IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CIVIL APPEAL NO. 15 OF 2017

(Arising from Civil Case No. 30 of 2011 in the District Court of Bukoba -C.S Uiso RM)

BUKOBA MUNICIPAL DIRECTOR.....APPELLANT

VERSUS

NEW METRO MERCHANDISE.....RESPONDENT

JUDGMENT

07/09/2022 & 23/09/2022
E.L. NGIGWANA, J.

This is a first appeal against the judgment of the District of Bukoba in Civil Case No. 30 of 2011 handed down on 27/09/2016.

The back ground to this appeal is briefly that; the respondent, New Metro Merchandise, sued the appellant, Bukoba Municipal Director for breach of contract which was entered on 05/07/2011. The respondent prayed for the following orders; payment of general damages at the tune of Tshs. **60,000,000/=,** payment of **Tshs. 10,000,000/=** being punitive damages, costs of the suit, payment of interest of 9% of the decretal amount from the date of judgment till payment in full and interest of 25% of the general damages from the date of default to the date of judgment.

In its judgment, the trial court found that the appellant had willfully breached the fundamental conditions and terms of the contract. Consequently, the appellant was condemned to pay the respondent general and punitive damages at the tune **Tshs. 60,000,000/=** (sixty Million) and **Tshs. 10,000,000/=** (ten million) respectively as well as costs of the suit.

Aggrieved by the decision of the trial court, the appellant lodged an appeal to this court, to wit; Appeal No. 15 of 2017 but the same encountered a stumbling block from Ms. Gisera Maruka and Mwita Makabwe, learned advocates for the respondent. The preliminary objection was raised to the effect that the present appeal is misconceived and bad in law for being hopelessly filed out of time.

Upon hearing the PO, this court (L. M. Mlacha, J) found the objection meritorious, hence sustained it. Consequently, this Appeal was dismissed with costs.

Aggrieved by the ruling of this court handed down on 19/03/2019, the appellant appealed to the Court of Appeal of Tanzania vide Civil Appeal No. 374 of 2021. In its judgment the Court of Appeal found that the present appeal was lodged within time. Let the Court speak for itself;

"*It follows then that the High Court erred when held that the appellant was supposed to lodge an application for extension of time under section 19 (2) of the LLA to plead that the delay was caused by belated supply of the copy of judgment. Here we once again stress that, the exclusion under section 19 (2) and (3) of the LLA is automatic and it is not subject to a court order. Therefore, the period between 27th September, 2016 when the judgment was delivered, to 15th May, 2017 when the copy of judgment was supplied is automatically excluded in computing the ninety days period prescribed under item number 1 of the schedule to the LLA. Counting the period from 15th May, 2017 to 6th July 2017, the appeal was lodged on the twenty third day. That is, it was well within the prescribed ninety days period. Accordingly, we find that the appellant's appeal was lodged in time. At the end, we hereby find that the appellant's appeal has merit. According we allow it. Further, we*

remit the file back to the High Court and direct it to expeditiously determine DC Civil Appeal No. 15 of 2017 on merit."

Following the herein above orders and directions of the Court of Appeal, the case file is now before me for the purpose of determining the present Appeal on merit.

The appellant's memorandum of appeal contained three grounds of appeal which were coached as follows:-

1. *That, the Hon. Trial Magistrate erred in law and fact by denying the appellant the right to be heard.*
2. *That, the Hon. Trial Magistrate erred in law and fact in closing the defense case while the appellant had another witness to call.*
3. *That, the Trial Magistrate erred in law and fact by failure to analyze the evidence adduced before it.*

Wherefore, the appellant is praying to this court to allow the appeal, quash and set aside both the judgment and decree of the trial court.

When the matter came for hearing, the appellant had the legal service of Mr. Athumani Msosole, learned State Attorney while the respondent was represented by Ms. Ritha Mahoo, learned advocate.

Before the commencement of the hearing, Mr. Msosole prayed to drop ground No. 3, and remain with the 1st and 2nd grounds of appeal and prayed to argue them together because they are intertwined. The prayer was not objected by Ms. Ritha, therefore, it was granted.

Submitting on the 1st and 2nd grounds of appeal, Mr. Msosole stated that, in the trial court, the learned State Attorney for the Appellant informed the trial

court that the appellant would feature two (2) witnesses. He added that the defence case commenced with DW1 whose evidence is found from page 30-31 of typed proceedings of the trial court.

Mr. Msosole added that after the testimony of DW1, the appellant through Mr. Nathaniel Mude, learned State Attorney prayed for an adjournment in order to call the last witness, but the trial magistrate refused the prayer, as a result, the trial Magistrate closed the appellant's case on the ground that the case is a long standing case.

