

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

PC CIVIL APPEAL NO 15 OF 2020

BETWEEN

WAIKENA CHACHA MUKUBYA _____ APPELLANT

VERSUS

1. MICHAEL MATIKO MNANKA _____ 1st RESPONDENT

2. PAULINA MWITA MNANKA _____ 2nd RESPONDENT

(Arising from the Decision and Orders from the District Court of Serengeti at Mugumu Hon. Ngaile RM, in Civil Appeal no.1 of 2018, dated 23.09.2019)

RULING

19th and 23rd October 2020

GALEBA, J.

This appeal originated from civil case no 83 of 2017 which had been instituted in the urban primary court **at Mugumu** in Serengeti. In that case, the appellant, a resident of **Mugumu** was claiming Tshs 12,520,000/= from the respondents who are residents of **Mbezi Beach Dar es salaam** and **Rebu in Tarime** respectively. That money was sent on 15.05.2017 from Mugumu by the appellant to the 1st Respondent for the latter to deliver a 500 liters plastic tank and 700 bags of cement to him **in Mugumu**. The goods were not delivered and on 06.08.2017 the appellant managed to get hold of the respondents and caused execution of an agreement between them. In that agreement, which was executed **in Tarime**, the 1st respondent was

the principal obligor and the 2nd, the guarantor. According to that agreement the money was to be paid fully by 15.10.2017. As per the appellant, up to that date, the money had not been paid as agreed hence the institution of civil case no 83 of 2017 on 21.11.2017 in the primary court at **Mugumu** suing both respondents.

Close to three (3) weeks later on 07.12.2017, the primary court in Mugumu passed judgment to the effect that the appellant won the case, and he was entitled to not only the claimed amount, but also costs of the case.

The respondents were dissatisfied with that decision and they filed Civil Appeal no.1 of 2018 in the district court of Serengeti at Mugumu raising 15 grounds of appeal to challenge the decision of the primary court. Amongst the grounds was ground 11, which was to the following effect;

"11. That the learned Primary Court Magistrate erred both in law and fact by entertaining the civil case of which cause of action took place in another court's jurisdiction. The said breached contract was signed before an advocate in Tarime District where the appellants reside."

When the appeal came up for hearing on 08.07.2019 in the district court, Mr. Gabriel Sasi learned advocate for the appellants, at page 16 of the proceedings, submitted as follows;

"I pray to drop the 11th ground of appeal".

Although there is no formal order from the court ordering that that ground was marked abandoned, but neither Mr. Sasi himself nor Mr.

* Cosmas Tuthuru learned advocate for the respondents in that matter made any submissions on that ground.

Despite the above position, the district court disposed of the appeal wholly based on the above ground which had been abandoned by the appellant and never argued by parties.

When I was preparing for hearing of this appeal, I noted the above anomaly, therefore when it came up for hearing on 19.10.2020 I required Mr. Cosmas Tuthuru and Mr. John Manyama both learned counsel for the appellant and the respondents respectively, to submit on whether it was lawful for the 1st appellate court to have decided the entire appeal based on a ground which was abandoned without affording parties opportunity to address it on that point.

Briefly, Mr. Manyama was of the opinion that as it is an issue of law even if parties were to address the court, nothing would have changed so the district court was right. On his part, Mr. Tuthuru was of the view that the district court was wrong to decide a matter without hearing submissions of parties on it.

Legally, where a party raises an issue, if the court is to make a decision on it, it must ensure that parties are invited to address it on the issue. The same is true even where the court itself raises an issue ***suo motto***. It does not matter the stage reached; even when the court entertains a matter when composing judgment, it must invite parties to address it before it can decide on the point. See **Wegesa**

Joseph Nyamaisa v Chacha Muhogo, Civil Appeal No 161 of 2016 (unreported) and **Mbeya Rukwa Autoparts and Transport Ltd v Jestina George Mwakyoma [2003] TLR 25**. In the latter case the Court of Appeal stated that in Tanzania:

"....natural justice is not merely a principle of the common law, it has become a fundamental constitutional right, Article 13(6) (a) includes the right to be heard among the attributes of equality before the law."

Mr. John Manyama submitted that because the matter was a point of law, what the parties would have submitted upon would not have changed anything. The answer to that submission is contained in **Halima Hassan Marealle v the Parastatal Sector Reform Commission**, Civil Application no 84 of 1999 (unreported) where it was held that;

"The concern is whether the applicant whose rights and interests are affected is afforded the opportunity of being heard before the order is made. The applicant must be afforded such opportunity even if it appears that he or she would have nothing to say, or that what he or she might say would have no substance."

So, where a right to be heard is involved, parties must be afforded that right irrespective of the merits of what they or any of them might have to say.

In **Tanga Gas Distributors Limited v Mohamed Salim Said and two others**, Civil Application no 68 of 2011, at pages 21 to 22 of the typed judgment, the Court of Appeal held that;

"No decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interest of any person without giving him a hearing according to the principles of natural justice."

In the present appeal, the issue of territorial jurisdiction was determined by the district court on appeal without inviting parties to submit on it. The consequences of that omission were elaborated in **Abbas Sherally and another v Rabdul Sultan H. M. Fazalboy**, Civil Application no 33 of 2002 (unreported). In that case it was held that, unless expressly or implied by law, the breach renders the proceedings, the decision and all orders made a nullity even if the same decision would have been reached had the parties been given a right to be heard.

In this appeal, I have no option but to hold that the judgment of the district court based on the 11th ground of appeal on which parties were not invited to make submissions is a nullity.

Based on the above position of the law, under the provisions of section 31(1) of the **Magistrates' Courts Act [Cap 11 RE 2020]**, this court makes the following orders;

1. The proceedings and all orders including the judgment in civil appeal no.1 of 2018 passed by the district court of Serengeti at Mugumu are hereby quashed and nullified.
2. The registry office here at the High Court is directed, as soon as possible, to transmit the original record of the primary court in civil case no 83 of 2017 and that of the district court in Civil Appeal no.1 of 2018 and this ruling to the district court of Serengeti.

3. Upon receipt of the records as directed in item 2 above, the district court of Serengeti at Mugumu shall invite parties in Civil Appeal no.1 of 2018 and hear them on the merits or otherwise of the 11th ground of appeal and make a decision thereafter.
4. For avoidance of doubt it is hereby ordered that the same honorable magistrate who heard Civil Appeal no 1 of 2018 will hear the above point of law once the records are remitted to the district court, unless for reasons beyond control of the court, in which case another honorable magistrate may hear the appeal on that point of law.
5. As no appeal can proceed from a nullity, this appeal is struck out with no orders as to costs.

DATED at MUSOMA this 23rd October 2020



Z. N. Galeba
JUDGE
23.10.2020

Court; This ruling has been delivered today the 23rd October 2020 in the presence of Mr. Cosmas Tuthuru learned advocates for the appellant and Ms. Paulina Chacha the 2nd respondent in person and in the absence of the 1st respondent.



Z. N. Galeba
JUDGE
23.10.2020