

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CIVIL APPEAL NO. 47 OF 2020

*(Originating from the ruling of the Court of the Resident Magistrate of Mwanza in
Miscellaneous Civil Application No. 76 of 2020 dated 30/06/2020)*

1. LETSHEGO BANK (TANZANIA) LIMITED..... 1ST APPELLANT

**2. BOSTON AUCTION MART AND GENERAL
AGENCY COMPANY LIMITED..... 2ND APPELLANT**

VERSUS

EMMA NGOWIRESPONDENT

JUDGEMENT

Date of Last order: 14/12/2020

Date of Judgement: 01/03/2021

F. K. MANYANDA, J.

In this appeal the Appellants namely, **Letshego Bank (Tanzania) Limited** and **Boston Auction Mart** and **General Agency Company Limited** are challenging an *ex parte* ruling of the Court of the Resident Magistrate in Miscellaneous Civil Application No. 76 of 2020 dated 30/06/2020 given by Hon. B. M. Lema, RM which granted interim injunctive



orders restraining the Appellants from selling all the commodities they attached from a shop of the Respondent pending hearing inter parties. In addition, it ordered return of all the attached commodities in order to enable the Respondent resume her business. The said orders were given in absence of the Appellants, who, after learning about its existence, got aggrieved and filed this appeal challenging the ex parte ruling on the following grounds, that:-

1. The trial court erred in law and facts in issuing an ex parte order against the Appellants whose offices are a few meters from the Court premises to the return (sic) to the Respondent, the lawfully attached shop's inventory which was legally mortgaged to her and the alleged attached money without any proof that indeed it was attached inventory.
2. The trial court grossly erred in law and facts to entertain the Miscellaneous Civil Application No. 76 of 2020 which it had no jurisdiction.

3. The trial court erred in law and facts on 30th June, 2020, while the Appellants entered appearance to object the same via their Counsel and in absence of execution order.

The background of this appeal is that, way back on 20/05/2019, the Respondent borrowed money TShs. 30,000,000/= from the 1st Appellant, the Bank. Out of that amount, she was required to pay an interest of TShs 17,222,518/= making total amount payable to be 47,222,518/= in one year. She collateralized her residential house and various business commodities as security all valued at market value of TSh. 161,1300,000/= and forced sale value of TSh. 76,050,000/=.

Then it happened that the loan was not fully repaid in time. The 1st Appellant instructed the 2nd Appellant to attach commodities in the shop run by the Respondent and took them away with intention of selling the same for purposes of recovering the Bank's money which the Respondent borrowed. Up to 12/06/2020, the loan stood at TSh. 30,939,002.50 which includes the court brokers costs expected to be recovered from money obtained from selling the Respondent's commodities.



Seeing this situation, the Respondent instituted Civil Case No. 45 of 2020 at the Court of the Resident Magistrate on 26/06/2020 claiming Shillings 250,000,000/= which the value of the commodities and cash Shillings 50,000,000/= taken by the Appellants.

Fearing loss of her commodities in case the same is sold, on the same day, she also filed Miscellaneous Civil Application No. 76 of 2020 praying for *ex parte* interim injunctive orders restraining the Appellants from selling all the commodities they attached from a shop of the Respondent pending hearing *inter parties*. She also prayed for return of all the attached commodities in order to enable her business resume.

As stated above, the trial court granted the interim orders prayed by the Respondent in its ruling dated 30/06/2020 pending *inter parties* hearing of the application. After been served, the Appellants filed their counter affidavits on 20/07/2020, hence the matter became ready for inter party hearing. However, the Appellants were not patient enough to wait for the *inter parties* hearing, they chose to appeal against the ruling of the trial court which gave the interim orders, hence filed this appeal on 04/08/2020 under certificate of urgency.



Hearing of this appeal was directed to proceed in the absence of the Respondent because of her faulting to enter appearance for the hearing and without any notice after been dully served. Mr. Kaswahili, learned Advocate, who represented the Appellant argued the three grounds of appeal seriatim.

The grievance in ground one is that the trial court erred in law in granting the *ex parte* order without issuing a prior notice or issue summons to the Appellant to enter defence, as a result he was condemned unheard. The *ex parter* order was issued 16 days after attachment of the commodities at that there was no justifiable hurry and the commodities were not in a state of being wasted or destroyed. He cited the case of **Knight ware vs. Shamsi Ismail** [1989] TLR 48 where the circumstances of dispensing with the notice under Order XXXVII of the Civil Procedure Code, [Cap. 33 R. E. 2019], hereafter, the CPC. Mr. Kaswahili was of the view such circumstances were missing. He was of the view that the trial court ought to have summoned the Appellants.

In ground two, Mr. Kaswahili submitted that the trial court had no pecuniary jurisdiction to entertain the matter before it because the value



of the subject matter in Civil Case No. 45 of 2020 from which the application originated was TSh. 250,000,000/=. Its pecuniary jurisdiction is limited to TSh. 200,000,000/=. He was of the view that in the light of the express provisions of section 13 of the CPC which require suits to be filed in the lowest jurisdiction court, in this matter is the High Court. He prayed this Court to strike out Civil Case No. 45 of 2020 for want of jurisdiction of the trial court.

In respect of ground three, Mr. Kaswahili submitted that it was an error to grant the *ex parte* order while the Appellants had already objected the same.

Mr. Kaswahili added that the order to return the attached commodities by the trial court is un-executable unless there is a specific application to that effect under Order XXI rule 9 whereas a court broker is appointed and files feedback per Order XXI rule 22(1) and (2). He was of the view that since all these procedures were not followed, the appeal be allowed.

I will start by dealing with the grievance in the first ground that the trial court granted the *ex parte* order without issuing a prior notice or

issue summons to the Appellant to enter defence to the Appellants, as a result he was condemned unheard.

