IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 240 OF 2018

(Appeal from Ruling and Order of the District Court for Kinondoni at Kinondoni, Hon. J. Mushi RM, dated 28th September, 2018 in Misc. Civil Application No. 104 of 2018)

AIRTEL TANZANIA LIMITED.....APPELLANT

VERSUS

RAFAEL LOGISTIC (T) LIMITED.....RESPONDENT

JUDGEMENT

Date of last Order: *04/08/2020*
Date of Judgment: *23/10/2020*

MLYAMBINA, J.

The appeal is against the decision of the District Court of Kinondoni at Kinondoni which was delivered on 28th September, 2018 by Honourable J, Mushi, Resident Magistrate. The records indicate, and it is not disputed, that the Appellant filed *Misc. Application No. 104 of 2018,* before the Magistrate's Court, praying for extension of time to file restoration of *Civil Case No. 59 of 2016* which was dismissed by Honourable J. Mushi on 7th December, 2016 for want of prosecution.

In reply, the Respondent raised three point of preliminary objections against the said application of extension of time, namely:

i. That, the application is hopelessly time bared under Part III to the First Schedule of *the Law of Limitation Act of 1971 [CAP 89 R.E. 2002].*
ii. That, the application is the abuse of the Court process.
iii. That, the application is incompetent for being supported by an incurable defective affidavit.

The Magistrate's Court ordered the hearing of said points of preliminary objections to be disposed by way of written submission. Respectfully, both parties adhered to Courts scheduling order. Eventually, the ruling on the three point of preliminary objection was delivered on 28th of September, 2018 by Honourable Mushi J. The first objection was sustained and the application for restoration of *Civil Case No. 59 of 2016* was dismissed without costs. Out of unknown intent, the Appellant in its written submission has argued that all the three objections were not sustained.

In wrong view of the Appellant, the parties were not granted their right to be heard before the Magistrate Court could proceed and deliver a ruling on the main matter.

In response, the Respondent objected the appeal. In their view, the only issues seem to appear at the last paragraph of the ruling which entails that what the Trial Magistrate dismissed is the

application for restoration itself as opposed to application for extension of time. Thus, this is a mere clerical and /or typing error not causing a miscarriage of justice. The reason is that the title to the ruling clearly indicates that it is the application for extension of time which is being determined.

I have gone through the entire impugned ruling. I noted the last paragraph read:

> For the reasons thereof, the first point of preliminary objection is upheld and accordingly the application for restoration of *Civil Case No. 59 of 2016* is dismissed without cost.

As correctly submitted by the Respondent, before the Court was an application for extension of time for restoration of *Civil Case No. 59 of 2016*. It was therefore an error on the part of the Court to dismiss the application for restoration of *Civil Case No. 59 of 2016* which was not before it.

Also, I find it was an error of the Court for not awarding costs without giving reasons. The Respondent had engaged a Lawyer, attended hearings and incurred other incidental costs. In the light of the decision of this Court in the case of **Bahati Moshi Masabile t/a Ndono Filing Station v. Camel Oil (T)** Civil Appeal No. 216

of 2018, High Court of Tanzania at Dar es Salaam Registry (unreported), a successful party has the right to costs.

On the pint of right to be heard, I understand, it is a principle of natural justice every litigant be heard before a decision is made. In the case of **Sadiki Athumn v. Republic** [1986] TLR 235 it was held that:

> *The requirement that a party to the proceeding must be given the opportunity to lay his views is a fundamental principle of natural justice...*

Again, In **Mbeya Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma,** Court of Appeal of Tanzania Civil Appeal No. 45 of 2000, cited by Sameji, J. (*supra*) at page 17, it was held by the Court of Appeal that:

> *In this country natural justice is not merely a principle of common law. it has become a fundamental constitutional right. Article 13 (6) (a) include the right to be heard amongst the attributes of equality before the law.*

In **Abbas Sheally and Another v. Abdul Fazalboy,** Court of Appeal of Tanzania, Civil Application No. 33 of 2002, also cited by Sameji (*supra*), the Court of Appeal of Tanzania emphasized that:

The right of a party to be heard before adverse action decision is taken against such party has been stated and emphasized by the 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 has the party been heard, because the violation is considered to be a breach of natural justice. [Emphasis Added]

However, in the instant case, both parties were heard on the raised *plea in limine litis*. Consequently, the objection on time limitation was properly sustained.

In the circumstances of the above, the appeal is found devoid of any merits. The resultant effect is, as I hereby dismiss the appeal with costs and award costs to the Respondent in *Misc. Civil Application No. 104 of 2018* before the Kinondoni District Court.

Y. J. MLYAMBINA

JUDGE

23/10/2020

Judgement pronounced and dated 23rd October, 2020 in the presence of Counsel Elisha Kiwula holding brief of Walter Masawe for the Appellant and Elisha Kiwula for the Respondent. Right of Appeal explained.

Y. J. MLYAMBINA

JUDGE

23/10/2020