IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 20 OF 2020

(Appeal from the Judgment of the Resident Magistrates' Court of Mwanza at Mwanza (Lema, RM) Dated 3rd of February, 2020 in Misc. Application No. 63 of 2019)

ABDALLAH YAHAYA LUHORELA ..... APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC ..... 1ST RESPONDENT

NSOMBO AND COMPANY LIMITED ..... 2ND RESPONDENT

JUDGMENT

18th June, & 19th June, 2020

ISMAIL, J.

This is a judgment on an appeal preferred by the appellant, against the ruling of the Resident Magistrates' Court of Mwanza at Mwanza (Hon. Lema, RM), on an application (Misc. Application No. 63 of 2019) which was instituted by the appellant. The application sought to set aside a dismissal order which was given by the trial court, dismissing a suit (Civil Case No. 53 of 2019) for want of prosecution. By a notice of preliminary objection filed in the court on 4th November, 2019, the counsel for the respondents

moved the court to strike out the application for restoration of the suit on the ground that the supporting affidavit was defective. The preliminary objection was argued by way of written submissions and the ruling in respect thereof was delivered on 3rd February, 2020. It is this ruling that has stocked the appellant's anger, hence his decision to institute the instant appeal. The lone ground of appeal is to the effect that:

1. *That, the Trial Court erred both in law and fact by determining the main application without giving the parties hereto the right to be heard.*

At the hearing of the appeal, Mr. Zephania Bitwale, learned advocate, represented the appellant while the respondents enlisted the services of Mr. Gwakisa Gervas, learned counsel. In his laconic address in support of the appeal, Mr. Bitwale submitted on what he contended as the trial court's denial of the right to a fair hearing against the appellant. He submitted that, while the ruling was to be made in respect of the competence or otherwise of the application, the trial magistrate went overboard and determined the merits of the application without hearing the parties. While dismissing the application, the learned magistrate held the view that no sufficient cause had been raised in respect of the application, hence his decision to dismiss it with costs.

Mr. Bitwale further contended that it is a rule of justice that a person should be given the right to be heard, as emphasized by the provisions of Article 13 (6) of the Constitution of the United Republic of Tanzania. In view thereof, he prayed that the appeal be allowed by setting aside and quashing the decision of the trial court.

In a terse rebuttal, Mr. Gervas opposed the appeal. He submitted that whereas what was at stake was Misc. Application No. 63 of 2019, the appeal is against the main application. It was his submission that there was no main application pending in the trial court. He held the view that in view of this distinction, the appeal is against a non-existent application. Mr. Gervas further argued that, as a matter of principle, an appeal should be argued in the same way the grounds of appeal have been couched. In this case, since there was no application in the name of "main application" then the appeal before this Court is misconceived and lacking in merit. He prayed that the same be dismissed with costs. Probed on whether it was proper for the trial court to dispose of the pending application together with the objection, Mr. Gervas conceded that that was an impropriety as the proper procedure was to call the parties for the hearing of the application.

In rejoinder, Mr. Bitwale emphasized that disposal of the preliminary objection should not have extended to the disposal of the main application.

From the parties contending submissions, one thing is clear and it constitutes a divergent point by the counsel. This is in respect of the fact that at no point in the trial proceedings were the parties invited to submit on the application for restoration of the dismissed suit. This is also evident from the proceedings of the trial court whose page 5 provides for what transpired on 21st November, 2019, the date on which parties were ordered to argue the preliminary objection by way of written submissions. Ruling in respect thereof was set for 12th December, 2019. On the date set for the ruling, the same was still deferred to 19th December, 2019, on which day the same was pushed further to 16th January, 2020. It was not until 3rd of February, 2020 that the ruling was finally pronounced and when it came, it determined the entirety of the matter. The critical issue for consideration, at this point, is whether or not the action taken by trial magistrate denied the parties, especially the appellant, the right to be heard thereby contravening the rules of natural justice. If so, what are the consequences?

It is a cardinal principle of natural justice that a party should be afforded an opportunity to be heard before a determination is made on his

rights. This is known, in Latin, as *audi alteram partem,* which literally means, hear the other side. In respect of the court proceedings, a trial magistrate or judge's responsibility in conforming to this principle entails the party's right to be informed of any adverse point that the judicial officer is going to base his decision on. This position was splendidly and persuasively accentuated in ***Hadmor Productions v Hamilton*** (1982) I ALL ER 1042 at p. 1055, in which Lord Diplock stated thus:

> *"Under our adversary system of procedure, for a Judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what is his answers to it".*

The position in the foregoing passage inspired the Court of Appeal's decision, held in ***Scan – Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu***, CAT-Civil Appeal No. 78 of 2012 (ARS-unreported), in which it was held:

> *"We are of the considered view that in line with the audi alteram partem rule of natural justice,* ***the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit*** *- See* ***Shomary Abdallah v. Hussein and Another*** *(1991) TLR 135;* ***National Housing Corporation versus Tanzania Shoes and Others*** *(1995) TLR 251 and* ***Ndesamburo v. Attorney General*** *(1977) TLR 137.* ***The right to be heard is emphasized before an adverse decision is taken against a party.***"

See ***Mire Artan Ismail & Another v. Sofia Njati***, CAT-Civil Appeal No. 75 of 2008 (unreported).

What the trial magistrate did cannot be said to bring any conclusion other than the fact that the rights of the parties and, I must say, the appellant's, were grossly infracted, when the application that he filed was decided adversely and without letting the parties address him on the adequacy or otherwise of the grounds on which the application was based. What comes out of this ignominious conduct of the trial magistrate is nothing better than a mere sham that cannot be allowed to stand. It is simply a parody of justice that is abhorrent.

In consequence of this, I allow the appeal. I quash and set aside the ruling on the application and order that the application be heard and determined by another magistrate.

It is so ordered.

DATED **at MWANZA** this 19th day of June, 2020.

M.K. ISMAIL

JUDGE

Date: 19/06/2020

Coram: Hon. F. H. Mahimbali, DR

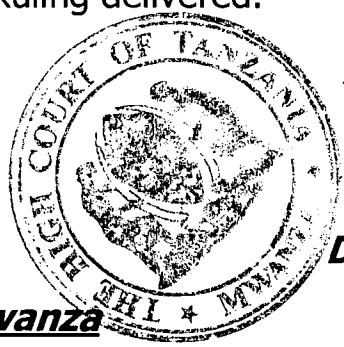
Appellant: Mr. Zephania, Advocate

Respondent: Mr. Gwakisa Gervas, Advocate

B/C: Leonard

Order:

Ruling delivered.



F. H. Mahimbali

DEPUTY REGISTRAR

At Mwanza

19th June, 2020