

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
(DISTRICT REGISTRY OF MBEYA)  
AT MBEYA**

**MATRIMONIAL APPEAL NO. 09 OF 2021**

(Appeal from the District Court of Kyela at Kyela in Matrimonial Revision No. 09 of 2012. Originating from Kyela Urban Primary Court in Matrimonial Cause No. 33 of 2011.)

**AYUBU MWAMBIPILE.....APPELLANT**

**VERSUS**

**SARAH MWASILEMBO.....RESPONDENT**

**JUDGEMENT**

Date of Last Order: 27/01/2022  
Date of Judgment: 10/03/2022

**MONGELLA, J.**

The respondent filed for divorce in Kyela Urban primary court against the appellant whereby she was successful. Thereafter the appellant made it difficult for the decree to be executed, especially on division of matrimonial properties whereby he even complained to the district commissioner to object the execution of the court decree. A copy of the letter was also sent to the district court. Given the situation, the respondent as well complained verbally before the district court in an endeavour to have the decree executed.



The district court decided to exercise its revisional powers whereby it called for the primary court record and revised the decision. In the end it ordered for the following properties to be sold and the proceeds divided equally between the parties. The properties were: 2 houses, 2 cows, a shop, 4 bicycles, 4 pigs, and 2 refrigerators. Further, it awarded the respondent custody of the children and ordered the appellant to provide maintenance to the children. The decision aggrieved the appellant whereby he preferred the appeal at hand on four grounds. I shall however determine on one ground for reasons to unfold shortly.

The ground concerns the right to be heard whereby the appellant, through assistance from his advocate, Mr. Kelvin Kuboja Gamba, faults the revisional order by the district court on the ground that the parties were not afforded the right to be heard.

Mr. Gamba argued that the decision of the district court based on the complaint by the respondent before the district court. He contended that the appellant was however never summoned by the district court to be heard before the decision was entered. He was of the view that the right to be heard is fundamental as enshrined under the Constitution of this Country, under Article 13 (6) (a). As such, he further contended that a decision entered without according parties their right to be heard is null and void. In support of his argument he cited the case of **Mbeya-Rukwa Auto Parts and Transport Ltd. vs. Jestina George Mwakyoma** [2003] TLR 250; and that of **Pili Ernest vs. Moshi Musani**, Civil Appeal No. 39 of 2019. He prayed for the revisional order to be nullified.



The respondent briefly replied to the respondent's arguments on this ground. She contended that the appellant was summoned by the district court immediately after writing a letter to the district commissioner and the district court delivered its decision after giving the parties the opportunity to be heard.

I have considered the arguments by the parties and gone through the lower court record. Contrary to the respondent's contention, it is apparent on face of record that the parties were not accorded the chance to address the court on the issues forming the basis of the revision. The respondent failed to even state the manner and date in which the parties addressed the court on the issues connected to the revision. The record also does not contain any summons calling the parties for hearing. It only contains one page proceeding which shows the pronouncement of the court's revisional order. This signifies that the parties were only summoned for delivery of the revisional order and not for hearing.

It is trite law that before a court of law reaches a decision parties must be given the opportunity to address the court on the issues involved unless a party defaults by not entering appearance. This requirement is founded under the fundamental principles of natural justice which *inter alia* demands parties to a suit to be accorded the right to be heard, hence fair hearing. In the case of **Sadiki Athuman v. Republic** [1986] TLR 235 it was held:

*"...the requirement that a party to the proceedings must be given the opportunity to lay his views is a fundamental principle of natural justice."*



In ***Mbeya Rukwa Autoparts and Transport Ltd. v. Jestina George Mwakyoma***, Civil Appeal No. 45 of 2000 (CAT, unreported) it was also held:

*“In this country natural justice is not merely a principle of common law. It has become a fundamental constitutional right. Article 13 (6) (a) include the right to be heard amongst the attributes of equality before the law...”* [Emphasis added].

It being a fundamental principle, it follows therefore that, the omission to accord parties the right to be heard renders the judgment of the court a nullity. This legal position was settled by the Court of Appeal in the case of ***Abbas Sheally and Another v. Abdul Fazalboy***, Civil Application No. 33 of 2002, whereby it ruled that:

*“The right of a party to be heard before adverse action or decision 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.”* [Emphasis added].

In its order, the district court stated that the revision was conducted under **Section 22 (1) of the Magistrates’ Courts Act, Cap 11 R.E. 2019**. The section provides:



***“A District court may call for and examine the record of any proceedings in the primary court established for the district for which it is itself established and may examine the records and registers thereof, for the purposes of satisfying itself as to the correctness, legality or propriety of any decision or order of the primary court and to the regularity of any proceedings therein, and may revise any such proceedings.”***

As much as the district court is empowered to revise the proceedings and decisions of the primary court, in circumstances where such revision touches the substantive rights of the parties, it is precluded from proceeding without according the parties the right to be heard. This is specifically provided under **section 22 (3) of the Magistrates' Courts Act**, which states:

*“In addition to the provisions of subsection (2) of this section, **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 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.** [Emphasis added].*

In the matter at hand, the district court altered the primary court's decision regarding the matrimonial home and custody of the children, which obviously are connected to the parties' substantive rights. In the premises, in accordance with **section 22 (3) of the Magistrates' Courts Act**,

the district court ought to have accorded the parties the right to be heard by addressing the court on the issues complained of in the revision.

For not according the parties the right to be heard, the proceeding and order of the district court stands defective, and therefore hereby nullified. The case file is remitted back to the district court for the matter to be properly heard by according the parties their right to address the court on the subject matter of the revision. The case should be heard before another Magistrate. Considering that this is a matrimonial matter, I make no orders as to cost.

Dated at Mbeya on this 10<sup>th</sup> day of March 2022.

  
**L. M. MONGELLA**

**JUDGE**

**Court:** Judgment delivered in Mbeya in Chambers this 10<sup>th</sup> day of March 2022 in the presence of both parties and Mr. Kelvin Kuboja Gamba, learned counsel for the appellant.



  
**L. M. MONGELLA**

**JUDGE**