

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM SUB-REGISTRY)  
AT DAR ES SALAAM**

**CIVIL APPEAL NO 1332 /2024**

[Arising from Ruling of Temeke District Court Hon. Ngeka SRM) dated 21<sup>st</sup> day of  
December 2023, in Misc. Civil Application No. 87 of 2023

**SAID MAKOLELA ..... APPELLANT**

**VERSUS**

**LILIAN MOSHA ..... RESPONDENT**

**JUDGMENT**

**17<sup>th</sup> & 24<sup>th</sup> May 2024**

**KIREKIANO, J:**

The parties herein are before this court not for the first time. I prefer to preface this decision on what transpired before this court in Civil Appeal No. 222 of 2019 (Arising from Civil Revision No. 15 of 2014 of Temeke District Court originating from Civil Case No. 101 of 2013 at Mbagala Primary Court). Having heard the parties this court (Mruma J) court decided;

*For all that has been said, I allow the Appellant's appeal.  
The proceedings of the Mbagala Primary Court were illegal  
and, therefore, null and void. I accordingly quash and set*

*aside all the proceedings and orders of Mbagala Primary Court **in Civil Case No. 101 of 2013** The judgement and consequential orders which arose from these proceedings are also quashed and set aside as they originated from proceedings, decisions and orders which were illegal and null. The 1st Respondent has the right to institute a fresh suit to claim the money she lent to the Appellant”*

Before the Temeke District Court, there was a previous appeal, Civil appeal no 10/2023. In that appeal, the District Court allowed the appeal filed by the respondent herein, holding that the primary Court at Mbagala had acted on non-existing Civil case no 101/2013, which had been nullified by the High Court in Civil Appeal No. 222 of 2019. It's important to note that this appeal was heard ex parte after the respondent in that appeal, and now the appellant defaulted appearance despite being served by publication.

In Civil application no 87 of 2023 before the District Court, the appellant herein made an application seeking an order to rehear the appeal. The application was made under Rule 18 of the **Civil Procedure Appeals in Proceedings Originating in Primary Court Rules GN no 312/1964**. The District Court found that no good cause was shown to warrant re-hearing of the appeal and dismissed the application.

The District Court, in its reasoning for dismissing the appellant's application, stated that the applicant could not be served personally and, in the end, was served by publication, which was done on 01/6/2023. The court deemed this to be sufficient service, and thus, the reasons for re-hearing advanced by the applicant were not strong enough to warrant rehearing the matter.

The appellant is dissatisfied with the District Court's decision and has thus preferred this appeal, setting forth three grounds for appeal.

- 1. To the learned Magistrate erred in Law and facts for failure extend time for re hearing civil appeal no 10/2023 while the appellant raised strong reasons for failure to appear to defend the same.*
- 2. That the Honourable Magistrate erred in law and facts for failure to put into consideration that the appellant intended to challenge the legality of the Civil appeal no 10/2023 which did not consider that the primary court acted in its power to execute the decision of this court*
- 3. That generally the Magistrate erred in law and facts for denying the appellant right to be heard*

The appellant was underrepresented, while the respondent was represented by Mr. Omari Kilwanda, a learned advocate. At the instance of the appellant's request, this appeal was heard by way of written submissions.

In his submission, the appellant argued that the learned Resident Magistrate did not correctly inquire about the appellant's whereabouts before deciding to serve him through publication. He said the summons should have been affixed at the court or sent to his local authority rather than publishing the same in the newspaper.

In the second ground of appeal, he faulted the learned Magistrate's decision for failing to consider that the appellant intended to challenge the legality of civil appeal No. 10 of 2023. According to him, the civil Appeal No. 10 of 2023 was not a proper remedy because the case appealed was in the stage of execution, and if the respondent had been aggrieved, he had to file a revision.

On the third ground, he argued that the district court denied him his right to be heard based on the respondent's insufficient reasons, citing

**RWAMUGANDA vs RAMUNDU, [2014], Vol. II, E. A 311** to the effect that service of summons by publication is rebuttable.

On his part, Mr Kilwanda, counsel for the respondent, responded that before the District Court ordered Civil Appeal No. 10 of 2023 to be heard ex-parte, the appellant was served with copies of all appeal documents via a legally registered court process server on Bahati Mwenegoha, and later, the Appellant was served by publication via Mwananchi Newspaper; all these documents are in the records of Temeke District Court.

