

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(MOROGORO SUB-REGISTRY)**  
**AT MOROGORO**

**CIVIL APPEAL NO. 35 OF 2022**

*(Arising from the Judgment of the District Court of Kilombero, at Ifakara in Civil Appeal Case No. 11 of 2022 and Originating from the Judgment of Ifakara Primary Court in Civil Case No. 100 of 2022)*

**KIKUNDI CHA WANAWAKE WA NGUVU (TAUSI TENGEWA) .... APPELLANT**  
**VERSUS**  
**AZIZA MTAALAMU AND 4 OTHERS .....RESPONDENTS**

**JUDGMENT**

31<sup>st</sup> May & 18<sup>th</sup> Sept, 2023

**CHABA, J.**

On 1<sup>st</sup> September, 2022 the appellant herein preferred the instant appeal after being aggrieved by the decision of the District Court of Kilombero, at Ifakara (Hon. Kaniki, SRM) in Civil Appeal No. 11 of 2022 which nullified the proceedings and decision of the Ifakara Primary Court in Civil Case No. 100 of 2022, on the ground that the same was tainted with irregularities and consequently ordered for the matter to be *tried de-novo* before another Magistrate.

In her Petition of Appeal to this Court, among other things, the Appellant through the legal services of Mr. Michael Mteite, Learned Advocate from Candid Law Attorneys, prayed for judgment and orders against the respondent basing on the following eleven (11) grounds of appeal: -

1. The Learned Magistrate of the first appellate court grossly erred in both law and facts for being misdirected herself for not determining conclusively the first appeal before her for not pronouncing the winner and loser by conforming herself to the trial court's proceedings and judgment.
2. The Learned Magistrate of the first appellate court grossly erred in both law and facts for being misdirected herself for calling a person on 26th July 2022 which was a judgment day who was not a witness at the trial court to emphasise transactions of the members about the status of the debtors/respondents in the Kikundi at the appellate stage.
3. The Learned Magistrate of the first appellate court grossly erred in both law and facts for being misdirected herself for ordering the matter to start afresh (DE NOVO) at the trial court before another magistrate with new set of assessors while there is no any scintilla of material error apparently occurred on the face of record of the trial court's proceedings of the suit or on the judgment.
4. The Learned Magistrate of the first appellate court grossly erred in both law and facts for being misdirected herself for calling one person called **Rawling Masanja** as Mwalimu wa kikundi to elaborate facts of the case while he was not a witness at the trial court proceedings who gave the different story favouring the respondents at the first appellate court.
5. The Learned Magistrate of the first appellate court grossly erred both law and facts for being misdirected herself for not considering that, before her there are two appeals of the defaulted members of kikundi who lost the civil cases at the



trial court where the trial court divided them into two cases, who are 14 defaulters among 32 members, the rest had paid their liabilities.

6. The Learned Magistrate of the first appellate court grossly erred in both law and facts for being misdirected herself, that Mwalimu said that the respondents do not have debts because they paid the debts via their shares, the first appellate magistrate asked Mwalimu, why the debt was huge while the shares are small. Mwalimu replied that he could not remember because it was a long time had passed.
7. The Learned Magistrate of the first appellate court grossly erred in both law and facts for being misdirected herself for not considering the weight of appellant's evidence (verbal and documentary) produced at the trial court to substantiate her claim contrary to the respondents' evidence.
8. The Learned Magistrate of the first appellate court grossly erred in both law and facts for being misdirected herself for not considering **loan cardinal principal** that, in any financial institution which deals with advancing loan to its customers, there must be the presence of defaulters or debtors as respondents.
9. The Learned Magistrate of the first appellate court grossly erred in both law and facts for being misdirected herself for ordering retrial of the case purposely to assist the respondents who denying now the existing of their debts for rebuilding the evidence against the appellant which will cause a miscarriage of justice on the part of the appellant. the appeal and the trial court proceedings or judgment had no any legal error/defect against any party to the suit which made the first appellate court to order of retrial.





10. The Learned Magistrate of the first appellate court grossly erred in both law and facts for being misdirected herself for not adhering to the constitutional right of representation by forcing the appellant on 26th. 07. 2022 to state her case while the appellant's advocate had an emergency, but the respondents had their advocate assisting them to defend their case, despite of the appellant's objection, the Learned Magistrate of the first appellate court forced the proceedings to continue.

11. The Learned Magistrate of the first appellate court grossly erred in law by denying the appellant's constitutional right of appeal by denying to supply her copy of the judgment which was read from her laptop since 29th 07. 2022 to date.

At the hearing of the appeal, the appellant was represented by Ms. Tausi Tengewa, whereas all respondents were absent save for the 1<sup>st</sup> and 4<sup>th</sup> respondents who appeared in persons and unrepresented. By consensus, both parties agreed to argue and dispose of the appeal by way of written submissions and both parties complied with the Court's scheduled orders. The appellant's written submission in chief as well as the rejoinder was drawn and filed by the appellant herself, whilst the respondents' reply submission was drawn and filed by Mr. Frank Malebeto, Learned Advocate from Funuki & Co. Advocates.

I am thankful to both parties for their compliance to the scheduled orders as well as for their respective submissions. However, I find no need to reproduce the same as during scrutiny of the lower Courts records and while in the course of composing my Judgment, I noticed and discovered a legal issue



concerning the competence of the instant appeal before this Court which for the interest of justice needs to be redressed.

