

**IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA**

CRIMINAL REVISION NO. 7 OF 2022.

*(Originating from Miscellaneous Criminal Application No. 26/2022 of Mbarali District
Court at Rujewa Dated 22/12/2022)*

ITWE LUGWISHA NJENJIWA APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

13/3 & 4/4/2023

Nongwa, J.

The genesis of this matter is that, the Respondent successfully filed under Certificate of Urgency a Miscellaneous Criminal Application NO.26 of 2022 before Mbarali District Court at Rujewa, under section 392 (1) of the Criminal Procedure Act(Cap 20 R.E 2022), section 47(1) of the Police Force Auxiliary Service Act Cap 322 R.E 2002) and Section 25(1)(d) of the National Parks Act (Cap 282 R.E 2002) read together with Regulations 7(i) and 20 both of the National Parks Regulations GN 50 of 2002 as amended. The respondent prayed for the court to hear the same ex-parte seeking orders to forfeit to the Government and to be disposed by way of sell in Public Auction unclaimed 138 cattle found at Mwanjulwa area within Ruaha National Park and seized by Park Rangers. The respondent also prayed for the court to appoint Court Broker to conduct the sale of the said 138 cattle

by way of Public Auction and deposit the proceeds in Bank Account No. 52010101511 in the name of the Forfeited Assets and Revenue Collection Account (NMB BANK).

Being aggrieved by the orders of the trial court, the applicant under Certificate of Urgency inhere filed for revision.

Now comes this ruling emanating from the said application for Revision in which the Applicant herein is seeking the following orders;

1. That, this Honorable Court be pleased to call and examine the records in respect of decision in Miscellaneous Criminal Application case number 26/2022 between The Director of Public Prosecution and Unknown at District Court of Mbarali, at Rujewa for the purpose of satisfying itself as to the correctness, legality and as to the regularity of proceedings.
2. That, this Honorable Court may be pleased to make any appropriate orders as may think fit for the interest of Justice.

The application has been preferred under section 372 and 373(1) (b) and (2) 388 of the Criminal Procedure Act Cap 20 R.E. 2022. The application has been supported by an affidavit of Itwe Lugwisha Njenjiwa.

The learned counsel Mr. Faraji Mangula represents the applicant, while the respondent has been represented by the learned State Attorney Mr. Baraka Mgaya.

In his submission in support of the application, Mr. Mangula argued that the that the proceedings in the subordinate court was tainted with serious irregularities which has greatly affected the basic rights of the Applicant thus subject to being quashed by this court.

Submitting on the alleged irregularities, Mr. Mangula submitted that, the Applicant was never afforded the right to be heard which is a fundamental Constitutional right under Article 13 (6) (a) of a Constitution of United Republic of Tanzania of 1977 [as amended from time to time].

That, the assertion that, the respondent made a lot of effort to locate the owner of the cattle but it never bore any fruit, is quite not true as the Applicant herein made follow-up to the court and offices of the Respondent to his surprise the 138 cattle were ordered to be forfeited by the Mbarali District Court:

Mr. Mnagula went on submitting that the subordinate court has failed to give the Applicant right to be heard as can be seen in the proceedings the case was registered, heard, visited Locus in quo within a single day on **22/12/2022**, a speed that led to violation of the Applicant's right.

Referring to the Applicant's Letter dated **21/12/2022** addressed to the Resident Magistrate in charge of Mbarali informing the Court of Justice

and the Respondent that he is the owner of the said 140 cows before 2 cows starved to death, together with his mobile phone numbers were there in case the Court would wish to communicate. Instead, the subordinate court was determined to finalize the matter in anyhow it never used that chance to give the Applicant right to be heard or respond to the letter. That, the First Respondent as officers of the Court never informed the court about the existence of the owner and prayed to proceed with the matter *ex parte* without issuing of the court summons.

Citing the case of **Mohamed Nassoro Vs. Ally Mohamed (1991) TLR 133**, Mr. Mangula argued that the procedure was for the summons to be affixed in duplicate in the local government offices or in a conspicuous places and the Respondent was supposed to show proof of service. That, this Honorable Court in **Mwanjiwa Mdashi Vs. Director of Public Prosecution Miscellaneous Criminal Revision NO. 03 of 2021** (unreported) at page 9 and 13 insisted the issuance of Court Summons as per the dictates of section 100,101, 102 and 103 of The Criminal Procedure Act Chapter 20 Revised Edition 2022.

