

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 303 OF 2020

OMARY SHABANI NYAMBU.....APPELLANT

VERSUS

**DODOMA URBAN WATER SUPPLY AND SEWERAGE
AUTHORITY (DUWASA)..... RESPONDENT**

**[Appeal from the Judgment and Decree of the High Court of Tanzania
(Land Division) at Dar es Salaam]**

(Chinguwile, J.)

dated 2nd day of October, 2013

in

Land Case No. 180 of 2007

JUDGMENT OF THE COURT

3rd & 28th July, 2023

MKUYE, J.A.:

Omari Shabani Nyambu, the appellant, is appealing to this Court from the judgment and decree of the High Court dated 2nd October, 2013 by Hon Chinguwile, J. in Land Case No. 180 of 2007.

Before embarking on the merit of appeal, we find appropriate to narrate a brief background of the matter which goes thus:

The appellant instituted civil proceedings against the respondent, Dodoma Urban Water Supply and Sewerage Authority, claiming that the respondent had encroached into his land located at Mzakwe Village,

Msalato Ward within Dodoma City and installed therein a water supply pipeline. The appellant alleged that, there was no prior consultation neither was he paid compensation. He, therefore, sought for compensation to the tune of TZS 50,000,000/=.

On the other hand, the respondent claimed that the appellant's father who lived in Mzakwe Village was compensated after a survey of the affected land was conducted by an Agricultural Officer.

Upon hearing both the parties as depicted at page 119 of the record of appeal, the trial judge on 11/12/2012, granted leave for the parties to file final written submissions by 12/12/2012 and the judgment was reserved to a date to be notified to the parties. Then, the record reveals that on 11/10/2013, the judgment was delivered in the absence of the parties.

In its judgment, the trial court observed that, the suit having been founded on tort of trespass, the limitation period in terms of item 6 of the First Schedule to the Law of Limitation Act (the LLA) was three years from the date of the alleged trespass. It found that, as the wrongful act was committed in 2001, by instituting the suit on 17th September, 2004, the same was time barred. As a result, the suit was dismissed under section 3(1) of the LLA.

Aggrieved by the said High Court's decision, the appellant has now appealed to this Court on four grounds of appeal. However, for a reason that will become apparent shortly, we do not wish to reproduce them.

When the appeal was called on for hearing, the appellant was represented by Mr. Mohamed Tibanyendera, learned advocate whereas the respondent enjoyed the services of Mr. Camilius Ruhinda, learned Principal State Attorney assisted by Mr. Daniel Nyakiha, learned State Attorney. Curiously, in view of what transpired in the trial court in delivering the judgment, the Court wished to satisfy itself whether there was a valid judgment in accordance with the law.

Mr. Tibanyendera contended that there was no judgment since the so-called judgment was delivered in the absence of both parties without any notification of the date of its delivery being issued to the parties. In this regard, he argued that the said judgment was a nullity and implored to the Court to exercise its power of revision and nullify the said judgment under section 4 (2) of the Appellate Jurisdiction Act (the AJA). As to the way forward, he urged the Court to remit the case file to the High Court with an order for another judge to re-compose the judgment.

On his part, Mr. Ruhinda conceded that there was no judgment that was read over to the parties and agreed with Mr. Tibanyendera on the way forward.

Having heard the submissions from both sides, the issue for this Court's consideration is whether there was a valid judgment in view of the fact that it was delivered in the absence of the parties who were not notified on the date of its delivery. Our starting point will be Order XX rule 1 of the Civil Procedure Code, (the CPC) which provides:

*"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**".* [Emphasis added]

In this case, the record bears out that on 9/2/2011, Advocate Mganga who represented the defendant (respondent herein) prayed to close the defence case after her only witness, one Wilson Yohane had completed testifying in court. The trial court made, among other orders, the defendant to file final submissions by 8/3/2011 and the plaintiff by 8/4/2011 as shown at page 111 of the record of appeal. Then, the record shows that the matter came up for mention on several occasions before Hon Mutungi, J. and different Deputy Registrars since the trial Judge (Chinguwile, J.) had been transferred to another High Court Zone. It would appear that the respondent was not able to file her final written submissions within the scheduled time and, therefore, she filed an application for extension of time to file it. On the other hand, the

appellant lodged a notice of preliminary objection against that application to which on 11/12/2012, when the application was placed before Hon. Chinguwile, J. for hearing, he did not insist on it. Hence, the trial court granted the extension of time ordering the respondent to file her final written submissions by 12/12/2021 and reserved the judgment to a date to be notified.

However, the record does not show what transpired thereafter but it appears that the judgment was delivered on 11/10/2013 as shown hereunder:

"Date: 11/10/2013

Coram: Hon. A. F. Chinguwile, J.

*For the Plaintiff: **absent***

*For the defendant: **absent***

*Order: **Judgment delivered in the absence of both parties.***

Sdg: A. F. Chinguwile

JUDGE

11/10/2013". [Emphasis added]

According to the above excerpt, it is crystal clear that the so-called judgment was pronounced in the absence of the parties. There is nothing to show that the notice for the judgment was issued to the

parties as it was ordered earlier on. In the case of **Awadhi Iddi Kajass v. Mayfair Investment Limited**, Civil Application No. 281/17 of 2017 (unreported), while discussing the competence of the judgment that was delivered in the absence of parties who had no notice of the date of its delivery, like in the case at hand, the Court held that there was no operative, valid and effective judgment delivered in the absence of the parties who had no notice of the date of its delivery.

As regards the effect of a judgment not delivered in accordance with the law, the Court, in the same case of **Awadhi Idd Kajass** (supra), relied on the case of **Gilian's Modern Bakery v. F. J. Kuntner** (1954) 21 EACA 123 and held that the judgment which is not delivered in accordance with the law, could not be taken to have come into existence as to be capable of being appealed against.

Applying the principle in the above cited authority, we agree with both learned counsel that the purported judgment delivered in the absence of the parties was not an effective, operative or a valid judgment which could have been appealed against. It was a nullity.

In the event, we are constrained to invoke our revisional powers under section 4 (2) of the AJA and nullify the proceedings dated 11/12/2012 to 19/11/2014, quash the purported judgment dated 2/10/2013 and the resultant decree and order that the case file be

placed before another judge for composing a fresh judgment to be delivered in accordance with the law.

It is so ordered.

DATED at DAR ES SALAAM this 25th of July, 2023.

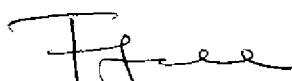
R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of July, 2023 in the presence of Mr. Mohammed Tibanyendera, learned counsel for the appellant and Mr. Daniel Nyakiha, learned State Attorney for the respondent/Solicitor General, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL