

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

MISCELLANEOUS CRIMINAL REVISION NO. 3 OF 2021
(Originating from Miscellaneous Criminal Application No. 2 of 2021
of Mbarali District Court at Rujewa dated 29/1/2021)

MWANJIWA MDASHIAPPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

RULING

15th December & 20th January, 2022

KARAYEMAHA, J

In this application for revision the applicant, Mwanjiwa Mdashi, is moving this Court for the following orders:

- (i) That, this Honourable Court be pleased to call and examine the records in respect of Miscellaneous Criminal Application No. 2 of 2021 of the District Court of Mbarali between **the Director of Public Prosecution vs Unknown** for the purpose of satisfying itself as to the correctness, legality and as to the regularity of proceedings.

- (ii) That, this Honourable Court may be pleased to make any appropriate order as may think fit for the interest of justice.

The application is supported by affidavit deposed by the applicant one Mwanjiwa Mdashi. The application is challenged by the respondent through the counter affidavit sworn by Mr. Hebel Kihaka, learned Senior State Attorney.

Brief facts giving rise to the present application can be summarized as follows. On 19/1/2021 while the Park Rangers from Tanzania National Park (TANAPA) were on patrol within the Ruaha National Park found 121 herds of cattle grazing within the park at Ngiriyama area. The Park rangers seized the said herds of cattle, took them to Ikonga post and kept them for ten days waiting for the owner to show up. At the expiry of ten days no one appeared to recover them. Therefore, the respondent decided to file a criminal application at the Mbarali District Court on 29/1/2021. On that day the application was heard ex - parte on the reason that the owner of the cattle did not intend to recover the same because he made no effort to contact TANAPA officers or at least report to any police station. In the end the learned trial Magistrate ordered the 121 herds of cattle found and seized

at Ngiriama area to be disposed by public auction and sold at the market value. It was ordered further that money realized from the auction be deposited into account No. 9921161271 of the Bank of Tanzania.

Apparently, the court's order came into the knowledge of the applicant. He unsuccessfully staged Misc. Criminal Applications No. 2 of 2021 to halt the selling the 121 herds of cattle process. The trial court's order triggered the instant application.

Disposal of this application took a form of written submission preferred on a consensual basis by parties and consistent with the schedule drawn by this court. The applicant is represented by Mr. Faraji Mangula, learned Advocate whereas the respondent is represented by Ms. Zena James learned State Attorney.

Mr. Mangula faulted the trial court for conducting the hearing of Misc. Criminal Application No. 2 of 2021 ex – parte without issuing the summons. Guided by the case of ***National Microfinance Bank Plc v Mibarwe Loiteyeyo Mollel***, Civil Appeal No. 57 of 2016 [2018] the learned counsel submitted that hearing the application ex - parte without proof of service and without scheduling it for hearing was a gross error and fatal.

Mr. Mangula submitted relying on section 103 of the Criminal Procedure Act, Cap 20 RE 2019 (herein the CPA) that the applicant was never served with a summons. He argued adding that since the applicant was unknown, the respondent was to serve him by affixing duplicates of summons to some conspicuous part of the house or homestead in which the person served resides. It was his submission that in circumstances of this case the respondent was to affix the summons on the Local Government's office or the vicinity of Ngiriyama area which according to him were conspicuous parts.

It was his further submission that before the case could be heard ex – parte, the respondent had to show proof of service. The learned advocate sought reliance to the case of ***Mohamed Nassoro v. Ally Mohamed*** [1991] TLR 133 to support his stance.

Mr. Mangula complained that the failure to issue summons to the applicant prejudiced his constitutional right to be heard as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977. On this view, he cited cases of ***Hussein Khanbhai v Kodi Ralph Siara***, Civil Revision No. 25 of 2014 which cited the case of ***Dishon John Mtaita v the DPP***, Criminal Appeal No. 132 of 2004 and

referred this court to the case of ***Sherally & another v Abdul S.H.M Fazalbay***, Civil Application No. 33 of 2002 (all unreported).

In response, Ms. James submitted that the trial Court ordered the case to be heard ex – parte after being satisfied that the public was duly notified through posters placed in different areas that the 121 herds of cattle were seized. She stated further that the posters were made for ten days from 19/1/2021 in all villages surrounding the National Park. The learned State Attorney remarked that posters affixed on local areas equated to the notice which was not reacted upon by any person. She seems convinced that the notice issued on 19/1/2021 inviting the owner of the said cattle to appear and recover his cattle was equal to summons served to an interested part hence properly relied upon by the trial court to pronounce the ruling as it did. It was on that bases that the learned advocate dismissed the complaint that the applicant was not afforded a right to be heard.