It was his further argument that, the respondent never provided evidence as to what extent he made those efforts to locate the owner of the herds of cattle contrary to law that require the respondent or defendant to

defend his case, summons must be issued upon him or her so that he or she can be heard. That even in their counter affidavit there is nowhere they have attached the proof that the posters or duplicated of summons was affixed in a conspicuous place as the law dictates. Mr. Mangula, tirelessly invited the court to section 103 of the Criminal Procedure Act, that if the summons cannot be exercised as per section 101 or 102 then the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned resides, a thing that was not done in the case at hand, as such the trial court has erred grossly and this Court has to quash the said decision and proceedings for being tainted with irregularities.

Mr. Mangula also made reference to the case of **Patrobert D. Ishengoma Versus Kahama Mining Corporation Limited (Barick (Tanzania) Bulyanhulu) and 2 others, Civil Application No. 172/10 Of 2016**, Court of Appeal of Tanzania Sitting at Mwanza, in particular at page number 14 of the Judgment of the court on when a party is being denied right to be heard in a country where rule of law is its foundation, that;

"... In consistence with the Constitution right to be heard we order the Applicant to be impleaded as one of the Respondents before

the determination of the Judicial Review be it adverse or otherwise..."

That, as the applicant was not afforded his right to be heard as he was never part to the suit at the District Court, then that was a violation of a party's right to be heard and that renders the all decision a nullity and thus an illegality that can be cured in this Application for Revision.

Concluding his submission in chief, Mr. Mangula submitted that the application for Revision has merit and it be allowed by quashing and nullifying the decision of the trial court for being tainted with irregularities and in the alternative, Mr. Mangula urged this Court invoke its Revisional and Administrative powers as stated in item 2 of the Chamber summons to order the Applicant to be reimbursed the proceeds of the sale which the court ordered to be deposited in Bank account No. 52010101511 in the name of the Forfeited Assets and Revenue Collection Account (NMB Bank).

Mr. Mangula commented on his alternative prayer that since the Trial Court has not respected this courts directives to commence trial by both parties in the case of **Mwanjiwa Mdashi (supra)** and in the case of **Sedi Sinyau and 4 Others Versus Director of Public Prosecutions Criminal Revision No. 04 Of 2021 (Unreported)** at page 13 where the same

orders to hear the case with both parties were never heeded to. He anticipates that if this Honorable Court find merit in this application the same can never be adhered to then at least the Applicant can recover the proceeds, or otherwise as this court see it just.

In his reply, the learned State Attorney, Mr. Baraka Mgaya, submitted that the application lacks merit. That, the said herds of cattle were taken to Nyota Ranger Post while waiting for the owner to show up but in vain. Later the matter was reported to Rujewa Police Station where file number RUJ/RB/1593/2022 was put in place and the police affixed notices (see annexure "P2") in conspicuous places outside the Park and nearby Local Authority offices including Mbarali Pastoralist Secretary but no one showed up to police claiming to be the owner of the said cattle, hence the Officer Commanding Station (OCS) of Mbarali Police Station proceeded to inventorise the 138 herds of cattle as unclaimed as shown in annexure 'P3', and that, in the urge to avoid unnecessary cost of taking care the herds of cattle and unnecessary death since there was no grazing place at Nyota Post Ranger, the prayers were granted.

Mr. Mgaya referred this court to section 47(1) of the Police Force Auxiliary Service Act Cap 322 R.E 2002, that gives the police power of disposing the unclaimed property whereby the police have been given the

duty to prepare inventory and furnish the same to the court. Therefore, the Officer Commanding Station of Rujewa Police Station exercised his duties as provided by the above cited section whereby he exercised all necessary efforts for tracing the owner of the said 138 herds of cattle by affixing notices to all conspicuous places but no one showed up to claim the ownership of the said herds of cattle hence he prepared an inventory and finally furnished the same to the Magistrate through Miscellaneous Criminal Application NO.26 of 2022.

Mr. Mgaya admitted the silence of section 47(1) of the Police Force Auxiliary Service Act Cap 322 R.E 2002 as to the requirement of issuing summons to the purported owner of the unclaimed property as submitted by the applicant in his written submission. There being no such a requirement, then the subordinate court (Mbarali District Court), could not be faulted of violating natural justice of right to be heard as submitted by the Counsel of the Applicant in his written submission.

