

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

(PC) CIVIL APPEAL NO. 60 OF 2020

*(C/F District Court of Babati, Civil Appeal No. 19 of 2020, Originating from Bashnet
Primary Court, Civil Case No. 10 Of 2020)*

MANDOO AMIAPPELLANT

VERSUS

PETRO DEEMAY.....1ST RESPONDENT

PASKALI PETRO.....2ND REPONDENT

JUDGMENT

31/05/2022 & 12/07/2022

KAMUZORA, J.

This is a second appeal preferred by the Appellant herein following his dissatisfaction with the decision of Babati District Court (the 1st appellate Court) in Civil Appeal No. 19 of 2020 where the judgment was delivered in favour of the Respondents herein.

The brief facts giving rise to this appeal are that, the Appellant and Paskalina Petro sued the Respondents at Bashnet primary Court (the trial court) claiming for Tshs.3,998,000/= as compensation arising out of criminal case No. 6 of 2020 and criminal appeal No. 8 of 2020. The Appellant prosecuted criminal case above mentioned in the primary court

of Bashinet and the court issued an order for compensation and ordered the Respondents to pay Tshs. 4,245,600/= to the Appellant. Being aggrieved the Respondents filed an appeal at Babati District Court where the decision of the trial court was nullified for failure of the Appellant in herein to pay court fees. The Appellant was aggrieved and preferred this appeal on the following grounds;

- 1. That, the 1st appellate court erred in law and in fact by nullifying decision of the trial court by hold that the Appellant herein instituted a Civil Case No. 10 of 2020 at Bashnet Primary Court without paying filing fees the fact which is not true.*
- 2. That, the 1st appellate court erred in law and fact by nullifying the decision of the trial court by misconstruing the issue/matter to be of criminal nature while the same is tortures in nature.*
- 3. That, the 1st appellate Court erred in law and in fact as it turned itself into witness of the facts adduced during the hearing instead of relying on the evidence on the record of the trial court.*

Hearing of this appeal was conducted by way of written submissions whereby Mr. John M. Shirima, learned counsel represented the Appellant whilst Mr. Abdallah Kilobwa, learned counsel represented the Respondents.

Arguing in support of the appeal on the first ground, Mr. Shirima submitted that, the 1st appellate court raised the issue of non-payment of

court fees suo-moto without giving the parties a chance to address the court regarding the said issue. That, the 1st appellate court denied the parties their right to be heard which is a cardinal principle of natural justice. To buttress his point, he cited the case of **Furnell Vs Whangarei High School Board** (1973) AC 660 and **Mbeya- Rukwa Auto Parts & Transport Ltd Vs Jestina George Mwakagoma**, Civil Appeal No. 45 of 2000 where the court insisted on the right to be heard before a certain issue is decided between the parties.

Responding to this ground, Mr Kilobwa agree that the issue of non-payment of court fees was raised by the 1st appellate court suo-moto and the parties were not given a right to argue on it. He however insisted that, the 1st appellate court was right to raise the said issue suo-moto and determine it without involving the parties as it does not go to the root of the case. He added that, the 1st appellate court after perusing the records of the trial court noted that filing fee was not paid and proceeded to nullify the whole proceedings of the trial court for being incompetent. Further to that he added that, failure by the counsel for the Appellant to mention that they had paid the court fees in their submission prove that no fees were paid. That, empty words without any proof made the 1st appellate court to nullify the proceedings of the trial court. He concluded that, the

Appellant failed to show how non-involvement of the parties caused injustice and miscarriage of justice on his part thus, there is no merit on this ground.

In rejoinder the Appellant's counsel reiterated what was submitted in chief. Having considered the arguments by both parties on the first ground and the records of this matter, there is no dispute that the issue regarding payment of court fees was raised suo motu as so submitted by the counsel for both parties. The main issue for determination is whether the 1st appellate was correct to raise and determined the issue on non-payment of court fees.

The law allows the court to raise any issue suo motu where there is good reason to do so for adherence to the rules of procedures and practice and for proper determination of the rights of the parties. However, that requirement does not defeat the cardinal principle of natural justice on the right to be heard. It is the position of this court and the Court of Appeal which is the superior court of the land that before the court can make any decision affecting the rights of the parties, it has to make sure that it accords the parties an opportunity to address the court on the same.

It must be noted that, cases must be decided on issues or grounds on record and if it is desired by the court to raise new issues either founded on the pleadings or raising from the evidence in records or arguments during the hearing of the appeal, the parties must be given an opportunity to be heard by the court on such issues. The act of the court to raised issues suo-moto without availing parties a right to be heard has been decided in many cases including in the case of **Wegesa Joseph M. Nyamaisa Vs Chacha Muhogo**, Civil Appeal No. 161 of 2016 (CAT at Mwanza, Unreported) where it was held; -

"In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts, while composing their decision, discover new issues with jurisdictional implications. The way the first appellate court raised two jurisdictional matters suo motu and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and the judgment of the High Court a nullity, and we hereby declare so."

From the above decision, any decision arising from an issue raised by the court but not addressed by the parties is tantamount to the denial of the right to be heard and that would vitiate the entire proceedings. Read also the case of **Kumbwandumi Nemfoo Ndossi Vs Mtei Buss Service Ltd**, Civil Appeal No 257/2018 CAT at Arusha (Unreported).

In the present matter it is not disputed that the first appellate court at page 3 of its decision raised and argued the issue of non-payment of court fees. That was a new issue not raised or argued on appeal by the parties. The magistrate rendered the proceedings of the trial court as nullity for failure to comply with legal requirement of paying fees before hearing the case.

I agree with the counsel for the Appellant that the Appellant was denied right to be heard. What was raised by the court was a matter of law in the sense that the suit becomes competent before the court upon payment of court fees but it was also a matter of fact as it needed a proof of payment. That being the case it was necessary for the parties to be given opportunity to address the court on whether they have proof of payment or not.

It was submitted by the counsel for the Respondent that, the issue raised suo-moto did not go the root of the case and did not prejudice the Appellant. I do not agree with such contention because, the appeal before the first appellate court was determined on the basis of the issue raised suo motu by the court. The judgement of the district court at page 3 to 4 is clear that the proceedings of the trial court were nullified due to the Appellant's failure to pay court fees. With that decision, it becomes

obvious that, the issue raised suo motu did go to the root of the matter. The parties were denied their right to heard on the issue of non-payment of fees which led to the nullification of whole proceedings of the trial court. In that regard the Appellant was prejudiced for being denied his right to be heard.

Based on the above cited authorities, I find merit in the 1st ground of appeal and this ground determine the merit of the appeal. I thus, see no reason to labour much in determining the rest of the grounds. I therefore allow the appeal and direct the file to be remitted back to Babati District Court for Civil Appeal No. 19 of 2020 to be heard and determined by another Magistrate with competent jurisdiction. Since the appeal emanates from the decision on issue raised suo motu by the court, each party shall bear its own costs.

Ordered accordingly.



DATED at **ARUSHA** this 12th day of July, 2022.

A handwritten signature in black ink, appearing to read "D. Kamuzora", is written above the name "D.C. KAMUZORA".

D.C. KAMUZORA

JUDGE

