THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO 41 OF 2021

(Arising from the Judgment and Decree of the District Court of Kilosa, originating from Civil Case No. 10 of 2020 at Msowero Primary Court)

RAJABU HAMISI ..... APPELANT

VERSUS

WERENGO MAHURUSI ..... RESPONDENT

JUDGMENT

Last Court Order: 03/09/2021

Judgment date on: 16/11/2021

NGWEMBE, J.

The appellant Rajabu Hamisi, being dissatisfied with the judgement and decree of the 1st appellate court (District Court of Kilosa before Hon. Mayagilo), preferred this appeal. Originally, this case traces back to a land dispute involving a piece of land, which same was decided by the Ward Tribunal of Msowero on 12/5/2020. Part of the record is quoted hereunder:-

> *"Baraza linatamka wazi kuwa mdai (Warengo Mahurusi) katika shauri hili ameshinda katika eneo lake la ukubwa wa 35 urefu na upana wa 20, na mdaiwa (Rajabu Hamisi) ameshindwa"*

Such decision of the Ward Tribunal, opened a new marathon of litigation, whereby Warengo Mahurusi instituted a criminal case, before Msowero Primary Court recorded as Criminal Case No. 85 of 2019 for the offence of causing chaos (kufanya Fujo) contrary to section 89 of the Penal Code. At the end of trial, the trial court held as quoted hereunder:-

> *"Baada ya ushahidi huo, tuliona mlalamikaji na mshitakiwa tatizo ni umiliki wa eneo hilo. Mshitakiwa anaachiliwa huru chini ya fungu la 37 (1) PCCPC Nyongeza ya III ya SMM No. 2/84 chapisho la mwaka 2002".*

That being so decided, another marathon of litigation commenced by Mr. Rajabu Hamisi instituting a civil suit in the same Primary Court of Msowero claiming compensation of TZS. 3,500,000/= for Malicious Prosecution. The trial court decided in favour of the appellant herein and ordered the respondent to pay compensation to the tune of TZS. 500,000/= only. That decision offended the respondent herein, hence appealed to the District Court (Civil Appeal No. 23 of 2020).

Upon hearing that appeal, the first appellate court instead of determining the grounds of appeal, observed equally another serious legal issue. He observed that the trial magistrate misconceived the requirement of law in composing the court judgement, hence the whole judgement of the trial court was nullity by operation of law and the appeal likewise was incompetent because it was founded on a nullity decision. Finally, ordered retrial before another trial magistrate, but with the same set of assessors.

Such order for retrial triggered discomfort to the appellant, thus exhausted his basic right to appeal against it to this court clothed with two grounds:-

1. *The first appellate court erred in law for raising the issue of irregularity at the judgement writing stage without affording the appellant an opportunity to defend; and*
2. *The 1st appellate court erred in law for making a decision without first determining the grounds of appeal.*

In arguing this appeal, the appellant abandoned the second ground and concentrated his energy on the first ground alone. In this appeal, I have decided to trace the genesis of this appeal, with a view to underscore the current struggles of the disputants in the corridors of justice. Before, considering the grounds of appeal, it is imperative to point out that land matters must be decided according to the land laws, which are well-established and its hierarch commences from the Ward Tribunal, appealable to the District Land and Housing Tribunal, then back to the High Court and finally to the Court of Appeal.

As I have underscored, the genesis of this appeal, principally, originated from land disputes, which turned into criminal trial and later into civil disputes. Both disputants seem to be determined to seek their justices in the corridors of these courts of law. Undoubtedly, that is the right way used by civilized societies. Having so said, now let me consider the crux of the matter hereunder.

In this appeal, both parties managed to procure representation of learned advocates and on the first day of hearing, those counsels jointly

agreed to address this court by way of written submissions. Subsequently the prayer was granted and the court proceeded to schedule dates of filling their written arguments. Unfortunate and without any cause, the respondent failed to comply with the court schedule. To date has failed to file any argument in respect to the appellant's written submission. As such, only the appellant complied with the scheduling order.

Based on a principle founded by doubting Thomas, instead of entering judgement as scheduled, I found prudent to confirm on whether the respondent was served with the appellant's written submission. Thus, summoned both parties to appear in court for necessary orders. On the mention date (9/11/2021) the appellant was represented by Bahati Ibrahim Kashoza, but the respondent neither himself nor his advocate appeared in court. Following that absence, the court lacked any explanation for his failure to comply with this court's order.