Armed with salutary principle that, every case has to be decided basing on its peculiar facts, Mr. Mgaya argued that section 47(1) of the Police Force Auxiliary Service Act Cap 322 R.E 2002 which was among of the moving section in Miscellaneous Criminal Application NO.26 of 2022 does not suggest

requirement of issuing summons to the purported owner of unclaimed property so that to make appearance before the court.

Mr. Mgaya argued further that, the purported owner ought to have reported to Rujewa Police Station where the case regarding 138 herds of cattle seized on 19/12/2022 within Ruaha National Park was reported by TANAPA Officers and it was not right for the applicant herein to write a letter to the District Court of Mbarali which is not seized with powers to deal with unclaimed properties after the Inventory is furnished to the court as per the spirit of section 47(1) of the Police Force Auxiliary Service Act Cap 322 R.E 2002.

Submitting in respect of cases referred by the counsel for the applicant, Mr. Baraka argued that, the same are distinguishable to the case at hand in that the case of **Mohamed Nassoro Vs Ally Mohamed (1991) TLR 133, Mwanjiwa Mdashi Vs DPP Miscellaneous Criminal Revision No 3 of 2021** (High Court Mbeya, **Karayemaha J.**) and **Sedi Sinyau and Four Others Criminal Revision No. 4 of 2021**, High Court Mbeya, **Karayemaha J.**) in which the court insisted the need of issuing summons to the purported owners of the unclaimed properties. The court made such finding by invoking the provisions of sections 103 of the Criminal Procedure Act Cap 20 R.E 2022. That, the court misdirected itself in invoking sections

101, 102 and 103 of the Criminal Procedure Act on one reason, the above provision is found under Part V of the Act which deals with the process of compelling the appearance of accused person in court where the issuance of summons comes into play. That in the above two cases there were no any accused persons to be summoned since the case was filed in the ambit of section 47(1) of the Police Force Auxiliary Service Act Cap 322 R.E 2002 where the accused or the purported owner of unclaimed property was not known. That, since the court misdirected itself by invoking section 101,102 and 103 of the Criminal Procedure Act, this court should not be persuaded by the finding in those cases and as they are not binding, the court should not to invoke sections 101, 102 and 103 of the Criminal Procedure Act in the case at hand since their application are very uncalled for.

Submitting in respect of the cited authority of **Patrobert D. Ishengoma Vs Kahama Mining Corporation Ltd (Barrick Tanzania) and 2 Others** CAT at Mwanza (Unreporte,) Mr. Mgaya submitted that the parties were very known and the case did not emanate from the facts of unclaimed properties like in the case at hand hence is very distinguishable.

Acknowledging the principle of according right to be heard to any party to the case, Mr. Mgaya argued that every case to be decided basing on its peculiar facts. Thus in the case at hand which finds the basis from unclaimed

properties as provided by section 47(1) of the Police Force Auxiliary Service Act Cap 322 R.E 2002, and the owner of unclaimed properties being not known as he did not show up to the police, then the Subordinate Court cannot be faulted to violate the principle of natural justice. He prayed for the court to dismiss this application.

Rejoining, Mr. Mangula insisted on the denial of right to be heard for the applicant and that the posters were not court summons. Mr. Mngula also argued on the way Mr. Mgaya is challenging the ruling of this court in) in which the court insisted the need of issuing summons to the purported owners of the unclaimed properties, saying that the court misdirected itself in invoking sections 101, 102 and 103 of the Criminal Procedure Act and this court should not be persuaded by the finding in those cases as they are not binding. I concede with Mr. Mangula's argument for in that, for a Learned State Attorney what has been submitted by Mr. Mgaya in respect of the court's decision in **Mwanjiwa Mdashi** (supra) and **Sedi Sinyau** (supra) is not proper way in challenging a court's decision for the same is still valid unless and until is set aside by the superior court. If they were not satisfied with those two decisions, they ought to have appealed.

In this application the court is called on to examine the records in respect of Decision in Miscellaneous Criminal Application case number

26/2022 between The Director of Public Prosecution and Unknown at District Court of Mbarali, at Rujewa for the purpose of satisfying itself as to the correctness, legality and as to the regularity of proceedings.

I have gone through the rival submission by the two sides and examined the records of the trial court and came to the observation that there is no dispute that in the Miscellaneous Criminal Application NO.26 of 2022 before Mbarali District Court at Rujewa, the court ordered forfeiture to the Government of the 138 herds of cattle and ordered sale through public auction and proceeds to be deposited in the respective account. Moreover, it is of no doubt that the application was heard ex parte.

