IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

CIVIL APPEAL CASE NO. 08 OF 2023

(Arising from Civil Appeal No. 19 of 2022, Tabora District Court, Originating from the decision of Tabora Urban Primary Court in Civil Case No. 41 of 2021)

1. NASSORO JUMANNE ..... 1ST APPELLANT
2. JUMANNE ALLY ..... 2ND APPELLANT

VERSUS

KESSY AMBONISYE ..... RESPONDENT

Date of Last Order: 15.08.2023
Date of Judgment: 30.08.2023

JUDGMENT

KADILU, J.

The appellants were the defendants in Civil Case No. 41 of 2021 before Tabora Urban Primary Court in which they were alleged to have destroyed the respondent's crops. At first, the case was heard in the absence of the appellants whereby on 29/06/2021, judgment was pronounced in favour of the respondent. On 17/02/2022 while the respondent was in the execution processes, the appellants applied to the primary court to have the exparte judgment set aside on the ground that they never received summons to appear to the trial court. The application was granted. Exparte judgment was set aside, execution processes were stayed and the case was set to be heard afresh inter-parties.

After hearing both parties, on 09/09/2022 the case was decided in favour of the respondent. The appellants were ordered to pay Tshs.

7,000,000/= to the respondent being compensation for the destroyed crops. They were also condemned to pay Tshs. 10,000/= as costs of the case. Dissatisfied with the decision, they filed Civil Appeal No. 19 of 2022 in the District Court of Tabora on the following grounds:

1. *That, the trial court erred in law and facts by not determining the legal owner of the land at the time of the alleged crops destruction.*
2. *That, the trial court erred in law and facts by ordering compensation without clear proof that the alleged destroyed crops belonged to the respondent.*
3. *That, the trial court erred in law and facts by ordering compensation of Tshs. 7,000,000/= without valuation report from Agricultural Extension Officer.*
4. *That, the trial court erred in law and facts by admitting in evidence still pictures/photographs which were edited and which lack direct connection with the alleged destroyed crops.*
5. *That, the trial court erred in law by failing to evaluate properly the evidence before it.*
6. *That, the trial court erred in law and facts by holding that the appellants were satisfied with the decision in Criminal Case No. 50 of 2021 while the same is at appeal level in the High Court.*

The district court determined the appeal and set the date of judgment. In the course of composing judgment, the appellate Magistrate noted that the application for setting aside exparte judgment in the primary court was made out of time prescribed by the law. He dealt with the point raised *suo motu* and prepared a ruling. Invoking revisional powers vested to the district court, he nullified the proceedings and the inter-parte judgment of the primary court reached on 09/09/2022. He upheld the primary court's exparte

judgment of 29/06/2021. He then struck out the appeal for being incompetent before the district court.

The decision aggrieved the appellants. They preferred the present appeal to this court armed with the following grounds:

1. *That, the learned Magistrate erred in law and facts by holding that the order setting aside exparte judgment violated the law of limitation while no formal application is mandatory in primary courts which can be seen in court file, but the appellants made applications for both extension of time and setting aside exparte judgment and the primary court Magistrate allowed both.*
2. *That, the learned Magistrate erred in law and facts by holding that the appeal was incompetent.*
3. *That, the learned Magistrate erred in law and facts by holding that the inter-parte suit before the primary court was time-barred.*
4. *That, the learned Magistrate erred in law and facts by not considering in revisional power the issue of impropriety and illegality as compensation was ordered without assessment report of the Agricultural Extension Officer.*

When the appeal was called on for hearing, the parties appeared in person, without legal representation. Being lay persons, their submissions were of less assistance to the court especially on the points of law contained in the petition of appeal. Having examined the grounds of appeal keenly, I find the point for deliberation is whether the appeal is meritorious or not. In my determination, I will resolve the first and second grounds together as they are both challenging the competence of the matter before the district court.

The appellants claim that, the learned Magistrate erred in law and facts by holding that the order setting aside exparte judgment in the primary court violated the law of limitation. According to them, it is not mandatory to make formal applications in primary courts which can be seen in court files. For that reason, they alleged to have made applications for both extension of time and setting aside exparte judgment. They stated that the primary court Magistrate allowed both applications therefore, the learned district court Magistrate erred in law and facts by holding that the appeal was incompetent.

Perusal of the court file shows that on 08/02/2022, the appellants made a formal application to the primary court seeking the exparte judgment delivered on 29/06/2021 to be set aside so as to get their right to be heard. It was stated in the second paragraph of the affidavit sworn by the second appellant that, the reason for their non-appearance to the trial court was that they did not receive summons. The application and supporting affidavit are silent about the extension of time. In addition, original record reveals that application for setting aside exparte judgment was heard exparte and there is nothing in the record of the primary court concerning application for extension of time.