Responding on section 102, 102 and 103 of the CPA, Ms. James argued that summons should be served to the known person or whose place of residence is known. She submitted that it was impossible in this case because the seized cattle belonged to unknown person.

Attacking the cited cases, the learned counsel differentiated them with the current case because according to her, they have different origins. To her, in the case of **Mohamed Nassoro** (supra) and **Hussein Khanbhai** parties were known but were not summoned during the hearing.

Rejoining, Mr. Mangula reiterated that legally parties to a case cannot be notified to appear in court by way of posters. He argued that the act of notifying the public through posters did not bar the trial Court from issuing the summons. He stressed that the applicant was to be summoned by the Court in terms of section 103 of the CPA failure of which is fatal to the case.

Briefly, those were arguments by both parties. Before I go to decide on the substance of this application, I must first say something about a serious irregularity that transpired in the filing of this application. The application does not indicate the date when the same was filed. The application was not even signed either by the Resident Magistrate or any authorized court official to prove that the application was duly presented for filing on a particular date. These irregularities are fatal to the application, and this court would be minded to settle its decision of this application on merely those irregularities. But I wish to

go further and make a finding on whether, despite of these irregularities, this application has merit.

I have anxiously considered the application, the record of the trial court and the rival submissions. Apparently, there is no dispute that 121 cattle were found unlawfully grazing in the Ruaha National Park at Ngiriyama area. As per Regulation 7 of the National Park Regulations, Government Notice No. 50 of 2002 no any person is allowed to introduce any animal in the park and if any domestic animal is found within the National Park may be destroyed by any officer or servant of the trustees. See section 29 (3) of the National Park Act [Cap 282 RE 2002]. This law allows the National Park rangers to seize any domestic animals found in the National Park and destroy them. If that option is not taken, they have to seek aid of the Court to give any necessary order on how to deal with them.

In view of that I am made to believe that officers guided by the National Park substantive and procedural laws, seized those herds of cattle and kept them. While taming them, laws required them to make announcements to the public so that the owner of the cattle would turn up and redeem them. This is vivid through the posters made by the Ruaha National Park authorities and Ms. James was emphatic in

addressing the court on that aspect. It is also true that apart from making those announcements no body appeared to claim or redeem the 121 herd of cattle. In that regard I have no qualm at all.

Comprehending the sequence of events, it is abundantly clear that the National Park officers exhausted the procedures provided by the law on their part. Since steps taken by them became abortive, they moved the trial court to give orders as sought in the chamber summons. This notion means that they were engaging the court to start the process of trying the application presented before it no to proceed where they ended. The court was asked, after all parties concerned had been summoned and appeared, to give an order that the unclaimed property, to wit, 121 herds of cattle which were found in Ngiriama area within Ruaha National Park be disposed by public auction.

The record of the trial court shows that Criminal Application No. 2 of 2021 was presented for filing under certificate of urgency on 29/1/2021. Upon inception of the application, the trial court, on the same day and without delay, without issuing summons and an order of ex – parte hearing, heard the Republic only and ordered the selling of 121 herds of cattle by public auction. The court's action entails the fact

that it commenced trying the case without summoning the respondent. Indeed, this is the center of the applicant's complaint.

As hinted earlier on, after seizing 121 herds of cattle, the park rangers made announcements by affixing posters in areas close to Ngiriyama area. No body appeared to claim or redeem the said cattle. Now the issue in my view is whether it was proper for the trial court to rely on the posters by the respondent that the public was notified by the court? I have the mind to answer this issue in the negative. Why? Because the posters made by the National Park Authorities are not court summonses. Moreover, the TANAPA actions are regulated by National Park Laws and regulations which as I said earlier provide for a procedure in dealing with domestic animals found within the National Park. Likewise, actions instituted in the court of law have their way of being processed. The correct procedure provided by the law is that after the inception of the suit, the court's proceedings are guided by the procedural laws different from those regulating actions taken by the National Park's authorities. In the instant matter, the trial court was to seek aid of the Criminal Procedure Act, Cap 20 RE 2019 in dealing with the application before it without fear or passion. What does this mean. It means that after admitting Criminal Application No. 2 of 2021, the trial

