

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TEMEKE HIGH COURT SUB-REGISTRY)

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO 16 OF 2021

(Arising from Civil Revision No. 19 of 2021 of Kinondoni District Court before Hon. E.A. Mwakalinga – SRM Original Probate and Administration Cause No 404/2015 of Kinondoni Primary Court before Hon. Marck. B. - RM.)

DAVID MWANGA NABURI.....APPELLANT

VERSUS

PAUL KACHEMBA.....1st RESPONDENT

ANDREW REUBEN NABURI2nd RESPONDENT

JUDGMENT

2/5/2022. & 10/5/2022

I.C. MUGETA, J

The appellant filed in the district court an application for revision of orders of the Primary court which was heard by way of filing written submissions. While composing its ruling, the District Court discovered that the affidavit supporting the application was defective. The parties had not addressed this issue during hearing of the application. Without summoning the parties to address her, the learned Senior Resident Magistrate dismissed the application for incompetency on ground of a defective affidavit.

Mugeta

The appellant has filed an appeal on the ground that he was denied the right to be heard on the competency of the affidavit. Elisaria Moshia, learned advocate for the appellant has submitted that having discovered the defect in the affidavit, the magistrate ought to have afforded the parties the right to address her regarding the discovered matter. To support his argument, he cited the case of **Elizabeth Mpoki & others V MAF Europe Dodoma**, Civil Application No 436/1 of 2016, Court of Appeal – Dodoma (unreported).

Mary Brown, learned advocate for the respondent holds a different view. She argued that the district court rightly dismissed the application because a defective affidavit cannot support an application. She cited the case of **Mohamed I. A. Abdul Hussein V. Pita Kempamp** [2005] TLR 383 to buttress her argument. She is of a further view that affording the parties the right to be heard would not have changed the fact that the supporting affidavit is defective.

In rejoinder, Mr. Moshia submitted that hearing the parties before determining their rights is a question of procedure which ought to have been followed before determining whether the affidavit is defective.

I have read the District Court record which shows that the parties in their written submissions never addressed the issue of competency of the affidavit. Indeed, that matter was raised *suo motu* by the learned magistrate

when composing her decision and determined the application on that point of law.

In the case of Elizabeth Mpoki (Supra) it was held that when the court discovers an issue in the course of composing its decision, it must summon the parties to address it over that matter before deciding on it. The Court of Appeal made a similar holding in the case of **Jayant Kumar Chandubhai Patel & 3 others V. AG & 2 others**, Civil Application No 160/2016, Court of Appeal – Dar es Salaam (unreported). The court stated: -

“... it is our firm finding that the judgment under review was arrived at without affording the parties an opportunity to be heard on the new matter raised by the court Suo motu. What the court ought to have done upon uncovering the new matter was to re -open the hearing and require the learned counsel for the parties to address it on the issue”.

It is my view that the situation in the two cited cases is similar to this case. In this case the learned magistrate, indeed, uncovered a new issue in the course of composing her decision and did not summon the parties to address her on the competency of the affidavit. Marry Brown, counsel for the respondent, has submitted that if the affidavit is defective, hearing the parties cannot change that fact. I agree. However, as rightly submitted by Mr. Mosha

for the appellant, any decision by a court of law on any matter must be preceded by a full hearing of the parties concerned. In this case the parties were not heard before the magistrate decided the competency of the affidavit. This was an error on part of the learned magistrate.

Consequently, I find merits in the appeal. It is hereby allowed. The ruling of the district court and the subsequent orders are quashed and set aside. I order the district court to determine the issue it raised *suo motu* upon hearing the parties. However, this should be done by another magistrate with competent jurisdiction. Since the matter in controversy was raised *suo motu*, should the successor magistrate find it not worth the court's attention, he shall proceed to determine the application on merits. No order as to cost because the error resulting to the appeal was occasioned by the court.




I.C. MUGETA

JUDGE

10/05/2022

Court: - Judgment delivered in chambers in the presence of Marietha Mollel advocate, holding brief of Elisaria Moshia advocate for the appellant and Mary Brown advocate for the respondents.

Sgd: I.C. MUGETA

JUDGE

10/05/2022