THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

(PC) CIVIL APPEAL NO. 99 OF 2019
(Originating from the District Court of Kilosa, Civil Appeal No. 31 of 2018)

ANDREW A. KATEMA.....APPELLANT
VERSUS
SIMONI NGALAPA.....RESPONDENT

RULING

19th & 30th October 2020

MASABO, J.:

The Appellant Andrew A. Katema appeals against the judgment and decree delivered by the District Court of Kilosa District at Kilosa on 24th April, 2019 in Civil Appeal No. 31 of 2018. In the original suit, *Shauri la Madai* Na. 42 of 2018 the appellant had sued the Respondent for a sum of Tshs 40,741,000/ = being damages resulting from the respondent's breach of contract. The decision of the trial court did not amuse him as his claims were partly successful. In his appeal to the district court he fronted the following five grounds but none of the them was determined as the appeal was disposed by an issue raised suo motto by the court.

Disgruntled by decision of the first appeal court he has appealed to this court armed with 3 grounds of appeal.

(i) that the appellate magistrate erred in law and in fact by determining an appeal and raised a ground of appeal suo moto

without giving the appellant an opportunity to examine and challenge thus condemned unheard,

(ii) that the appellate magistrate grossly misdirected herself for entering a judgement without considering the grounds of appeal raised by the appellant,

(iii) that the appellate court erred in law for exercising power which has no jurisdiction.

When the suit was called for hearing, both parties had representation. Mr, Richard Mwaringo, learned advocate appeared for the Appellant whereas the respondent was represented by Mr. Fabian Mruge, learned counsel.

Arguing in support of the appeal, Mr. Mwaringo abandoned the 3rd ground and proceeded to submit on the 1st and 2nd ground of appeal. In regard to the first ground, he submitted that the appellate court, on its own, raised an issue as to the admission of Exhibit U2 and through that issue and without hearing the parties, he quashed the lower court proceedings and ordered a trial *de novo*. He argued that such an approach denied the parties the right to be heard as enshrined under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977. To fortify his argument, he invited me to the decision of the Court of Appeal in **DPP vs Shaban Donasian & 10 Others,** Criminal Appeal No. 106 of 2019, CAT (unreported) where it was held that once a court raises an issue *suo motto*, the parties are to be given an opportunity to challenge it.

In regard to the 2nd ground of appeal, Mr. Mwaringo reiterated that the appellate court misdirected itself as it wrongly entered the judgement without considering the grounds of appeal. In support, he cited the case of **Mwanahawa Muya vs Mwanaidi Maro, [1992] TLR 98 CAT** where the Court of Appeal held it was improper for the court court to use revisional powers where there are issues for determination. He argued that, the fact that the court neglected the ground of appeal is a serious misdirection.

Mr. Fabian vehemently resisted the two grounds of appeal. He submitted that the District Court has power to determine the matter before it. He further submitted that the parties were given a chance to submit. He added that the appeal court had power to consider the irregularity or otherwise of the exhibit. In the alternative, he argued that the appellant has not specified the extent to which he was prejudiced, hence, the appeal is unmeritorious. On the 2nd ground, Mr. Fabian submitted that it is not true that the 1st Appellate court did not address itself to the grounds of appeal as it considered the grounds and made a correct judgment.

In rejoinder, Mr. Mwaringo submitted that the counsel for respondent has not disputed the fact that the parties were given an opportunity to challenge Exh.U2. Therefore, it was wrong for the court to rely exclusively on that issue while neglecting the grounds of appeal.

I have considered the submissions by both parties and the lower courts records which I have thoroughly read. As It could be seen from the grounds

of appeal and the submissions made by the parties, there is one major issue for determination namely; whether the appellate magistrate erred in law and in fact by determining an appeal solely based on an issue it had raised *suo motto* and without hearing the parties.

Luckily, this issue is not an unchartered territory. It has been a constant topic in jurisdiction. Needless to say, the law is now highly settled as there is a plethora of authorities on the same. In addition to the two authorities cited by the appellant, other relevant authorities include: **Patrobert D. Ishengoma vs Kahama Mining Corporation& 2 others**, Civil Application No 172 of 2016 CAT at Mwanza (unreported); **EX- B.8356 S/Sgt Sylvester S. Nyanda vs The Inspector General Of Police & The Attorney General,** Civil Appeal No. 64 Of 2014, CAT (unreported); J**ohn Morris Mpaki vs The Nbc Ltd. And Ngalagila Ngonyani**, Civil Appeal No. 95 of 2013 (CAT) unreported; **Mbeya Rukwa Auto Parts & Transport Ltd vs Jestina George Mwakyoma** [2003] TLR 251 (CAT); and **Abbas Sherally &. Another vs Abdul S. H. M. Fazalboy**, Civil Application No 33 of 2002 (CAT).

The position underlined in these authorities is that, a decision likely to adversely affect the rights of parties shall not be made without affording the parties a right be heard. A decision or order made in contravention of this principle, risks nullification ".....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." **Abbas Sherally &. Another vs Abdul S. H. M. Fazalboy** (supra).

A better articulation of this principle is found in **Patrobert D. Ishengoma vs Kahama Mining Corporation & 2 others** (supra) which I quote below in extenso:

> Inappropriateness of courts raising jurisdictional matters *suo motu* and determining them without hearing the parties was deplored in **EX- B.8356 S/SGT SYLVESTER S. NYANDA VS THE INSPECTOR GENERAL OF POLICE & THE ATTORNEY GENERAL,** CIVIL APPEAL NO. 64 OF 2014 (unreported). Three issues were framed for determination by the trial High Court. But, while preparing its judgment, the trial court abandoned all the three issues and framed a completely new issue upon which it based its decision. Before revising and quashing the entire proceedings of the trial High Court, the Court observed:
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> > *"There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed* ***suo motu*** *which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying of the parties the right to fair hearing."*

> In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts, while composing their decision, discover new issues with jurisdictional implications. The way the first appellate court raised two jurisdictional matters *suo motu* and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and the judgment of the High Court a nullity, and we hereby declare so. [Emphasis added]

In the instant case, as started earlier, there is no dispute that the appeal was decided on an issue raised *suo motto* by the court. The records reveal that, in determining the appeal, the court observed that there were irregularities in the admission of documents as exhibit and raised this issue *suo motto*. In particular, it observed that, there were no records that the document relied upon by the trial court (Exhibit U2) was tendered and admitted as exhibit. Having discussed this issue, the court nullified the trial court's proceedings and ordered a trial *de novo*.

Mr. Fabian has submitted that the parties were accorded the right to be heard which would imply that the requirement above was duly complied with. However, in my painstaking perusal of the record, I was unable to trace what the counsel submitted. In view of this I have come to the conclusion that the first appeal court did not invite the parties to address it on the appropriateness of tendering and or admission of Exhibit U2. The omission has, as per the authorities above, rendered the decision of the first appeal court a nullity and I hereby quash it.

I further direct that, the appeal Civil Appeal No. 31 of 2018 be remitted back to the District Court of Kilosa to be heard afresh by another magistrate with competent authority. Since the error was not occasioned by the parties, each of them will bear its respective costs.

DATED at DAR ES SALAAM this 30th day of October 2020

J.L. MASABO

JUDGE