Regarding the correctness, legality and regularity of the proceedings of the trial court, I have noticed that, the application was brought under section 392A of the CPA and sections 47(1) of cap 322 and section 25(1) (d) of cap 282 and regulation 7 of (i) and 20 of GN no. 50 of 2002.

The argument by Mr. Mgaya is based only on that section 47(1) of the Police Force Auxiliary Service Act Cap 322 R.E 2002, that gives the police power of disposing the unclaimed property is silent as to the requirement of issuing summons to the so called purported owner of the unclaimed property that there being no such a requirement, this is not doubted at all that the said section 47 (1) of Cap 322 is silent on issuance of summons to

respondents. However, the learned State Attorney is well aware that criminal proceedings are governed by the Criminal Procedure Act, Cap 20 R.E. 2022, and for the matter at hand the application before the trial court was preferred under the above cited provision which clearly requires the court to summon the respondent, it provides inter alia;

'S. 392 A (1) Every application under this act shall be made before a court orally or in written form.

(2) An application made in written form shall be by way of chamber summons supported by affidavit.

(3) The applicant shall-

*(a) **In case of written application, serve the respondent with a copy of application** within thirty days from the date the application was filed;*

(b) in case of oral application, the respondent shall reply to the application within time as the court may determine' (emphasis supplied).

The learned State Attorney has not submitted in respect of section 392A of CPA concerning issuance of summons to the respondent and perhaps he has misconceived the application that is before this court where the court is invited to examine the records of the trial court and not the procedures done by the park rangers and the police.

From the proceedings of the trial court, it is evident that the application was in a written form, by way of chamber summons, as such, the trial court was to abide with the provision of section 392 as a whole, I do not think it

was proper to read the provision of section 392A (1) in isolation to the rest of subsections that gives the modality upon which such an application can be entertained.

The respondent also claims that the owner of unclaimed properties being not unknown as he did not show up to the police, then the Subordinate Court cannot be faulted to have violate the principle of natural justice where the accused or claimant is not known. This argument is floppy as from the applicant's submission and in his affidavit has explained all efforts done by him and the village authorities to inform the Republic and the court through letters that he was the owner. At this time the matter was yet to be filed before the court. In the applicant's affidavit, paragraph 4,5,6 and 7 shows clearly that the owner was known to the officers who arrested the cattle to the extent of exchanging mobile phone numbers and that he was told to wait for control number so that he pays the fine for grazing within Ruaha National Park boundaries. That was on the date of arrest which is 19/12/2022, later on 21/12/2023, the applicant took effort and wrote to the Regional Prosecution Officer and to the court identifying himself as the owner of the herds of cattle that has been arrested. Moreover, the very next day, on 20/12/2023, the Ikanutwa Village Executive Officer wrote to the court informing the court that the owner of the cattle is willing to settle the fines.

Therefore, the issue of unknown owner or unclaimed properties hold nothing in this matter, the owner was available and was well known to all the actors.

There are some applications due to its urgency and other reasons that the law may allow to be heard ex parte, but most of the time should be pending hearing inter parties. However, looking at the chamber summons itself, I can say it was not certain as to whether the matter is being heard ex parte or inter parties, the applicant was not clear as to what mode of hearing the application he had wished, it starts by requesting all parties to appear on the date of hearing, but again prays for orders ex parte. If at all the respondent wished for the unknown to appear but the application be heard ex parte in the presence of the unknown or he wished not to summon the alleged unknown whom the police, the Park Rangers and the trial court were made aware of his existence, it is real not clear. For clarity I wish to reproduce part of the contents of the chamber summons inhere below;

'IN THE DISTRICT COURT OF MBARALI

AT RUJEW

***IN THE MATTER OF AN APPLICATION FOR FORFEITURE AND
SALE OF SEIZED LIVESTOCK BY COURT BROKER***

AND

***IN THE MATTER OF MISC. CRIMINAL APPLICATION NO. 26 OF
2022***

BY THE DIRECTOR OF PUBLIC PROSECUTIONS

**APPLICATION FOR FORFEITURE AND SALE OF SEIZED
LIVESTOCK**

CHAMBER SUMMONS

(Made under Section 392A (1) of the Criminal Procedure Act, [Cap. 20 R. E. 2022] and Section 47 (1) of the Police Force and Auxiliary Services Act, [Cap. 322 R. E. 2002] and Section 25 (1) (d) of the National Parks Act [Cap. 282 R. E. 2002] read together with Regulation 7 (i) and 20 both of the National Parks Regulations GN No. 50 of 2002 as amended and any other enabling provision of law).

