IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 15 OF 2021

EVANCE BETRAM ILIMBA ..... APPELLANT

VERSUS

EDGAR MPELELA ..... RESPONDENT

(Appeal from the decision of the District Court of Temeke at Temeke in Civil Appeal No. 130 of 2019)

JUDGMENT

9th May & 10th June, 2022

KISANYA, J.:

This is a second appeal. Before the Primary Court of Temeke at Temeke, Edgar Mpelela who happens to be the respondent herein sued Evance Betram Ilimba (the appellant) claiming for a debt of Tshs. 1,500,000. At the end of trial, the trial court resolved the suit in favour of the respondent. It ordered the appellant to pay the respondent a sum of Tshs. 1,500,000/= and Tshs 200,000 being the outstanding debt and costs respectively.

That decision did not please the appellant. He appealed to the District Court of Temeke at Temeke (the first appellate court) where he lost in Civil Appeal No. 130 of 2019.

Still aggrieved, the appellant has approached this Court by way of appeal. He has raised three grounds. The same are paraphrased as follows: -

1. The trial court erred in law and facts by failing to consider that the appellant had already paid Tshs. 1,325,000/= out of Tshs. 1,500,000/= which he owed the respondent
2. That the appellant was deprived by the trial court of his right to call witnesses.
3. That the trial court and first appellate court erred in law and fact for failure to consider the evidence adduced by the appellant.

At the hearing of the appeal, the appellant and respondent appeared in person, unrepresented.

Submitting in support of the first ground of appeal, the appellant faulted the lower courts for holding that he is responsible to respondent a sum of Tshs. 1,700,000/=. The appellant contended that the loan advanced to him was Tshs. 1,500,000/= and that he had already paid Tshs. 1,325,000. He further contended that the unpaid debt which he owed the respondent was Tshs, 175,000/= only.

On the second ground, the appellant was brief that, he was denied the right to call witnesses. It was the appellant's contention that the trial court was informed that his witness was sick but refused to adjourn the case.

As regards the third ground, the appellant submitted that both lower courts failed to consider his evidence and exhibits. He therefore prayed that the appeal be allowed with costs.

In his rebuttal submission, the respondent argued that the appellant did not produce evidence to prove that he paid him Tshs. 1,325,000. He expounded that the appellant did not summon the persons who witnessed him paying the debt. Therefore, the respondent supported the decision of the first appellate court.

In respect of the second ground of appeal, the respondent replied that the appellant was duly accorded the right to be heard.

Regard the third ground, the respondent submitted that the evidence adduced by the appellant was duly considered.

In his rejoinder submission, the appellant reiterated his submission in chief that he was not given the right to be heard.

Having heard the submission made by the appellant and respondent, I prefer to start with the second ground of appeal which goes to the root of the case. The appellant grieves that he was not accorded the right to call witnesses. In terms of the settled position, right to call witness(es) is part and parcel of the right to be heard enshrined under article 12(6) (a) of the Constitution of the United Republic of Tanzania, 1977 (as amended). It is also settled law that, a decision premised on the proceedings in which the right to be heard is infringed is a nullity.

The complaint that the appellant was denied the right to be heard was considered by the first appellate court. Upon examining the evidence on record, the first appellate court held as follows: -

> *"As per the lower court records, it is clear that, the claims by the appellant that the trial court denied him the right to call witness, are not reflected in his evidence. It is not indicated anywhere that, he prayed to the court to bring the said witnesses and the prayer to have been rejected. He had the right after he concluded to adduce his evidence, to address the court that he had witnesses to call, the right which he did not exercised (sic)."*

I was inclined to revisit the record. The same shows that when the case which gave rise to this appeal was called hearing on 2nd October, 2018, the hearing was adjourned to 11th October, 2018 and both parties ordered to bring their respective witnesses and exhibits. The record further displays that two witnesses testified for the then plaintiff (respondent) on 11th October, 2018. Thereafter, hearing was adjourned to 18th October, 2018 whereby the parties were directed to summon their witnesses.

It is also on record that on 18th October, 2018, the appellant was notified to bring his witnesses on 23rd October, 2018. On that day, the trial court heard the testimony of the appellant who features as DW1 (SU1). Thereafter, the case was fixed for judgment on 26th October, 2018. Indeed, judgment was delivered on 26th October, 2018 as scheduled.

Pursuant to the record, the appellant was not asked whether he had brought witnesses to give evidence or to produce document. As that was not enough, the appellant did not close the defence case. Going by the record, the appellant's witnesses could not give their testimonies even if they were in the court's premises or had reasonable cause for non-appearance. Had the first appellate court examined the record

properly, it would have noted that the appellant did not decide not to call witnesses.

In the light of the foregoing, I find merit in the second ground of appeal. As stated earlier, it is trite law denial of the right to call witness renders the proceedings and judgments of the trial court and first appellate court a nullity for breaching the right to be heard, one of the cardinal principles of natural justice. See for instance, the case of **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Faza lboy**, Civil Application No. 33 of 2002 (unreported) in which the Court of Appeal held that:

> *"The right of a party to be heard before 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 natural justice."*
> (Emphasis added)

Guided by the above decision, this Court is inclined to nullify the decisions of both lower courts because they are premised on the proceedings in which the right to be heard was violated. As this ground

is sufficient to dispose of this appeal, I will not address other grounds of appeal.

In the final event, I hereby exercise the revisionary powers of this Court under section 31 of the Magistrates' Courts Act, Cap. 11, R.E. 2019 to nullify the proceedings of the trial court and first appellate court and quash and set aside the judgment and orders made therefrom. It is further ordered that the case be heard afresh before another trial magistrate. As the said anomaly was not attributed by the parties, I make no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of June, 2022.

S.E. Kisanya
JUDGE

COURT: Judgment delivered this 10th day of June, 2022 in the presence of the appellant and respondent. B/C Bahati present.

Right of appeal explained.

S.E. Kisanya
JUDGE
10/06/2022