

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL APPEAL NO. 175 OF 2020

SARAPHINE KAMARA APPELLANT

VERSUS

ALEX DAUDI CHIBUNU 1ST RESPONDENT

KINONDONI MUNICIPAL COUNCIL 2ND RESPONDENT

DAR ES SALAAM CITY COUNCIL 3RD RESPONDENT

**(Appeal the ruling and drawn order of the Resident Magistrate Court of
Kinondoni at Kinondoni in Misc. Application No. 222 of 2019)**

JUDGMENT

18th and 21th March, 2022

KISANYA, J.:

This appeal is an appeal against the ruling and drawn order of the Resident Magistrate’s Court of Kinondoni at Kinondoni in Misc. Application No. 222 of 2019 in which the reliefs sought were granted in favour of the 1st respondent, Alex Daudi Chibunu, who happened to be the applicant.

The factual background leading to this appeal is brief and straightforward. The 1st respondent, Saraphine Kamara sued the above named respondents before the District Court of Kinondoni in Civil Case No. 15 of 2001. Her claim was for ownership of a land described as Plots No. 339 and 340, Block H, Mbezi Beach High Density Area, Dar es Salaam (henceforth “the suit premises”). The

case proceeded in the absence of the 1st respondent. It was terminated in her favour on the 11th day September, 2014.

It was on the 11th day November, 2019, the 1st respondent moved the Resident Magistrate Court of Kinondoni seeking an order for extension of time within to apply for extension of time to set aside the ex-parte judgment and decree of the District Court of Kinondoni in Civil Case No. 2001. In its ruling dated the 17th day of October, 2020, the Resident Magistrate's Court of Kinondoni found the application to be meritorious. It went on to extend the time within which to file an application to set aside the judgment and decree of the District Court of Kinondoni in Civil Case No. 15 of 2001.

Not amused, the appellant filed the present appeal predicating it on ten (10) grounds of appeal. For the reason which will be apparent in this judgment, I will not reproduce the said grounds.

When this matter was called for hearing on 3rd March, 2022, the applicant was advocated by Dr. Rugemeleza Nshala, learned advocate. On the other side, Mr. Emmanuel Hyera, learned advocate appeared representing the 1st respondent, while the 2nd and 3rd respondents failed to appear.

In view of the background of this case, I implored the parties to address the Court on whether the Resident Magistrate Court of Kinondoni was seized with jurisdiction to determine an application for extension of time to set aside the ex-parte judgment and decree passed by the District Court of Kinondoni. With leave of the court, the hearing was adjourned to 18th March, 2022 where the matter proceeded in the absence of the 2nd and 3rd respondents who defaulted to appear.

Submitting on the issue raised by the Court, Dr. Nshala the application was improperly filed before the Resident Magistrate's Court of Kinondoni because the decision subject for extension of time was heard and determined by the District Court of Kinondoni. He argued that the District Court is different from the Court of Resident Magistrate and that both courts cannot operate interchangeably. In that premises, the learned counsel submitted that the proceedings before the Resident Magistrate Court of Kinondoni were a nullity. The learned counsel fortified his submission by citing the case of **John Agricola vs Rashid Juma** [1990] TLR 1, **Nuhu Mbaga vs NBC and Another** [1997] TLR 173, **Thomas Elias Peter and Another vs R** [1993] TLR 263 and **William Rajabu Mallya and 2 Others vs R** [1991] TLR 83.

On the way forward, Dr. Nshalla urged the Court to declare the proceedings of the Resident Magistrate Court of Kinondoni in Misc. Civil Application No. 222 of 2019 a nullity. He also prayed that Misc. Civil Appeal Application No. 175 of 2020 filed in the same court be declared a nullity on the ground that it stemmed from the vitiated proceedings. Further to that, the learned counsel prayed that the costs be awarded in favour of the appellant.