On the first ground, he was of the view that the appellant mixed up his cause because, reading the entire lower court proceedings, there had been neither application nor ruling on the extension of time to rehear Civil Appeal No. 10 of 2023 unless the respondent had never been served with the copies of the said application for extension of time if at all was filed.

On the second ground, Mr Kilwanda submitted that reading between the lines of the filed submission in chief by the Appellant, the Appellant never showed the purported illegality in Civil Appeal No. 10 of 2023 that he intended to address apart from mixing up files, confusing himself, and misleading the court.

On the third ground of the complaint of right to be heard, Mr Kilwanda submitted that the Appellant was served per the law and never appeared, as he indicated in the first ground.

On my part, I wish to point out at this stage that the grounds to be advanced in the application for rehearing the appeal are akin to setting aside the decision reached ex parte. The applicant is expected to demonstrate good cause, such as not receiving proper notice of hearing; thus, he was not adequately informed of the proceedings, resulting in his non-appearance during the hearing date. The law under the ***Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules*** provides;

*Where an appeal is heard in the absence of the respondent and judgment is pronounced against him under rule 13 (3), he or his agent may apply to the appellate court to re-hear the appeal and **if the court is satisfied that the notice was not duly served** or that he was **prevented by any sufficient cause from appearing either personally or by agent** when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit.*

I will start with the first ground. According to the record, the appellant could not be served directly because he could not be traced for service, according to documents dated 3.5.2023 and 18.5.2023 and the process server's affidavit, Bahati Menegoha. In the affidavit dated 17.5.2023, the process server stated that the appellant could not be reached by cell phone, which was indicated. Still, the local leader at Saku Ilulu Mbagala informed him that the appellant could not be traced. I thus find that, the complaint that the summons should be served through local leaders wanting merit. Given the circumstances, I see no reason to fault the District Court's decision to resort to service by publication, published on 01.06.2023. The first ground of appeal lacks merit.

On the second ground, the appellant submitted a point of illegality to the district court. As I have indicated earlier, it was upon the appellant to appear before the district court to defend the appeal based on the grounds filed. Having considered the appellant's complaint in the second ground, I agree with the respondent's counsel that the appellant's complaint is confusing. If he had complaint on illegality in the decision of the primary court he should have appealed to the district court.

Lastly, on the third ground is on the right to be heard. This court is very much aware of the importance of giving a person a right to be heard. In the case of **Abbas Sherally & Another Vs Abdul S.H.M. Fazalboy** Civil Application No. 33 of 2002 (unreported), the Court of Appeal Court did not hesitate to hold 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 decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice".*

However, having deliberated on the first ground that the appellant was served by publication, the appellant cannot fault the district court's proceedings that the same exhibited a violation of his right to be heard. I have considered the decision cited by the appellant that the service by publication is a presumption. My contemplation on this is that given the facts of the case, if a part in a proceeding cannot be served directly and all efforts to trace him have been exhibited, then if service is done by publication, the



presumption may operate that he was served directly. This was the position of this court which I subscribe that is in **Lekam Investment Co Ltd vs the Registered Trustees of Al-Juma Mosque and Others (Civil Revision 27 of 2019) [2020]**, citing the decision of the Supreme Court of India in the case of ***Sunil Poddar and Others V. Union Bank of India, AIR 2008 SC 1006: (2008) 2 SCC 326*** Masabo J, held,

*Once a summons is published in a newspaper with wide circulation, the respondent cannot be heard complaining that he was not aware of such publication, and it is immaterial whether the respondent subscribes to or reads the newspaper.*

I thus find that the service to the appellant by publication served to accord him his right to be heard; defaulting appearance cannot merit a complaint that he was not accorded the right to be heard. In the end, I find this appeal devoid of merit. The same appeal is dismissed, and the respondent shall have the costs.



**A. J KIREKIANO**

**JUDGE**

**24.05.2024**

**COURT**

Judgment was delivered in the presence of the appellant, the respondent, and Mr. Omar Kilwanda, Counsel for the respondent.



**A. J KIREKIANO**

**JUDGE**

**24.05.2024**