Perusing the old precedents, it is settled that failure to file written submission is equal to failure to appear on the hearing date and fail to respond to the appellant's case. In year 2003 the court in the case of **Hidaya Zuberi Vs. Bogwe Mbwana PC. Civil Appeal No. 98 of 2003** the court held:-

> *"The practice of filing submission is tantamount to a hearing and therefore, failure to file submission has been likened to nonappearance or want of prosecution. Needless to say that submission filed out of time and without court leave are to be disregarded. It has to be said with no uncertain terms that filing submission out of time amounted to lack of*

prosecution consequently proceed to dismiss the application with costs"

In respect to this appeal, failure of the respondent to file written arguments as per the court order is tantamount to failure to appear on the hearing date. When the respondent fails to appear on the agreed hearing date, obvious the law is clear, like a brightest day light, that the court will proceed to hear the appellant unopposed. Accordingly, this judgement shall be based on the appellant's arguments alone.

The learned advocate for the appellant strongly challenged the 1st appellate court for raising a very important point of law, but failed to invite parties to address the court on such issue. Thus, the whole judgement became unfair to the parties. More so, referred this court to the Constitution and in the case of **Mbeya/Rukwa Autoparts and Transport Ltd Vs. Jestina George Mwakyoma [2003] T.L.R. 251**; and in the case of **M/s Darsh Industries Ltd Vs. M/s Mount Meru Milleers Ltd, Civil Appeal No. 144 of 2015** (CAT – Arusha) whereby the Court held:-

"Issues raised by the court suo motto and forming the base of the decision without having heard the parties renders the decision thereof a nullity even if the same decision would have been reached had the parties were heard"

Without laboring much on this issue, the 1st ruling of appellate court speaks louder that Hon. Magistrate in the cause of composing his ruling rightly observed a legally valid point of law, that the trial court faulted section 3 of Magistrates Courts Act by failure to seek assessors' opinion.

Thus, based his decision on that point of law, subsequently ordered retrial of the whole matter. This is the crux of this appeal, that the Hon. Magistrate *suo motto* determined the whole appeal based on an issue raised himself without involving the disputants.

It is settled, in our jurisdiction that courts are courts of law not courts of morals or sympathy. The duty is to decide what is before it as presented and argued by the disputants. That does not preclude the court from raising legal issues *suo motto*. When the court does so, must invite both parties to address on it before its verdict. This position was pronounced quit clearly by the Court of Appeal in the case of **Mbeya/Rukwa Autoparts and Transport Ltd Vs. Jestina George Mwakyoma [2003] T.L.R. 251 and in the case of M/SDARSH INDUSTRIES LTD VS. M/S MOUNT MERU MILLEERS LTD, CIVIL APPEAL NO. 144 OF 2015; WEGESA JOSEPH NYAMAISA VS. CHACHA MUHOGO, CIVIL APPEAL NO. 161 OF 2016** where the Court of Appeal ruled that:-

> *"It is an elementary and fundamental principle of determination of disputes between 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 the parties right to a fair hearing"*

In this appeal, I find the guidance pronounced by the Court of Appeal says all. There is no need to labour much on an issue which is well developed and settled in our jurisdiction. Accordingly, what the District court did, though was within its capacity to raise it, but failed to invite both parties to address on same. Thus, the

whole appeal turned to be unfair to the parties. Consequently, this appeal must succeed by nullifying the whole proceedings and ruling of the District Court. I therefore, proceed to order the appeal be heard afresh before another District Magistrate.

Since this matter has taken quite long time, I order the appeal before another District Magistrate should be determined within three months from the date of this judgement. Since the error was committed by the court *suo motto*, it is therefore, just and equitable to order each party to bear his own costs.

I accordingly order.

Dated at Dar es Salaam in chambers this 16th day of November, 2021

P.J. NGWEMBE

JUDGE

16/11/2021.

Court: Judgement delivered at Dar es Salaam in Chambers on this 16th day of November, 2021 in the absence of the appellant and in the Presence of the Respondent.

THE HIGH COURT OF TANZANIA

P. J. NGWEMBE

JUDGE

16/11/2021