court's first duty was to issue summons. Ms. James argued that summons could not be issued because the respondent was unknown. This argument seems to be attractive as far as she is aware but she had to re-call that posters were affixed in villages close to the Ngiriama areas within the Ruaha National Park. Similarly, the court in executing its noble duty and exercising its power, had to issue summons to the public notifying them that it had received a complaint from the respondent. In so doing, the court would be summoning the owner of herds of cattle to appear and answer the claim. It will be apposite to insist that where a suit or an application is instituted and the respondent is unknown, the best way is the court ordering the issued duplicates of the summons to be affixed to some conspicuous parts where the unknown respondent is contemplated to be residing. In this case places along Ngiriama area. I say so because summons may be effected on the person to be served by leaving it for him at his usual or last known place of abode or in area believed that the respondent resides. Since TANAPA officers had knowledge or believed that the owner might probably be residing in villages around Ngiriama area, the court summons would affixed in those areas such as the Local government's office, schools, some local leaders' houses, police station or post or other conspicuous places around Ngiriama area. This is the import of section 103 of the CPA in its

broad sense. If there was proof that the respondent could not serve despite diligent and reasonable efforts, basing on the details by server of summons, the court would allow substituted service.

A worthy note point is that the object behind sending the summons was essentially threefold- first, it was to apprise the public about the filing of a criminal application by the respondent against the owner of 121 herds of cattle and that they would be disposed by public auction in case no one appeared to defend or recover them; second, to enable the person who could appear be served with the copy of the application filed against him; and third, to inform the public about actual day, date, year, time and the particular Court so that the responsible person would be able to appear in the Court on the date fixed for his/her appearance in the said application and answer the suit either personally or through his lawyer.

Now coming to the facts of this case, it is a specific case of the applicant that, the trial court did not issue summons. In the affidavit in opposition filed by the respondent and in her submission a stand has been taken that since announcements through posters were made to the public must then be deemed to be sufficient notice and the trial court was correct to rely on it and hear the application ex – parte. With

due respect, in my considered opinion, the posters were not court summons. They cannot similarly serve as substituted service because they were made the Ruaha National Park Authority prior the institution of Criminal Application No. 2 of 2021 in court. Again, after inception of that application the court had no legal bases to proceed with the TANAPA proceedings. Its mandate is to start from the date when the application was filed. I wholeheartedly agree with the respondent seized cattle needed thorough care to protect them from wild animals, diseases, etc. nevertheless, this acute need did not in any way relax the court's legal duties.

Having this position, it is my conviction that failure by the trial court to issue the summons, means that it failed to acquire jurisdiction over the owner of the cattle. Courts may exercise their powers validly and with binding effect if they acquire jurisdiction over the parties. In view of this position, the trial court would have acquired jurisdiction over the owner of the 121 herds of cattle by a valid service of summons or through his voluntary submission. In case no one appeared, the trial court had no option than ordering the application to be heard ex – parte. I am mindful to state that the law casts an obligation on the court and simultaneously invokes a call to the conscience of the court to feel

satisfied in the sense of being proved that the summons issued by it were duly served when and when above, the court is conferred with a discretion to make an order the suit be heard ex – parte.

In the present matter it was irregular for the trial court to admit the application and try it without issuing summons, without satisfying itself that the public was appraised about the presence of the application in court and then ordering an ex – parte hearing on the date of its inception.

Therefore, the trial court committed a gross error of law and jurisdiction in proceeding with the application and deciding it on merits ex-parte without issuing summons and without scheduling the application for hearing which was substantially articulated by my Sister Dr. Opio, J in the case of ***National Microfinance Bank Plc v Mibarwe Loiteyeyo Mollel*** (supra). The notion behind it is that the owner of the 121 herds of cattle from the notified public was not afforded an opportunity to be heard before passing the impugned order which is liable to be set aside.

After examining the record of the trial court, this court is satisfied that it was incorrect, illegal and improper for the trial court to hear and

determine Criminal Application No. 2 of 2021 without issuing the summons. Given the circumstances, the decision reached by the trial court was a nullity hence nullified. I am therefore constrained to intervene.

In the result, this court invokes its revisional powers under section 373 (1) (b) of the CPA and sets aside the order of the trial court dated 29/1/2021. The trial court is directed to commence the trial by hearing both parties.

Order accordingly.



DATED at **MBEYA** this 20th January, 2022.

A handwritten signature in blue ink, appearing to read "J. M. Karayemaha", is written over a horizontal dotted line.

J. M. KARAYEMAHA

JUDGE