on 11/10/2017 was for the defendant to file WSD before another mention date which was fixed for 07/12/2017. The defendant filed their WSD on 06/12/2017 which was the date before the mention date. That being the case let it be ordered as follows.*
>
> ***Order:** The preliminary objection by the plaintiff is therefore misconceived. It is hereby dismissed.*

With due respect, we find the Judge misdirected himself by giving the said order. Considering it was a "mention" date and not the date set for the hearing of the PO, the order was unnecessary. Although the term "mention" is not provided for in our CPC, but it has been a well established practice that there is difference between a "mention" and "hearing" date. Guided by the decision in **Mr. Lembrice Israel Kivuyo** (supra), that

dismissal can only be made on a hearing date and not "mention" as most parties consider a "mention" day as a day for necessary orders, including scheduling of a hearing date, which was not the case in the instant matter. We thus agree with Mr. Mayenga's submission that it was not fitting for the Judge to hurridly react by dismissing the PO. The Judge did not even bother to allow Mr. Luoga to address him on the PO raised.

What is more, the dismissal order was, in our view, premature as there was another pending order dated 6th December, 2016, to determine. Had the Judge taken the time and perused the record, he would not have come up with the dismissal order, which he initiated.

As rightly conceded by Mr. Mayenga and Mr. Gilla that the right to be heard, which is fundamental, has been violated. We agree that not hearing the parties on the merits of the PO raised and dismissing the same on the "mention" date without being moved by a party present was a serious omission constituting illegality that violated the rule of natural justice. In the famous case of **Abbas Sherally & Another v. Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) where the Court said:

> *"The right to be heard before adverse action or decision is taken against such a party has been stated and emphasised 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."*

This violation of the right to be heard is a breach of the cardinal principle of natural justice and an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6)(a) of the Constitution. See: **Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma** [2003] T.L.R. 251.

Given the settled position of the law, we are satisfied that none of the parties was availed of an opportunity to be heard on the preliminary objection raised. This vitiated the proceeding before the High Court from the 27th March, 2018 onwards, and those proceedings are thus nullified.

We find this one ground suffices, and therefore no need to dwell on the remaining three, which were preferred in alternative.

We thus allow the appeal and order the record to be remitted back to the High Court and hearing proceed from where it was left before 27th March, 2018. Costs in due course.

Ordered Accordingly.

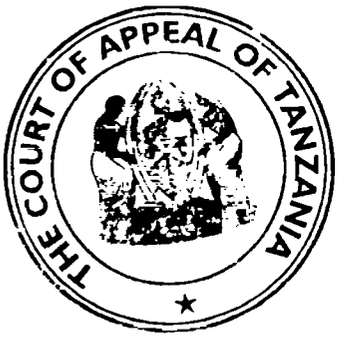
DATED at **MWANZA** this 25th day of February, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2022 in the presence of Mr. Kassim Gilla, learned counsel for the Respondent and also hold brief of Mr. Silyvanus Mayenga, learned counsel for the appellant is hereby certified as true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL