IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

DC CIVIL APPEAL NO. 32 OF 2023

(From the District Court of Dodoma in Miscellaneous Civil Application No. 57 of 2019)

SOPHIA DOSSA ..... 1ST APPELLANT

MSAFIRI TALUKA AKOMBOLWA..... 2ND APPELLANT

VERSUS

JIMMY NDOMBA..... RESPONDENT

JUDGMENT

Last Order: 21st March, 2024

Judgment: 12th April, 2024

MASABO, J.:-

The appellant is aggrieved by a dismissal order issued on 6th September 2023 by the District Court of Dodoma (the trial court) after it found out that the application was time barred hence offensive of section 22(4) of the Magistrate's Court Act, Cap 11. In terms of background, the dispute landed in court on 07th February 2018 when the respondent filed a suit at Makole Primary Court claiming TZS 10,800,000/= being compensation for breach of contract. The appellants were served through substituted services via Mwananchi Newspaper dated 24th February 2018 but they remained at large. On 8th March 2018 the matter was heard *ex parte* them and an ex parte judgment was delivered on 9th April 2018 whereby the appellants was adjudged to pay Tshs. 850,000/=. On 10th April 2018, the second appellant surfaced in court praying the court to set aside the *ex parte* judgment. He was heard in the absence of the respondent and at the end, his prayer was

granted and the *ex parte* judgment was set aside. The respondent was aggrieved by this decision. He applied for revision vide Civil Revision No. 5 of 2018 before the District Court of Dodoma. The application was granted on the ground that the respondent was not afforded the right to be heard. The proceedings were consequently quashed and it was ordered that the matter be heard inter parties. This was on 12th October 2018.

The order for rehearing of the prayer to set aside the ex parte judgment was not complied with by the trial court. On 08th March 2019, the respondent went back to the trial court and prayed for execution of the *ex aprte* decree of TZS 850,000/=. He also prayed for costs of the case to the tune of Tshs 6,449,000/= which was on 9th August 2019 granted after the applicant herein defaulted appearance. They were ordered to pay a sum of Tshs Tshs 7,299,000/= comprising of the decretal sum and the costs. In execution, the court issued a garnishee order on 12th December 2019, attaching Account Number 101207025641 at FINCA Microfinance Bank and a tricycle with registration Number MC 256BTP.

On the same day, 12th December 2019, the appellants resurfaced. They filed an application for stay of execution and the same was admitted as Miscellaneous Civil Application No. 2 of 2020 and an application for revision which was admitted as Miscellaneous Civil Application No. 57 of 2019, both before the district court. The appellants did not appear to prosecute the application for stay of execution. As a result, it was dismissed for want of prosecution. Their application for revision similarly ended barren after it was found to be res *judicata* on 08th July 2020. Aggrieved by the decision of the

District Court, the appellants filed an appeal to this court on 6th August 2020. The appeal was admitted as PC Civil Appeal No. 28 of 2020. This Court ruled in favour of the Appellants after it quashed and set aside the proceedings and the ruling of the district court in Misc. Civil Revision No. 57 of 2019 and forthwith ordered that the application be heard afresh.

Pursuant to this order, the matter was heard afresh by way of written submission as per the trial court's order dated 21st July 2023. After the hearing of the application, the court dismissed it reasoning that it was time bared as it was filed after the expiry of the time limit set under section 22(1) of the Magistrate' Courts Act, Cap 11. Aggrieved by the decision of the district court, the appellants have come back to this court by way of an appeal based on the following two grounds:

1. That, the trial Magistrate erred in law and fact by deciding that the Appellants' application was time barred to be revised since proceedings for revision in the District Court has to be done within 12 months from the termination of proceedings in the Primary Court.
2. That, the trial Magistrate erred in law and fact in the course of composing the ruling raised on an issue which was neither pleaded nor canvased by both parties and predicated his decision on that issue.

When the parties appeared before me for mention on 13th February 2024, the applicants represented by Mr. Christopher Malinga, learned counsel and the respondent, represented by Ms. Faraja Shayo, learned counsel

consented that the appeal be disposed of by way of written submissions. Both parties filed their submissions as per the schedule. Hence, the present judgment.

Supporting the appeal, Mr. Malinga submitted that the appellants' application was filed within twelve months from the day of termination of the proceedings of Makole Primary Court and the same was well within the jurisdiction of the district court. He argued that the district court misinterpreted section 22(4) of the Magistrates' Courts Act because the duration under this law sets a time limit within which a party aggrieved by a decision of a primary court can apply for revision to a district court. It is not a delimitation to the district court discharging its revision powers. He clarified that, the impugned decision was delivered by Makole Primary Court on 9th August 2019 and the revision application was filed before the District Court on 12th December 2019 which was only 4 months after the impugned decision. Hence the application was within the time limit of 12 months provided by the law.

Submitting on the second ground, Mr. Malinga argued that, the parties were not afforded the opportunity to submit on the issue of jurisdiction raised *suo motto* by the court while composing its judgment. The remedy for the irregularity, he argued, is nullification of the ruling. In fortification of this submission he cited the case of **Mohamed Said vs. Muhsin Amiri &Another** Civil Appeal No. 110 of 2020 [2022] TZCA 208 TanzLII. In conclusion he prayed that the appeal to be allowed with costs.

Replying to Mr. Malinga's submission, Mr. Ngongi opposed the appeal and submitted that section 22(4) of the Magistrates' Court Act provides for the time limit within which the district court can exercise its revision powers and not the time limit within which a person can apply for revision. Thus, the trial court cannot be faulted as its decision was well founded.

Submitting on the second ground of appeal, Mr. Ngongi joined hands with Mr. Malinga on the position of the law as regards the right to be heard on a matter raised *suo motto* by the court. He argued that it is a trite law that when there is a new issue raised when composing a judgment, the parties must be given an opportunity to address the court on it. He proceeded to argue that, in the present appeal, the parties were given such right. They were informed by the district court on the issue of time limit as per section 22(4) of the Magistrates' Courts Act and they both addressed the court on this issue in their written submissions. The principle in the cited case of **Said Mohamed Said** (supra) was not contravened. He concluded with a prayer that the appeal be dismissed with cost as it has no merits. This marked the end of the submission as the applicant did not file a rejoinder.

Having gone through the records, the petition of appeal and the submissions of both parties, I will now proceed to determine the appeal. I will conveniently start with the second ground of appeal. As stated above, the appellant's discontentment is that the court raised *suo motto* the issue of time limitation and without affording the parties the right to address it on this point, it dismissed the application based on the ground it has so raised *suo motto* that it was time barred for being filed after the expiry of the

duration of 12 months provided under section 22 (4) of the Magistrates' Courts Act. On the other hand, it has been submitted for the respondent that, the assertion is devoid of merit as the parties were notified of this issue and had an opportunity to address the court on it.

As correctly submitted by both parties, the right to be heard is very fundamental in the dispensation of justice and its abrogation attracts stern consequences to the proceedings and the decision thereof. There is a plethora of authorities on this cardinal law. I need not cite them all. The case of **Rajabu Yusufu Kirumbi & Others vs Wendo Mlaki & Others** (Civil Appeal No. 137 of 2021) [2024] TZCA 211TanzLII suffices. In this case, the Court while recalling its previous decisions stated that:-

> "It is a cardinal principle of natural justice that a person should not be condemned unheard, fair procedure demands that both sides should be heard. Further, the decision reached in violation of the principle of natural justice is void and is of no effect.....

In **Mbeya-Rukwa** (supra) the Court expressed the position of the law with respect to the right to be heard. It is a fundamental constitutional right. The Court stated:

> *"In this country, natural justice is not merely a principal of common law, it has become a fundamental constitutional right Article 13(6) (a) includes the right to be heard among the attributes of equality before the law and declares in part:*
>
> *a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo*

kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kikamilifu..." [When the right and duties o f any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing...].

Further, the Court in **Abbas Sherally** (supra) emphasised that even if the decision would be the same whether the party was accorded the right to be heard or not, still the court is duty bound to hear the parties before a decision is reached. The Court stated:

"The rights of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Court in numerous decisions. The right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice".

Accordingly and as submitted by the parties, much as a judge or magistrate may determine a matter based on an issue he has raised *suo motto*, he is legally bound to place the said issue before the parties and afford them an opportunity to address him on the said issue before composing his judgment, ruling or order. The omission constitutes a fatal irregularity with the consequences of nullifying the ruling as stated above (also **Peter Ng'homango vs. The Attorney General,** Civil Appeal No. 114 of 2011, CAT (unreported).

In the present appeal, the record of the trial court does not show that the issue of time limitation was raised *suo motto* by the court. It was also not raised by the parties in their affidavits. Up to 21/7/2023 when the trial court ordered the hearing to proceed in writing, the competency of the application based on time limitation was not at issue. For the first time, it surfaced through the respondent's reply. It was raised by the respondent in the course of his reply submission filed in court on 17th August 2023 whereby it was submitted that the application was incompetent for being out of the time prescribed under section 22(4) of the Magistrates' Courts Act. I have also observed that, when rejoining his submission, Mr. Malinga learned counsel for the applicant, responded to issue and argued that the application was filed well within time. Just as his arguments herein, he submitted and argued that the impugned decision was delivered on 9th August 2019 and the application was filed on 12th December 2019. Therefore, it was well within the time limit of twelve months provided by the law. Having considered these submissions, the court subscribed to the respondent's submission that the application was time-barred and hence incompetent and he subsequently dismissed it. Therefore, the assertion that the issue was raised *suo motto* by the court and that the parties were denied the right to address the court on it is lucidly wrong and misleading. The second ground of appeal is thus without merit.

Without prejudice to what I have stated, what I find amiss is the raising of a new issue from the bar and in the course of reply submission. In my firm

view, the point raised being purely legal ought to have been raised and disposed of as a preliminary objection. Raising it from the bar in the course of reply submission offended the principle of the law that delimits raising of preliminary objections from the bar (See **Zuberi Athuman Mbuguni vs National Bank of Commerce Limited,** Civil Application No. 311/12 of 2020 [2023] TZCA 17290 (Tanzlii) and **Hassan Kapera Mtumba vs. Salim Suleiman Hamdu,** Civil Application No. 505/12 of 2017 [2020] TZCA 236 TanzLII.

In the first ground of appeal to which I now turn, the appellants are challenging the merit of the finding that the application was time-barred hence incompetent. They are also challenging the dismissal order thereto. As I embark on this ground, it is apposite, I think, to reproduce part of the provision of section 22 of the Magistrates' Courts Act. It provides that:

> 22.-(1) A district court may call for and examine the record of any proceedings in the primary court established for the district for which it is itself established, and may examine the records and registers thereof, for the purposes of satisfying itself as to the correctness, legality or propriety of any decision or order of the primary court, and as to the regularity of any proceedings therein, and may revise any such proceedings.
>
> (2) In the exercise of its revisional jurisdiction, a district court shall have all the powers conferred upon a district court in the exercise of its appellate jurisdiction including the power to substitute a conviction, or a conviction and sentence, for an acquittal; and the provisions of paragraph (b) of subsection (1) of section 21 shall apply in relation to an order quashing proceedings and ordering a rehearing which is made in the exercise of a district court's revisional jurisdiction as they apply in relation to any such order made in the exercise of its appellate jurisdiction.

(3) n/a

(4) No proceedings shall be revised under this section after the expiration of twelve months from the termination of such proceedings in the primary court and no proceedings shall be further revised under this section in respect of any matter arising thereon which has previously been the subject of a revisional order under this section.

The plain meaning of subsection which is the epicenter of this ground of appeal is not difficult to comprehend as it is simple and straightforward. As correctly held by the trial court, it delimits the district court from exercising its revisional powers after the expiration of 12 months from the termination of the proceedings sought to be revised. The provision is of general application in that, it makes no distinction between revisions initiated by the court *suo motto* and those instituted at the instance of the parties. In this regard, the argument by the respondent's counsel that the delimitation is only on revision instituted by the court *suo motto* is materially misconceived as the subject of the delimitation is not on the initiation of the revision but the exercise of the powers by the court. Thus, it applies to all revisions made under this provision irrespective of whether the respective revision was instituted by the court *suo motto* or instituted by a party.

