

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

PC. CIVIL APPEAL NO. 52 OF 2022

(Arising from decision of Civil Revision No. 3 of 2022 in the District Court of Musoma at Musoma)

BETWEEN

IBRAHIMU ISSA KASIAN..... APPELLANT

VERSUS

VICTORIA F. M. RADIO..... RESPONDENT

JUDGEMENT

1st & 10th November, 2022

M. L. KOMBA, J.:

Before Musoma Urban Primary Court (the trial court), the appellant (decree holder) successfully sued respondent herein (judgment debtor), for recovery of civil debt of Tshs. 11,362,400/= being the unpaid amount collected from one business partner who paid directly to the said judgment debtor instead of paying to the decree holder.

Initially, the said decree holder had entered into agreement with the judgment debtor to run his affairs. According to the evidence, the decree holder secured a contract with a third party to advertise their activities through the judgment debtors' (Victoria F.M. Radio) for seven years for a consideration of Tsh 15,151,200/= and before they started the implementation of the said contract, the third party paid to decree holder

Tsh 3,787,800/ as an advance. While the Victoria FM Radio was under the decree holder supervisions, that third party paid the remaining sum of Ts 11,362,400/= to Victoria FM Radio account. The decree holder made follow up so that he could be paid the last installment, the judgement debtor failed to pay him for which Civil Case No. 508 of 2021 was instituted.

The matter was heard in *ex parte* against the respondent and the trial court was satisfied that the decree holder had proved his claim and consequently condemned the judgement debtor to pay the appellant Tshs. 11,362,400/=. Following that victory, and the fact that no appeal was preferred, the decree holder filed application for execution which was, according to law, supposed to be confirmed by the District Court.

When the matter was placed before T. J. Marwa for confirmation he, the Resident Magistrate decided to exercise his revisionary power *suo motto* as explained in the 1st page of the order in revision where he revised the decision of the trial court on the ground that the appellant did not prove his case. This was not saluted by the appellant hence this appeal with five grounds, two among them were complaining of the order in revision by the Resident Magistrate which was exercised without respondent complying with provision of Rule 30 (1) of the Magistrates Courts (Civil Proceeding in Primary Courts) Rules GN 310 of 1964 and GN 119 of 1984 and that the said revision

was raised and entertained *suo motto* without accord the appellant an opportunity of being heard.

On the hearing date, appellant appeared in person, unrepresented whereas respondent was represented by Mr. Christopher Waikama, an Advocate.

When given right to make his case, the appellant adopted his petition of appeal, and further submitted that it was not right for the District Court to vary the decision of the trial court because there was no application from the respondent. He further informed the court that appellant was not given right to be heard during that revision. He prayed for this court to revisit and quash decision of District Court as he was not given opportunity to be heard.

In reply, Mr. Waikama adopted his reply to the petition and further submitted that he agree with the decision of District Court to nullify the decision of the Primary Court because the District Court has powers of revision. He said the Primary Court misdirected to offer such amount bearing in mind the respondent was not present in Primary Court when the matter was determined in *ex parte* He prays the appeal to be dismissed with costs.

After hearing the submissions and read the record and judgment of the District Court of Musoma, I am in a position to determine whether the revisionary power exercised by the District Court was lawful or otherwise.

As it was submitted by both parties, application for execution of the decision of Primary Court in Civil Case No. 508 of 2021 was forwarded to District Court for confirmation. In course of studying the file so that can grant what was prayed by the party, District Court *suo motto* raised the issue of validity of the contract which parties signed. The learned Magistrate proceeded to vary decision of the trial court without according all parties right to address the court on the issue. As the record speaks the District Court only heard the appellant on revision.

From the submissions, the dispute between the parties herein is the validity of the revision exercised by the District Court *suo motto* and proceeded it without accorded the parties right to be heard. The appellant complain that he was not heard before the District Court when it analysed the contract between him and respondent and that District Court violated section 30(1) of GN 310 of 1964 and GN 119 of 1984. In the ruling which is the subject of this appeal the District Court refer its powers as conferred by section 22 of Magistrate court Act, Cap 11 which for easy of reference the section reads;

*'22.-(1) 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 as to the regularity of any proceedings therein, and may revise any such proceedings’.

From this extract it is obvious that the District Court has revision powers over the primary court. Words used is ...‘may call’. In the instance appeal the trial court forwarded the case file to District Court for execution form for confirmation. The matter was not called for inspection rather the file was submitted for confirmation of execution. It is my opinion that, since the matter came before the District Court for execution, the Magistrate ought to carry on the execution process only and not otherwise.

As the matter was heard before the trial court and the respondent was given an opportunity to defend his case by served her with summons, and the record show that she was aware of the matter before the court but she decided not to enter her appearance , she should bear the consequences came after.

However, the respondent was still had the chance to defend her case by either appeal or lodge an application to set aside an *ex parte* decision but again she chooses to stay quiet. That means she was agreed by the decision

of the trial court and was ready to comply. Thus, the District Court of Musoma was erred to revise the case *Suo Moto*.

Besides, if in the course of exercising that duty Magistrate found irregularities, he was supposed to call both parties to address the court on that issue rather than to proceed with one party. This is the same as denying the parties right to be heard on the issue as was held by the Court of Appeal in the case of **Mbeya Rukwa Autoparts And Transport Ltd V. Jestina George Mwakyoma** [2003] T.L.R. 251, where the Court held that, I quote:

'...natural justice is not merely a principle of the common law, it has become a fundamental constitutional right Article 13(6) (a) includes the right to be heard among the attributes of equality before the law'.

In the present case the Magistrate raised *suo motto* the issue of validity of the contract in the cause of confirming execution and proceeded to determine it without avail the parties right to address the court on the issue. This is the same as denying the parties right to be heard on the raised issue.

In the case of **EXB.8356 S/SGT Sylvester S. Nyanda V. The Inspector General of Police & The Attorney General**, Civil Appeal No. 64 of 2014 (unreported), the Court of Appeal held that: -

'There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed suo motto which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the 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 of the parties the right to fair hearing.'

The Court of Appeal in the above cited case went on to quash the proceedings of the High Court and order retrial. The Court took similar position in the case of **Wegesa Joseph M. Nyamaisa vs. Chacha Muhogo**, Civil Appeal No 161 of 2016, Court of Appeal of Tanzania, at Mwanza, (Unreported), where it was held that: -

"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."

Thus, from above cited decisions of the Court of Appeal it is settled law that where the Court or Tribunal raises issue *suo motto* and determined it without according the parties an opportunity to be heard, the entire proceedings and the decision of the court becomes a nullity.

In the present appeal the fact that District Court raised issue *suo motto* and proceed to determine it without accord the parties opportunity to be heard, this render the proceedings nullity.

For that reason, I hereby quash proceedings and decision of the District Court of Musoma over Civil Revision No. 3 of 2022. I order the execution application on Civil Case No. 508 of 2021 before the Primary Court of Musoma Urban to proceed where it ended

It is so Ordered.



M.L.K.
M. L. KOMBA

JUDGE

10 November, 2022