I agree with the Appellants in this complaint. The Chamber Summons was brought under Order XXXVII Rule 1(a), Sections 68(c) and (e) and 95 of the CPC. Let me see what these pieces of law provide.

Order XXXVII Rule 1(a) reads:-

"Where in any suit it is proved by affidavit or otherwise – (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit of or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or

(b) NA

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders: Provided that an order granting a temporary injunction shall not be made against the Government, but the court may in lieu thereof make an order declaratory of the rights of the parties."

It can be gleaned that under this law, the trial court had jurisdiction and had all the blessings of acting on the matter. On the other hand, Section 68(a) and (e) read as follows:-

"68. In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf-

(a) NA

(b) NA

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof as a civil prisoner and order that his property be attached and sold;

(d) NA

(e) make such other interlocutory orders as may appear to the court to be just and convenient."

Under these pieces of law the trial court is empowered to grant injunctive orders in order to prevent the ends of justice from being defeated. However these powers are subjected to other rules. Such rules include what this Court (Mapingano, J. as he then was) said in the case cited by Mr. Kaswahili of **Tanzania Knitwear Ltd vs. Shamshu Esmail** [1989] TLR 48 that

"(iii) under 0.37 r. 3 of the Civil Procedure Code the requirement of giving notice to the opposite party is mandatory. Where it appears that the delay in the issuance of notice will defeat the object of the injunction, the notice could be dispensed with."

It follows that the requirement of giving notice to the other party to be affected by the ex parte order in mandatory unless, with leave of the court, is dispensed with in circumstances where it appears that delay will defeat justice. Such a requirement is now found in Order XXXVII Rule Rule 4 as Rule 3 provided for the time limit of such orders.

The Respondent, for undisclosed reasons, did not cite Order XXXVII Rules 3 and 4 which would have drawn the attention of the trial court on the requirement of the notice and the time limitation of the interim injunctive orders. As a result the trial court gave unguided interim injunctive orders with neither issuance of the mandatory notice nor grant leave for its dispensation. It did not even specify time limit of the said interim orders.

In ground two, Mr. Kaswahili submitted that the trial court had no pecuniary jurisdiction to entertain the matter before it because the value of the subject matter in Civil Case No. 45 of 2020 from which the

application originated was TSh. 250,000,000/=. Its pecuniary jurisdiction is limited to TSh. 200,000,000/=.

Well, he might be right or not, this Court is not legally availed with the proceedings of the Civil Case No. 45 of 2020 because the same is not before it by either appeal or revision. The matter before this Court is an appeal from Miscellaneous Civil Application No. 76 of 2020 not Civil Case No. 45 of 2020. For this reason this ground fails.

In ground three the complaint by Mr. Kaswahili for the Appellants is that it was an error to grant the *ex parte* order while the Appellants had already objected the same.

Mr. Kaswahili added that the order of return the attached commodities by the trial court is un-executable unless there is a specific application to that effect under Order XXI rule 9 whereas a court broker is appointed and files feedback per Order XXI rule 22(1) and (2). He was of the view that since all these procedures were not followed, the appeal be allowed.

I think this issue is misplaced, I say so because the application before the trial court had not reached a contentious stage. The trial court

issued an interim *ex parte* order pending inter parties hearing. To me, I think it was the intention of the trial court; if at all anything like objections, the same would be brought before during inter parties hearing.

The Respondent instituted Civil Case No. 45 of 2020 at the Court of the Resident Magistrate on 26/06/2020 and at the same day filed Miscellaneous Civil Application No. 76 of 2020 praying for both *ex parte* interim injunctive orders restraining the Appellants from selling all the commodities they attached from a shop of the Respondent and return of all the attached commodities in order to enable her business resume. Also in the same application she prayed for the same inter order injunctive orders after *inter parties* hearing.

The trial court granted the interim orders prayed by the Respondent in its ruling dated 30/06/2020 pending *inter parties* hearing of the application. This was four days after the application was filed. After been served, the Appellants filed their counter affidavits on 20/07/2020, hence the matter became ready for inter party hearing on 13/07/2020.



However, suddenly, the Appellants changed their minds and appealed to this Court on 04/08/2020. The issues raised by the Appellant were to be argued during inter parties hearing on 13/07/2020 or on any other subsequent date. Probably the Appellants feared that the said inter parties hearing would be dilly dallied because the said ex parte order were not assigned with deadline dates.

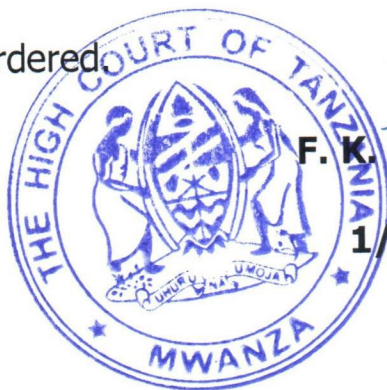
In the upshot, and for reasons stated above, I hereby find that the appeal is partly meritorious. I hereby quash the ruling of the Court of the Resident Magistrate of Mwanza in Miscellaneous Civil Application No. 76 of 2020 dated 30/06/2020 and set aside the extract order thereof. In lieu thereof this Court makes the following orders:-

- i. That the attached commodities be temporarily kept by the 1st Appellant without been sold pending the inter parte hearing of Miscellaneous Civil Application No. 76 of 2020;
- ii. Hearing inter parties of Miscellaneous Civil Application No. 76 of 2020 be conducted within 30 days from the date of this order failure of which the holding order in order I above will cease to have effect;



iii. No order as to costs conducted

It is so ordered




F. K. MANYANDA
JUDGE
1/03/2021