

**IN THE HIGH COURT OF TANZANIA**  
**TEMEKE SUB-REGISTRY**  
**ONE STOP JUDICIAL CENTRE AT TEMEKE**  
**PC CIVIL APPEAL NO.42 OF 2022**

*(Originating from Civil Revision No. 37 of 2021 at Kinondoni District Court)*

**RAFAEL REYET MOONO..... APPELLANT**

***VERSUS***

**ELLEN ERASTUS MALISA ..... RESPONDENT**

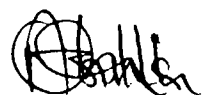
**JUDGMENT**

Date of last order: - 14/03/2023  
Date of Judgment: -14/06/2023

**OMARI, J.**

This is an appeal from decision and order of the District Court of Kinondoni at Kinondoni, delivered on 18 February, 2022 in Civil Revision No. 37 of 2021 which originates from Matrimonial Cause No. 133 of 2019 at Kawe Primary Court. Briefly, the Appellant filed an application before the District Court of Kinondoni for the following orders:-

1. That, the Honourable court be pleased to call for and examine the records of the Primary Court of Kawe in respect of Matrimonial Cause No. 133/2019 for the purpose of satisfying itself as to the correctness, legality or propriety of the proceedings and order of the Primary Court of Kawe delivered on 27<sup>th</sup> July, 2021 by Honourable A. Y. Maganga.



2. That the decision of Kawe Primary Court delivered on 27<sup>th</sup> July, 2021 by Honourable A Y. Maganga be quashed and set aside.
3. That, this Honourable court be pleased to order the respondent to hand over a Car make (Harrier TI 514DCK) which is in her possession to the Applicant.
4. That, this Honourable court be pleased to order that the Car make Suzuki Escudo (T679 AAG) continue to remain in the possession of the respondent thereof.
5. That, this Honourable court be pleased to order that the Applicant to pay the respondent TZS 9,540,000/=.
6. Costs of the application provided for.

The said Application was dismissed for reason of the Applicant's Affidavit being incompetent for it contains prayers. Aggrieved by the dismissal the Appellant knocked the doors of this court preferring an appeal armed with four grounds to wit:

1. The learned magistrate erred in law for dismissing the application for revision without considering the parties submissions.
2. The learned magistrate erred in law for failure to exercise her revisionary powers.

3. The learned magistrate erred in law for failure to afford the party' right to be heard on the issue raised *suo moto*.
4. The learned magistrate erred in Law for holding that the affidavit was incompetent for reasons that it contains prayers.

This Appeal was disposed by way of written submission, whereas the Appellant had the services of Valarie Luanda learned advocate while the Respondent enjoyed legal assistance from the Women's Legal Aid Centre.

In his submission the Appellant argued the first and fourth grounds together and the rest were argued separately. The Appellant submitted that the learned magistrate erred in law for dismissing the Application for being supported by an incompetent Affidavit which contained prayers while this was not the case. He argued that while the magistrate raised the issue *suo moto* and referred to paragraph 7 of the Affidavit and faulted it for containing prayers and as a result dismissed the Application, the said paragraph does not contain prayers, it is rather a narrative of what transpired and when read with the paragraphs before and after it can clearly be seen there are no prayers in the said paragraph. The Appellant submitted further that even if the Affidavit had prayers in the said paragraph the court should not have dismissed the Application, rather just expunge the defective paragraph as was held in **Msasani Peninsula Hotels Limited and 6 others v. Barclays**

**Bank Tanzania Limited and 2 others**, Civil Application No 192 of 2006 and **Harbinder Singh Sethi v. Republic**, Misc. Economic cause no 29 Of 2017 where the court took the same stand not to dismiss the entire matter instead the court should proceed to expunge the defective paragraph.

As regards the second ground the Appellant submitted that by wrongly dismissing the Application after raising the issue of a defective Affidavit *suo motu* the court failed to exercise revisional powers conferred it by the provisions of section 22(1) and (2) of the Magistrates Courts Act, CAP 11 R.E., 2019 (the MCA). Lastly, the Appellant submitted that by raising the issue of a defective Affidavit *suo motu* and determining the same without according the parties a right to be heard on the same, the magistrate is in violation of article 13(6)(a) of our 1977 Constitution of the United Republic of Tanzania. The parties were not heard as the magistrate raised the issue when composing the Ruling. The Appellant argued that it is well settled in case law *inter alia*, **Said Mohamed Said v. Muhsin Amir and another**, Civil Appeal No. 110 of 2020 Court of Appeal Tanzania.

It is on the basis of the submission that the Appellant prays for the Appeal to be allowed with costs, the matter be returned before another magistrate to determine it on merit.

When it was her turn the Respondent's submissions to oppose the Appellant's written submissions commenced by first stating that the Appellant has nothing tangible to move this court as it has been his tendency to file various cases with ill motive and as a delay tactic to stall the matter from coming to an end. She goes on to state that the Appellant filed Civil Revision No. 40 of 2020 and Civil Revision No. 37 of 2021 all at Kinondoni District Court seeking the same orders. On the grounds of appeal, she submitted that the Ruling of the trial court is very clear and correct together with the whole proceedings; thus there is no need to waste time to consider the appeal which contains a lot of fabricated information.

The Respondent further submitted that the Civil Revision was dismissed for having prayers, and it is true that it had prayers; listing that Appellant prayed that the court be pleased to order the Respondent to hand over a car, Harrier with Registration No. T514 DCK which is in her possession to the Applicant and he prayed for the court to order the Respondent to pay TZS 9,540,000. She went on to state that the said car is not in her possession as was explained by the Respondent in Kinondoni District Court in Civil Revision No. 37 of 2021. The submissions then veered off to an explanation about some bank loans and she stated that the ambiguous error of Primary Court order in respect of two cars which were not properly divided was settled via the court order dated 02 June, 2021.