Replying, Mr. Hyera agreed with the submissions made by the learned counsel for the appellant, save for the issue of costs. He prayed that each party be ordered to bear its own costs. His prayer was based on the ground that the issue under consideration was raised by the court and that it is the then counsel for the 1st respondent who erred to lodge the matter in a court which had no jurisdiction.

In his brief rejoinder submission, Dr. Nshala argued that the appellant was entitled to costs because his counsel was inclined to research on the issue raised by this Court.

On my part, I am, with respect, in entire agreement with the submissions made by learned counsels of both parties. It is trite law that jurisdiction of the court or tribunal is created by the legislation. Unless the court is seized with the jurisdiction, it has no mandate to hear and determine the matter before it. In

that regard, the issue of jurisdiction goes to the root of the case and can be raised at any time, including at an appellate level. The law is also settled that a proceeding by a court or tribunal that lacks jurisdiction to try the matter will be declared a nullity on appeal or revision. (See the decision of the Court of Appeal in **Sospeter Kahindi vs Mbeshi Mashini**, Civil Appeal No. 56 of 2017 (unreported)).

In terms of Order IX, Rule 9 of the CPC (Order IX, Rule of the CPC, R.E. 2002), an application to set aside the ex-parte decree is required to be filed in the court which passed the impugned decree. The above cited provision reads as follows:

*"In any case in which a decree is passed ex parte against a defendant, **he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order **setting aside** the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:.."***

Flowing from the above bolded expression, I have no flicker of doubt that the mandate to set aside the decree passed ex-parte is vested in the court

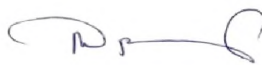
which passed that decree. This stance was also taken by this Court in **Mandi Mtatuturu vs Mtinangi Mtinangi** [1972] HCD No. 150 where it was held that an ex-parte judgment can only be set aside by the court which made it.

From the foregoing position, it is also my considered view that an application for extension of time to apply for an order to set aside the ex-parte judgment or decree must be lodged in the court which passed the said judgment or decree. It cannot be lodged in the court which at the end of the day will not determine the application to set aside the ex-parte judgment or decree. That being the case, the court which did not pass the ex-parte decree has no mandate to hear and determine the application for extension of time within which to apply for the order of setting aside the said decree.

In the instant appeal, the ex-parte decree was passed by the District Court of Kinondoni, while the application for extension of time to apply for an order to set aside the ex-parte judgment or decree was lodged in the Resident Magistrate Court of Kinondoni. In the view of the above stated position, the Resident Magistrate Court Kinondoni erroneously crowned itself with jurisdiction in entertaining and determining the matter that it did not possess. I therefore agree with Dr. Nshalla that the proceedings, ruling and drawn order subject to this appeal are a nullity.

In exercise of revisionary powers bestowed on this Court, I hereby nullify the proceedings of the Resident Magistrate's Court of Kinondoni in Misc. Civil Application No. 222 of 2019, quash the ruling and set aside the drawn order made thereon. In lieu thereof, the Court makes an order of striking out the application lodged in the Resident Magistrate's Court of Kinondoni for being incompetent. In consequence, any proceeding, decision or order made by the subordinate court basing on the decision of the Resident Magistrate's Court of Kinondoni in Misc. Civil Application No. 222 of 2019 is hereby declared a nullity. With regard to the costs, I agree with Mr. Heyra that the same cannot be awarded against the 1st respondent because the issue which has disposed of this appeal was raised by the Court. Thus, each party is ordered to bear its own costs. It is so ordered.

DATED at DAR ES SALAAM this 21st day of March, 2022.



S.E. Kisanya
JUDGE

Court: Judgment delivered this 21st day of March, 2022 in the presence of Dr. Rugemeleza Nshala, learned advocate for the appellant and the 1st respondent in person and in the absence of the 2nd and 3rd respondents. B/C Zawadi present.



S.E. Kisanya
JUDGE
21/03/2022