LET ALL PARTIES CONCERNED *appear before the honorable Resident Magistrate E. S. Mwambapa sitting in chambers on the 22nd day of December, 2022 at 8:30am or soon thereafter or as it will be directed by the Court, when the Applicant shall be heard on application for the following orders that:-*

EX PARTE

- a) That this Honorable Court be pleased to issue an order that the unclaimed property to wit, herd of 138 Cattle which were found at Mwanjulwa area within Ruaha National Park and seized by park rangers be forfeited to the Government and to be disposed by way of sell in a Public Auction.*
- b) That this Honorable Court be please to appoint Court broker to conduct the sale of the said herd of 138 Cattle by way of Public Auction and that, the proceeds from sell be deposited in a bank account with No. **52010101511** in the name of **FORFEITED ASSETS AND REVENUE COLL ACCOUNT (NMB BANK)***
- c) Any other relief (s) this Honorable Court deems fit and just to grant.'*
(the underline is mine)

Looking at the under lined words the chamber summons invites all parties and prays for ex parte hearing, the application is made under section 392A of CPA which provides mandatory requirement to serve the application to the respondent. The court having received the application ought to have

inquired on the issuance of summons for it had already been informed of the existence of the owner of the herds of cattle through letters. All procedures for summoning processes are well stipulated under sections 101,102 and 103 of the CPA.

As submitted by the counsel for the applicant, the process of forfeiture and sale of the 138 herds of cattle was tainted with irregularities that even cripples the law and the fundamental basic right of being heard as enshrined under article 13 (6) of the Constitution of the United Republic of Tanzania of 1977.

As well stated by this court in number of decisions and in particular my brother hon. Karayemaha J, in **Mwanjiwa Mdashi** (supra) which had almost similar facts to the application at hand, that the law casts and 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.

Moreover, under article 107A.-(1) of the Constitution, the Judiciary is mandated to be the authority with final decision in dispensation of justice. Therefore, courts are expected to abide with the principles of natural justice, one being right to be heard that is well stated under article 13 (6) (a) of the Constitution.

There are numerous decisions of the courts of record that has held that denial of right to be heard would obviously vitiate proceedings. The cited authority by the Applicant's counsel of **Patrobert D. Ishengoma** (supra) is also very clear on the right to be heard. In **Patrobert's** case, the court of appeal referred the case of **Mbeya Rukwa Auto Parts Transport Limited Vs. Jestina George Mwakyoma (2003) TLR** where the court emphasized that in this country natural justice is not merely a principle of common law but a fundamental constitutional right, and one of the attributes of equality before the law.

It follows therefore, the argument by Mr. Mgaya that this case is distinguishable to the present case in the sense that the parties were known and the case did not emanate from the facts of unclaimed properties like in the case at hand has no weight.

Despite the fact that the facts of the two cases are not the same, still the two cases concern denial of a right to be heard. After all efforts by the applicant to raise his hand through letters to inform the authorities and the court that those properties are no unclaimed ones, still he was denied that fundamental right. It is no doubt, this was a deliberate denial of right to be heard. It is a trite law that not only justice has to be done but it has to be

seen to be done and through proceedings one can see that justice has been done or not.

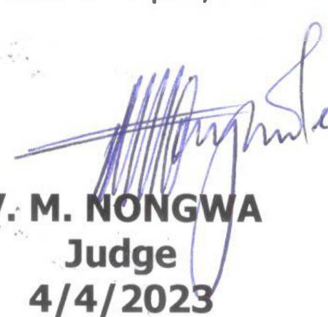
It is my conviction that, denying the applicant right to be heard, as seen from the trial courts proceedings, it is a clear indication of unfair trial in respect of those proceedings.

In the circumstances, I find the application merited, hence the decision by the trial court was a nullity, consequently, this court under section 373(1) (b) of the CPA, sets aside the trial court order to forfeit and sale the seized 138 herds of cattle dated 22/12/2022, and it is directed to recommence the trial by hearing both parties.

From the circumstances of this matter, I make no order as to costs.
It is so ordered.

Dated and delivered at Mbeya this 4th April, 2023.




V. M. NONGWA
Judge
4/4/2023