The primary court's Magistrate cited Rule 30 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules as permitting the court to set aside its previous exparte decision at any time, but it is my view that, this

interpretation is a misdirection on part of the learned Magistrate. The said Rule provides as follows:

> *"Where a claim has been proved and the decision made against a defendant in his absence, the defendant may,* ***subject to the provisions of any law for the time being in force relating to limitation of proceedings****, apply to the court for an order to set aside the decision and if the court is satisfied that the summons was not dully served, or that the defendant was prevented by any sufficient cause from appearing when the proceeding was called on for hearing, the court shall make an order setting aside the decision as against such defendant upon such terms as it shall think fit."*

Based on the above provision, it is clear that power of the primary court to set aside exparte decisions is subject to the provisions of any law for the time being in force relating to limitation of proceedings. That is, the primary court is not justified to set aside exparte decisions at any time without compliance with the law of limitation. Rule 2 of the first item of the Schedule to the Rules of Limitation provides that, an application to set aside exparte decision should be made within six (6) weeks from the date of the impugned decision. Thus, the district court Magistrate was justified in his finding that the application for setting aside exparte judgment in the primary court was made out of time prescribed by the law.

Counting from 29/06/2021 when the exparte decision of the primary court was delivered to 17/02/2022 when the primary court had set aside the exparte judgment, it is more than thirty (30) weeks which had lapsed.

Therefore, the application was really time-barred as held by the district court. Notwithstanding, since the point was raised by the learned Magistrate *suo motu*, he was required to invite the parties to address him on the point. I fully agree with the learned Magistrate that the point raised touched jurisdiction of the court as the district court would have no jurisdiction to entertain the appeal emanating from illegal proceedings, but it was improper for the court to proceed unilaterally to make a finding without affording parties right to be heard.

See the cases of ***Wegesa Joseph M. Nyamaisa v Chacha Muhogo***, Civil Appeal No. 161 of 2016, ***Mbeya-Rukwa Autoparts and Transport LTD v Jestina George Mwakyoma*** [2003] TLR 251 and ***EXB 8356 S/SGT Sylvester S. Nyanda v The Inspector General of Police & The Attorney General***, Civil Appeal No. 64 of 2014, in which the Court of Appeal held that the right to be heard is fundamental and the violation of which renders the entire proceedings and judgment a nullity. As rightly submitted by the appellants, nowhere in the record of the district court that the parties were heard on the point of time limitation.

In the case of ***Said Mohmed Said v Muhusin Amiri & Another***, Civil Appeal No. 110 of 2020, Court of Appeal of Tanzania at Dar es Salaam, it was stated that:

> *"...a trial judge is obligated to decide the case on the basis of the issues on record. As to what should a judge do in the event a new issue crops up in the due course of composing a judgment,*

the new question or issue should be placed on record and the parties must be given opportunity to address the court on it."

From the authorities cited above, I find the arguments by the appellants on the first and second grounds of appeal have merits. Under normal circumstances, I would order retrial of this case by the district court so that the appellants could be afforded an opportunity to be heard on the point raised by the court *suo motu*. Nevertheless, I do not think that will serve the interests of timely justice. It is a settled principle that retrial will be ordered where the interest of justice so demands. In the instant appeal, it is apparent that the proceedings of the primary court which led to the judgment of 09/09/2022 were a nullity for being resulted from a time-barred application by the appellants.

Although the appellants were not heard by the district court on this point, ordering a retrial will not change the impropriety in the proceedings of the primary court. It will only prolong the matter which will ultimately need to start afresh in the primary court so that the noted irregularity may be rectified. The stand of this court is that, the proceedings and decision of the primary court emanated from the time-barred application hence, the district court lacked jurisdiction to entertain the appeal emanating therefrom. The appeal before the district court was thus, incompetent as correctly observed by the learned district court Magistrate.

That said and done, I see no reason to deal with other grounds of appeal as doing so will not serve any meaningful purpose. In this regard, the

proceedings, judgment and order of the primary court dated 09/09/2022 are hereby nullified and set aside. Likewise, the proceedings, ruling and order of the district court in Civil Appeal No. 19 of 2022 are nullified, quashed and set aside. On the way forward, I direct the appellants (if still interested), to file an application for extension of time in the primary court so that they may be granted leave of that court to apply for exparte judgment of 29/06/2021 to be set aside in order to afford them the right to be heard. In the meantime, the primary court's exparte judgment of 29/06/2021 remains binding.

Given the outcome of the appeal, I order each party to bear its own costs.

It is so decided.

KADILU, M.J.

JUDGE

30/08/2023.

Judgment is delivered this 6th day of September, 2023 in presence of respondent and in absence of appellants.

N.W. MWAKATOBE

DEPUTY REGISTRAR

6/09/2023

Right to appeal is hereby explained.

N.W. MWAKATOBE

DEPUTY REGISTRAR

6/09/2023