As regards the third ground, the Respondent submitted that the learned magistrate was correct to act *suo motu* on the issue of the Affidavit of the Appellant being incompetent due to containing prayers in paragraph 7 of the Affidavit. In her view, everyone who approaches a court has to follow proper procedures and law to approach it. The court has to satisfy by itself that both parties have followed proper procedures before it determine the matter in its hand. The Respondent insists that both parties were heard. She agrees with the magistrate that the Appellant's Affidavit in support of the Application contravened the principles laid down in **Uganda v. Commissioner of Prison Ex Parte Matovu** [1966]. She concluded her submissions with a prayer that this Appeal be dismissed with costs for lack of merit and the decision of Kinondoni District Court dated on the 18 February, 2022 be upheld.

In rejoinder, the Appellant attacked the Respondent's submission by stating that they ought to have dealt with the grounds of appeal which is the matter before this Court. Instead, the Respondent decided to complain on issues which are irrelevant including issues of division of matrimonial property which were decided in the Primary Court. Further, the Appellant opined that it seems that the Respondent has failed to understand the gist of the Appeal thus, her allegation of fabricated information which are not identified. The Appellant further submitted that the Respondent failed to address on the



question of the magistrate raising the issue of the Affidavit *suo motu* and determining it. In his view the case of **Uganda v. Commissioner of Prison** **Ex Parte Matovu** (*supra*) cited by the Respondent has been overtaken by events and cannot be used to infringe the right to be heard which is a constitutional right, as a matter of procedure, where the Affidavit contains prayers and other extraneous facts, the remedy is to expunge the offending paragraphs. He once again prayed for the Appeal to be allowed with costs. Having considered the parties rival submissions, what is before this court for determination is only one issue whether the Appeal has merit. In doing so I shall proceed with the third ground of appeal which is somewhat interlinked with the rest of the grounds.

Although the Respondent claims the parties were heard in the said Revision in the District Court's typed Ruling on page 2 the learned magistrate states:

*'among other things, I wish to go direct to the Affidavit sworn by the Applicant in this Revision of which I find one issue to make it clear before determination of this Application for Revision since this court decided to leave no area without touching to preserve the justice. **I wish to go to suo motu and see whether the Affidavit before me is incompetent for containing prayer(sic)**' (emphasis supplied)*

On page 3 the said Ruling, it is further stated:

*'Having gone through the Affidavit before me, this court made the following findings; firstly the Affidavit of the*

*Applicant contain prayer particularly paragraph 7 in which it is not rule of practice and procedure which are used before court of law (sic)*

After this the Application was dismissed. I disagree with the Respondent's submission that they were heard on the issue of the Affidavit being defective, respectfully I believe she misconstrued what being heard means and likewise I disagree with the assertion that the learned magistrate was right in raising the issue and determining it *suo motu*. It is the cornerstone of our justice system that courts need to avail parties their right when determining disputes between them. In the case of **Director of Public Prosecutions v. Rajab M. Ramadhan**, Criminal Appeal No. 223 of 2020 (unreported) the Court of Appeal held as follows:

*'It is a rule against person being condemned unheard. Any decision arrived without getting adequate opportunity to be heard is a nullity even if the same decision would have been arrived at had the affected party been heard.'*

Such principles are supposed to facilitate fair trials by ensuring both parties are heard before a decision is made. In an earlier case of **Independent Power Tanzania Limited v. Standard Chartered Bank (Hong Kong) Limited**, Civil Revision No. 1 of 2009 (unreported) the court also had this to say:

*'... no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any*



*person without first giving him a hearing according to the principles of natural justice...'*

Therefore, the learned magistrate was duty bound to accord the parties a right to be heard on the alleged incompetent Affidavit before going ahead to *suo motu* deal with the issue and make a determination on the same in the name of preserving justice. In **Abbas Sherally and Another v. Abdul Fazalboy**, Civil Application No. 33 of 2002 the Court of Appeal further emphasized that:

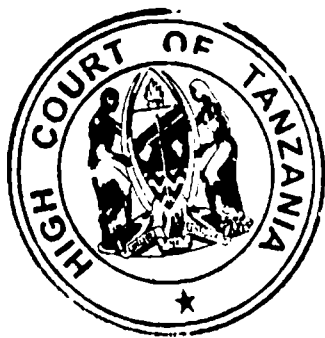
*'The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same would have been reached had the party been heard, because the violation is considered to be a breach of the principles of natural justice. For example, in the case of General Medical Council Vs. Spackman, [1943] A.C 627, Lord Wright said: "If principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision"....'*


In the present Appeal, the parties were not accorded with an opportunity to be heard on the issue of the Affidavit being incompetent or defective as the same was raised by the learned magistrate in the course of composing the Ruling. The Application was dismissed on the basis of being supported by an

Affidavit that was defective for containing prayers. This renders the Ruling a miscarriage of justice and therefore a nullity. Consequently, the third ground of appeal is allowed. As this ground alone is enough to dispose the Appeal, I find it unnecessary to venture into the other grounds of appeal as they are in any case, related.

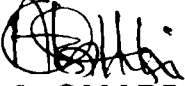
The Appeal is consequently allowed, the Ruling and order in Civil Revision No. 37 of 2021 are quashed and set aside respectively. I invoke revisional powers bestowed to this court under section 44(1)(b) of the MCA and order the Application be heard by another magistrate. Each party shall bear its own costs.

It is ordered accordingly.



  
**A.A. OMARI**  
**JUDGE**  
**14/06/2023**

Judgment delivered and dated 14<sup>th</sup> day of June, 2023.

  
**A.A. OMARI**  
**JUDGE**  
**14/06/2023**