

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

(PC) CIVIL APPEAL NO. 16 OF 2020

*(Arising from the Order of the District Court of Musoma at Musoma in Civil
Revision No. 9 of 2020)*

PENINA C. AGUKO APPELLANT

VERSUS

SOPHIA TUMBO RESPONDENT

JUDGMENT

6th and 6th November, 2020

KISANYA. J.:

In its *ex parte* judgment dated 9th September, 2019, the Kukirango Primary Court granted the claims of Tshs.11, 610,747 arising from the loan advanced to **Sophia Tumbo** (the respondent). **Penina C. Aguko** (the appellant) was also awarded a compensation to the tune of Tshs.2, 900,000. The proceedings which led to the *ex parte* judgment were nullified, *suo motu*, and the judgment set aside by the District Court of Musoma at Musoma in Civil Revision No. 9 of 2020. The District Court went on to order for retrial of Civil Case No. 27 of 2019 of the Kukirango Primary Court before another magistrate with competent jurisdiction and new set of assessors.

Aggrieved, the appellant has filed the present appeal which is premised on the following two grounds of appeal:

- 1. That the Honourable District Resident Magistrate Court grossly erred in law by condemning the Appellant unheard thereby infringing her constitutional and statutory right to be heard.*

2. That, the District Resident Magistrate erred in law by exercising his revisional power despite that there was no any irregularity worth to be revised.

At the hearing of this appeal, the appellant was represented by Mr. Iman Mapunda, learned advocate. The matter proceeded in the absence of the respondent who failed to appear.

At the very outset, Mr. Mapunda prayed to drop the second ground. Submitting in support of the first ground, Mr. Mapunda faulted the District Court for revising the decision of the trial court and making orders which affected the appellant without according her a right to be heard thereby contravening section 22(3) of the Magistrate Courts Act, Cap. 11, R.E. 2019 (the MCA). Citing the case of **Dishon John Mtaita vs the Director of Public Prosecutions**, Criminal Appeal No. 132 of 2004 (unreported), Mr. Mapunda argued that the proceedings of the District Court were a nullity. He then moved the Court to allow the appeal, quash the decision of the District Court and grant any other relief.

I have examined the argument advanced by Mr. Mapunda in line with the evidence on record. The issue for consideration is whether the appellant was condemned unheard by the District Court in the revision proceedings.

I am mindful that of in terms section 22 of the Magistrate Courts Act, Cap. 11, R.E. 2019, the District Court has power to call for and examine records of any proceedings of primary court within its jurisdiction with a view of satisfying itself as to the correctness, legality or propriety of the decision or order issued thereto, and as to the regularity of any proceedings therein, and revise them accordingly.

However, such power cannot be exercised without according the parties an opportunity to be heard. This is provided for under section 22(3) of the MCA which provides:

"...no order shall be made in the exercise of the court's revisional jurisdiction in any proceeding of a civil nature increasing any sum awarded, or altering the rights of any party to his detriment (other than an order quashing proceedings in a lower court or an order reducing any award in excess of the jurisdiction or powers of the lower court to the extent necessary to make it conform thereto) unless such party has been given an opportunity of being heard."

In that regard, the parties to the proceedings before the Primary Court who are likely to be affected in the revision are required to be called and heard in the revision proceedings. Such requirement is based on the fact that, every person who is likely to be affected by the decision to be reached by the District Court is entitled to right to fair hearing enshrined under Article 13(6) (a) of the Constitution of the United Republic of Tanzania. It is trite law that, any decision which does not take into account the right to be heard is a nullity. See the case of **EX D. 8656 CPL Senga s/o Idd Nyembo and 7 Others vs R**, Criminal Appeal No. 16 of 2018 (unreported) when the Court of Appeal cited with approval its decision in **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) where it was held that: -

"The right of a party to be heard before an adverse action or decision is taken against such a 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 had the party been heard, because the violation is considered to be a breach of the principles of natural justice."

Further in **Dishon John Mtaita** (supra), the Court of Appeal reiterated that, the right to be heard is fundamental when one's right is being disposed of by any person, authority or court of justice when it held as follows:-

"As pointed out by both learned counsel in this appeal, the right to be heard when one's rights are being determined by any authority, leave alone a court of justice, is both elementary and fundamental. It flagrant violation will of necessity lead to the nullification of the decision at in breach of it.."

*That is why this Court unequivocally held in the case of **D.P.P vs S.I. Tesha** (supra) that a denial of a right to be heard in any proceedings would definitely vitiate the proceedings."*

The above position of law and settled law will govern us in determining the issue whether the appellant was denied the right to be heard.

It is apparent on record that, the revision proceedings in the case at hand were called, *suo motu*, by the District Court of Musoma when the appellant "applied for approval of decree of his (sic) by the trial court to be executed". As rightly submitted by Mr. Mapunda, neither the appellant nor the respondent was called to address the District Court on the issue(s) determined by the learned District Resident Magistrate. The coram shows that, both parties were not present when the matter was placed before the learned District Resident Magistrate for the first time on 24/3/2020. However, learned District Resident Magistrate went on to fix the date of ruling or order. This is what transpired on that day:

Court: The case is adjourned as the order in revision is not ready

SGND- RM

25/03/2020

Order: 1. Ruling/order 27/03/2020

SGND-RM

25/03/2020"

Apart from the above, nothing was recorded in the case file. The District Court delivered an ORDER IN REVISION on 20th April, 2020 in the absence of the parties.

In the circumstances, this Court does not need a microscope to detect whether the right to be heard was infringed by the learned District Resident Magistrate who determined the revisional proceedings. Since both parties were likely to be affected by the decision in revision proceedings, they were entitled to the right to be heard. The omission to hear the parties vitiated the revisional proceedings. Consequently, the Order in Revision and the appeal arising from the nullity proceedings are also a nullity.

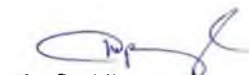
In the event, this Court exercises its revisional powers and hereby nullify the proceedings of the District Court in Revision No. 9 of 2020, quash and set aside the Order in Revision arising thereto. The case file is remitted to the District Court to be assigned to another magistrate for purpose satisfying himself/herself as to the correctness, legality or propriety of the decision or order issued by the trial court, and revise them if the need arises after hearing the parties. Each party to bear its own costs. It is so ordered.

DATED at MUSOMA this 6th day of November, 2020.




E. S. Kisanya
JUDGE

COURT: Judgment delivered this 6th November, 2020 in the presence of Mr. Iman Mapunda, learned advocate for the appellant and in the absence of the respondent the respondent.


E. S. Kisanya
JUDGE
6/11/2020