IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

PC. CIVIL APPEAL NO. 43 OF 2020

(C/F Civil Appeal No. 7 of 2020 District Court of Babati as originated from Babati Primary Court vide Civil Case No. 18 of 2020)

SAUMU MBAGA..... APPELLANT

VERSUS

GERVAS GERALD ISOWE .....RESPONDENT

JUDGMENT

25/02/2012 &30/04/2021

GWAE, J

In this judgment, I am asked to determine as to the propriety of the order of the District Court of Babati at Babati Court (1st appellate court) dated 28th April 2020 dismissing the appellant's appeal with costs on the strength that, an interlocutory order issued by Babati Primary Court ("trial court") is in law not appealable. In the trial court order which is in question, the respondent's prayer of unloading charcoal from a motor vehicle with Registration No. T. 974 ASM pending hearing and determination of the respondent's suit, Civil Case No. 18 of 2020 was granted accordingly.

Seemingly, the appellant was aggrieved by the trial court's interlocutory order as a result, she filed an appeal before the District Court of Babati at Babati (1st appellate court) where her appeal was dismissed with costs. Hence this appeal comprised of three grounds of appeal to wit;

1. That, the 1st appellate court erred in law when dismissed the appeal with costs without availing parties with an opportunity to address the court on a point of law raised by the court suo motto that the appeal is premature
2. That, the 1st appellate court erred in law when abdicated its duties when ignored the strength of the 1st ground of appeal presented before it which touches the violation of fundamental right to be heard
3. the 1st appellate court would not have dismissed the appeal if it had considered the provisions of section 20 (1) of the Magistrates Courts Act, Cap 11 R. E, 2019, the fact that the primary courts are not bound by technicalities of dealing with matters as under the Civil Procedure

It was consensually agreed by parties' advocates namely; Ms. Mwenda and Ms. Natujo for the appellant and respondent respectively and the court that, this appeal be disposed of by way of written submission. The Parties' written submissions were eventually filed in conformity with the court order dated 25th February 2021. I shall not however reproduce what have been arguments by the parties' advocates in this appeal but I shall thoroughly consider the same in the

course of determining the grounds of appeal in their seriatim or as raised herein above.

Starting with the 1st ground, it is trite law that a right to be heard in any case before a court of law or quasi-judicial body is fundamental to the extent that if a party in a proceeding is denied that right it amounts to a violation of natural justice as enshrined in our Constitution, 1977 as amended from time to time. The violation whose resultant effect is no other than declaration that such proceeding and decision thereof are a nullity. This position has also been consistently emphasized by our courts as well as foreign jurisdiction, for instance in **Abbas Sherally and another vs. Abdukl S. H. M. Fazaiboy**, Civil Application No. 33 of 2002 (unreported) where the Court of Appeal of Tanzania held and I quote;

> "The right of a party to be heard before adverse action 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 had the party been heard, because the violation is considered to be a breach of natural justice"

In **Mbeya-Rukwa Auto parts and Transport Ltd vs. Jestina George Mwakyoma** (12003) TLR 251 and **Kumbwandumi Ndemfoo Ndoosi v. Mtei**

Bus Services Limited, Civil Appeal No. 257 of 2018 (unreported-CAT), both cited by the appellant's counsel).

In the light of the above quoted judicial jurisprudence, principles of natural justice and provisions of our Constitution (See article 13 (6) (a), I am therefore legally made to adhere to the established principle that, right to be heard is a basic right exercisable by any person by virtue of being a human being, however, in my opinion, a party to a proceeding who fails or neglects to exercise such fundamental right of being heard should also be condemned accordingly. Relying on the decision in Mbeya-**Rukwa Auto parts and Transport Ltd** (supra), I am of the view that, even a consequential order after hearing the parties on the issue raised by the 1st appellate court suo motto might be the same, yet the law requires the parties to be heard.

In our instant appeal, it is evidently clear from the record and decision of the 1st appellate court that, the 1st appellate Resident Magistrate did not avail the parties an opportunity to address him on, 'whether the appeal before him is appealable in law or not'. This is the gross violation of one of principles of natural justice on the part of the 1st appellate court which cannot be left undisturbed in order to put the records right.

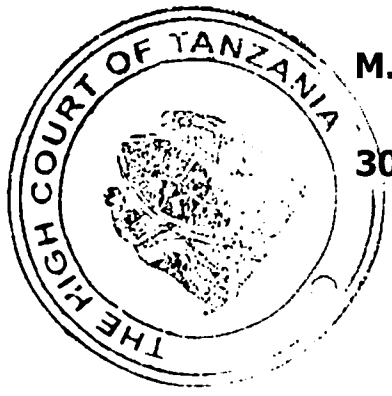
Having found as rightly complained by the appellant that, the parties were not afforded an opportunity to address the 1st appellate Resident Magistrate on

the issue which he suo motto discovered on the competence of appeal before him, I therefore find not legally justifiable to proceed determining other grounds of appeal as doing so I shall pre-empt the 1st appellate court's decision.

This appeal is therefore allowed. The records of the trial court and those of the 1st appellate court shall be expeditiously remitted to the 1st appellate court for it to avail the parties and or their representatives to procedurally address the District Court and then compose its either ruling or judgment as the case may be before the same appellate Resident Magistrate. Each party shall bear its costs as the error so caused is not a blameworthy of either of the parties.

M. R. Gwae
Judge
30/4/2021

Court: Judgment delivered in the presence of the parties' advocates



M. R. Gwae
Judge
30/4/2021