Mr. Msosole further argued that the right to be heard is so fundamental as guaranteed under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time, but the circumstances of this case, the appellant was denied that right. To support his argument, he referred this court to the case of **Ngesela Keya Joseph @ Ismail and two others versus the Republic**, Civil Appeal No. 116 of 2021 CAT (unreported), where the Court of Appeal insisted that the right of the party to be heard is so basic therefore, any decision that is arrived at in violation of it will be nullified.

The learned State Attorney ended his submission urging the court to allow this appeal, quash and set aside the judgment and decree of the trial court, and the case file be remitted back to the trial for it to continue with the defence from where it ended.

On her side, Ms. Ritha conceded to the grounds of appeal raised by the appellant and submission made by the learned State Attorney for the Appellant on the major reason that there was violation of the right to be

heard which a fundamental right. She also conceded to the reliefs advanced by the learned State Attorney.

Having considered the grounds of appeal and submissions by both parties for and against the appeal, the issue for determination is whether the appellant was denied the right to be heard.

In the instant matter, the complaint is that the appellant was denied the right to be heard. The records of the District Court revealed that Civil Case No.30 of 2011 was filed 11/11/2011 vide **Exchequer Receipt No.44891510.** Issues were framed on 17/06/2013 and the hearing of respondent's case commenced on 27/11/2015 with PW1 while PW2 testified on 22/12/2015, date in which the respondent's advocate prayed to close the respondent's case. Following that prayer, the respondent's case was marked closed.

On 12/04/2016, defence hearing commenced with DW1. Then, the case was adjourned to come for further defence hearing on 3/05/2016, but the defence case did not proceed because the expected witness entered no appearance. The trial court reacted by closing the defence case and setting the date for judgment. Let the court record speak for itself;

"***Date**: 3/5/2016*

***Corum:** Hon. C. S. Uiso-RM*

***Plaintiff**: Nathan Alex, Advocate for plaintiff*

***Defendant:** Nathaniel Mude Solicitor for Defence*

B/C: Peace M.

Solicitor for the Defendant: Nathaniel Mude

For defence hearing, unfortunately, my witness is absent. I pray for a two weeks adjournment, he will be present.

Court: *The Defendant has been given crumble time to call their witnesses. This matter has taken too long since 2011.Anothe adjournment cannot be tolerated .I hereby close the defendant's case*

It is so ordered

Sgd S.C.Uiso-RM

3/5/2016

Order: *Judgment on 03/06/2016*

Sgd S.C.Uiso-RM

3/5/2016"

Looking on what had transpired in the trial tribunal, it does not need an Angel to descend from Heaven to know that there was violation of the right to be heard. Indeed, no justification why a two weeks adjournment was refused. It is apparent that the decision to close the appellant's case was reached arbitrarily contrary to rules of justice, the irregularity which rendered the trial unfair.

The Court of Appeal of Tanzania in the case of **Rukwa Auto Parts and Tran sport Ltd Versus Jestina George Mwakyoma,** [2003] TLR 251 had this to say;

"In this country, natural justice is not merely a principal of common law; it has become a fundamental constitutional right Article 13 (b) (a) includes the

right to be heard amongst the attributes of equality before the law, and declares in part;

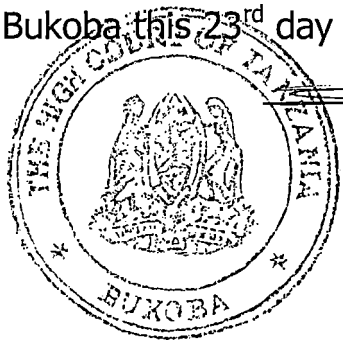
(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamizi na Mahakama au chombo kinginecho kinacho husika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."

In another case, **Abbas Sherally and Another Versus Abdul Fazalboy,** Civil Application No. 33 of 2002, the Court of Appeal emphasized the importance of the right to be heard as follows:

"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"

In the upshot, I am constrained to invoke revisional powers of this court to nullify the proceedings of the District Court from page 31 to 32 of the typed proceedings dated 03/05/2016, quash and set aside judgment and orders thereto. Having done so, the case file is remitted back to the District Court of Bukoba for the trial Magistrate or his successor to continue with the hearing of the defence case from where it ended. For avoidance of doubt, the trial court's duty is to receive the evidence of appellant's last witness according to law, and after the close of the defence case, to compose judgment according to law. I direct that the matter be expeditiously heard and determined. Given to the fact that the anomaly was caused by the trial court, each party shall bear its own costs. It is so ordered.

Dated at Bukoba this 23rd day of September, 2022



E. L. Ngigwana

JUDGE

23/09/2022.

Judgment delivered this 23rd day of September, 2022 in the presence of Mr. Msosole, learned State Attorney for the Appellant but also holding brief for Ms. Ritha Mahoo, learned advocate for the Respondent who is absent; Hon. E.M. Kamaleki, Judges Law Assistant and Ms. Tumaini Hamidu, B/C.

E. L. Ngigwana

JUDGE

23/09/2022.