At this juncture, for the purpose of clarity and just deliberation of the noticed irregularity, I find it pertinent to expound on two settled positions of the Law. Firstly, it is a trite principle of law that, a point of law especially the one touching jurisdiction of the Court can be raised at any stage of the proceedings, even at this stage of appeal either by the parties or the Court *suo motu*. This view is based on the fact that, an issue concerning jurisdiction of the Court is a fundamental one that must be decided before a Court decides any other issue. [See the decision of the Court of Appeal of Tanzania (the CAT) in the case of **Richard Julius Rukambura Vs. Issack Ntwa Mwakajila and Another**, Civil Application No. 3 of 2004, sitting at Mwanza (unreported), following its previous decision in **Fanuel Mantiri Ng'unda Vs. Herman Mantiri Ng'unda and 20 Others, (CAT)** in Civil Appeal No. 8 of 1995 (unreported)].

The second position is that, when in the course of composing a verdict, the Court discovers a serious irregularity in the proceedings touching the issue of jurisdiction, it can decide on it without re-opening the proceedings for inviting parties to address it as it was underscored by the CAT in **Richard Julius Rukambura' case** (supra) where the Court succinctly held: -

***"On a fundamental issue like that of jurisdiction a court can suo motu, raise it and decide the case on***



***the ground of jurisdiction without even hearing the parties."*** [Emphasize added].

Fortified by the positions of law as hinted above, I now turn to the matter under consideration. According to the records, it is apparent that this appeal stemmed from Ifakara Urban Primary Court in Civil Case No. 100 of 2022 where the respondents herein were aggrieved and successfully appealed to the District Court of Kilombero, at Ifakara via Civil Appeal Case No. 11 of 2022. The records further reveal that, in a bid to assail the decision of the first appellate Court (the District Court of Kilombero, at Ifakara), the appellant filed her Petition of Appeal directly to this Court on 1<sup>st</sup> day of September, 2022 contrary to the mandatory requirement of the law as stipulated under Section 25 (3) and (4) of The Magistrates' Courts Act [CAP. 11 R. E, 2019], which stipulates thus: -

**"Section 25 (3) - Every appeal to the High Court shall be by way of petition and shall be filed in the district court from the decision or order in respect of which the appeal is brought....**

**Section 25 (4) - Upon receipt of a petition under this section the district court shall forthwith dispatch the petition, together with the records of the proceedings in the primary court and the district court, to the High Court".** [Emphasis is mine].

The above provision was amplified by the Court of Appeal of Tanzania in the case of **Sophia Mdee Vs. Andrew Mdee and 3 Others**, Civil Appeal No. 5 of 2015 (unreported), where at pages 8 - 9 the Court observed as follows; I quote: -

*"The starting point is the procedure as to how and where an appeal is lodged in the High Court on matters originating from Primary Courts. Section 25 (3) & (4) which falls under Part III of the Act provide the answers. It reads: -*

*(3) Every appeal to the High Court shall be by way of petition and shall be filed in the District Court from the decision or order of which the appeal is brought.*

*(4) Upon receipt of a petition under this section, the district court shall forthwith dispatch the petition together with the record of the proceedings in the primary court and the district court, to the High court.*

The Apex Court went on further explicating thus:

*"From above, it is clear that if one intends to appeal in the High Court from the decision or order of the district court in matters originating from primary courts, he has to lodge his petition of appeal in the district court which handed down the decision and the district court shall immediately forward the same to the High Court".*



Again, in emphasizing on adherence to the laid down mandatory procedures in lodging appeals in Courts of law, the CAT in the recent case of **Alberto Mtega Vs. Republic (Criminal Appeal No. 545 of 2020) [2023] TZCA 142 (27 March, 2023)** (extracted from [www.tanzlii.org](http://www.tanzlii.org)), underlined that: -

***"On our part, we hasten to say that at any given level, an appeal is a creature of the law. Any person intending to lodge an appeal before the court of law therefore, must do so in accordance with the law."***  
*[emphasize added].*

Applying the stance of law observed above to the matter at hand, I hasten to hold that, since the appellant filed her appeal directly to this Court on 1<sup>st</sup> day of September, 2022, it therefore goes without saying that, the instant appeal was filed contrary to the mandatory requirement of the provision of section 25 (3) (supra) and no doubt that this Court has been deprived its power to entertain the same. According to section 25 (3) of the Magistrates' Courts Act [CAP. 11 R. E, 2019], and Rules 4 (1) & (2) and 5 (3) & (4) of The Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN. No. 312 of 1964, appeals coming to this Court in matters originating from Primary Courts have to be lodged in the same District Court which is tasked with the duty to dispatch the records of both the trial Primary Court and the District Court to this Court. There is no gainsaying that, failure to abide by the



procedural legal requirement affects the jurisdiction of the Court at this appellate stage. I say so because, an appeal is a creature of the law where a person intending to lodge an appeal before the higher must do so in accordance with the law.

Now, taking cognizance of the above cited authorities and the guiding provisions of the law, it is my considered view that, non-compliance with the mandatory legal procedural requirements in particular, direct institution of an appeal against the decision of the District Court exercising its appellate jurisdiction over matters originating from the Primary Court to the High Court is incurably fatal and cannot be salvaged by the overriding objective principle.

Accordingly, this appeal is incompetent and its remedy is to strike it out from the registry of this Court, as I hereby do.

**It is so ordered.**

**DATED at MOROGORO** this 18<sup>th</sup> day of September, 2023.



  
M. J. Chaba


**JUDGE**

**18/09/2023**

**Court:**

Ruling delivered in Chamber's on this 18<sup>th</sup> day of September, 2023 in the presence of Ms Aisha Sadick Amani, representing the appellant, and in the absence of the Respondents.



  
L.B. Lyakinana


**Ag/Deputy Registrar**

**18/09/2023**

**Court:**

Right to Appeal to the parties fully explained.



  
L.B. Lyakinana

**Ag/Deputy Registrar**

**18/09/2023**