While I subscribe to the reason advanced by the trial court, I am intrigued whether, in the circumstances of this case, the blanket application of this provision will serve the interest of justice. As stated above and as the parties both agree, the appellants herein did not sleep over their right to revision. After the termination of the proceedings in the primary court, they took the necessary legal steps well within the 12 months prescribed by instituting the

application for revision on 12th December 2019 which was only 4 months after the proceedings in the primary court terminated on 9th August 2019. Thus, when they filed their application before the district court, they were well within the time and there was sufficient time for the court to exercise it powers. What delayed the exercise of the revisional powers by the district court is not the appellant's fault. They prosecuted the application until it was finally dismissed on the ground that it was res judicata to Civil Revision No. 5 of 2019 a decision which enraged them and they challenged it, again well in time, before this court in PC Civil Appeal No. 28 of 2020. It is the outcome of this appeal in a judgment delivered on 3rd March 2022 which remitted back the application to the district court with directives for rehearing of the application. The court stated that:

> "The decision the District Court of Dodoma in Misc. Civil Application No. 57 of 2019 is hereby quashed and set aside. It is further directed that the same court re-hear the parties and compose a fresh decision. In doing so the court may wish as well to consider whether after delivering an ex parte judgment the appellant could legally initiate revision proceedings against subsequent orders without attempting to set aside the said ex parte judgment.

When the court made this order on 3rd March 2022, the duration of 12 months had already lapsed as it was almost two years and 7 months after the proceedings of the primary court terminated on 9th August 2019. It was thus expected that after the matter being remitted, the district court and the

parties would have confined themselves to the merit of the application or, in addition, to the points raised by this court in its directives while remitting the record. However, they became wiser and raised a new issue which ended with a dismissal order subject to the present appeal.

From this background, I am of the firm view that, the circumstances of this case do not favour the literal interpretation of the above provision as the outcome of such interpretation is certainly pregnant with the risk of condemning and punishing the applicants for the delay they did not solely occasion and in so doing, prejudice them by depriving them the right to a remedy. This does not appear to have been the intention of the legislature.

While contemplating this, I was inspired by the decision of the Court of Appeal in **Barnabas Msabi Nyamonge vs Assistant Registrar of Titles Shufaa Jambo Awadhi** (Civil Appeal 176 of 2018) [2019] TZCA 279 TanzLII in which the Court dealt with the similar provision in a different context. Reversing the decision of this court, the Court of Appeal held that the literal interpretation of subsection (4) of section 22 of the Magistrates' Courts Act, may in the circumstances of that case, lead to absurdity and defeat the whole purpose of section 22 and the intent and object of the legislature in making such provision.

It is in this view and the peculiar circumstances of this appeal as above narrated I hold, as I do, applying of the twelve months limitation prescribed by section 22 (4) of the Magistrates' Courts Act to the peculiar circumstances of this case would bring absurdity simply defined by the Court of Appeal in **Barnabas Msabi Nyamonge vs Assistant Registrar of Titles Shufaa Jambo Awadhi** (supra) to mean contrary to sense or reason. Needless to

emphasize, having been directed by this court to re-hear the application, the district court was bound to re-hear the application and determine it on merit. Its departure from the directive was lucidly wrong. The first ground of appeal is therefore with merit.

In the foregoing, the appeal is allowed and in consequence, I nullify the proceedings and quash and set aside the ruling of the District Court of Dodoma in Civil Revision No. 57 of 2019. The record is once again remitted back to the district court with directives that it should re-hear the application on merit and compose a fresh judgment. Also, as previously directed by this court in PC Civil Appeal No. 28 of 2020, the court may, if it wishes, consider whether after delivering an ex parte judgment the appellants could legally initiate revision proceedings against subsequent orders without attempting to set aside the said exparte judgment. Costs of the present appeal shall be on the respondents.

DATED at **DODOMA** this 12th day of April, 2024.

J. L. MASABO

JUDGE