

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB – REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 79 OF 2023

(Arising from PC. Civil Appeal No. 14 of 2022 Temeke District Court (Hon. N. Madam, RM), Originating from Civil Case No. 68 of 2022 Temeke Primary Court)

SOPHIA TASSILO LUKINJAAPPELLANT

VERSUS

WINNIE RUTASHOBYA.....RESPONDENT

JUDGMENT

POMO, J

The appellant, SOPHIA TASSILO LUKINJO, filed the instant appeal against the respondent, WINNIE TUTASHOBYA. She is aggrieved by the first appellate court’s judgment in Civil Appeal No. 14 of 2022 Temeke District Court which was delivered on 31/01/2023 Hon. N. Mkadam, RM against her favour. A total of four grounds of appeal are fronted, to wit: -

- 1. That, the learned magistrate erred in law and fact in not considering clear evidence recorded by the trial primary court in the matter at hand*

- 2. That, the learned magistrate erred in law and fact in failing to interpret the provisions of the law in relation to the matter which was before her*
- 3. That, the learned magistrate formulated her own ground and departed from grounds raised by the Appellant and failed to ascertain the gist of the issue when based solely on the annexure "A"*
- 4. That, the learned magistrate erred in law and fact in failing to take into consideration the unequivocal promise of the respondent*

On 4th April, 2023, the respondent filed a notice of preliminary objection against the appeal in that the appeal is time barred.

On 23rd May, 2023 when the appeal came for hearing, I ordered both the Appeal and the objection raised against it be argued by way of written submissions. Parties complied the submissions filing schedules.

In the course of composing the judgment, I observed that before the first appellate court, SAMWELI JULIUS and the respondent herein, were co – defendants before the trial court, in Civil Case No. 68 of 2022 Temeke Primary Court. The trial court ordered the two jointly to pay the Appellant TZS 3,475,000/-. Aggrieved with such findings by the trial court judgment,

the Respondent herein filed Civil Appeal No. 14 of 2022 before Temeke District Court against the Appellant herein excluding the said SAMWELI JULIUS to be a party to it. Basing on this infraction, I ordered parties to address this court on the competent of the first appellate proceedings; the resultant judgment thereto and the appeal herein emanating from such proceedings and judgment. Following that, this court re-opened the appeal to allow parties to address it on this pertinent issue.

On 26th February, 2024 parties appeared before Hon. S.B. Fimbo, Deputy Registrar of this court, for mention of the appeal. The appellant appeared represented by Mr. Benjamin Marwa, a learned advocate and the respondent was present unrepresented. They agreed on schedules of filing submissions whereby the appellant had to file it on 4th March, 2024; reply submission by the respondent on 11th March, 2024 and rejoinder, if any, be filed on 18th March, 2024 by the appellant. Both sides complied the scheduled orders.

Mr. Benjamin, for the Appellant, argued that against the appeal before the district court the very defect was raised but dismissed on 19th October, 2022 Honourable N. Mkadam, RM. Therefore, failure to include the said SAMWEL JULIUS who was a party before the trial court, is fatal to the

proceedings hence the appeal is incompetent, the counsel stressed. He cited the case of **Daudi Mongi versus Angelina Sangiwa and Another**, Land Appeal No. 156 of 2019 High Court (Land Division) at Dar es Salaam and **Mustapha Lyapanga Msovela versus Tanzania Electric Supply Co. Ltd, Iringa regional manager and Another**, Civil Appeal No.16 of 2020 High Court at Iringa (both unreported).

In reply, the respondent submitted that, an appeal is a constitutional right as enshrined under article 13(6)(a) of the Constitution of the United Republic of Tanzania of 1977 as amended. That, failure of SAMWEL JULIUS to appeal though was a party before the trial court does not render away the other party to use her right of appeal against that decision. Thus, to her the appeal was properly before the first appellate district court.

I have considered the submissions by the parties as well the lower courts records. There is no dispute that before the trial court, the Respondent herein together with SAMWEL JULIUS, were the defendants in Civil Case No. 68 of 2022 filed by the Appellant against them. Also, it is the findings of the trial court ordering jointly the herein respondent and the said SAMWELI JULIUS to pay TZS 3, 275,000/- the Appellant. Appeal by the Respondent before the district court is against this findings aiming to

exonerate her from liability imposed by the trial court to the two. Determining the Respondent appeal before the district court denied SAMWELI JULIUS the right of hearing for such non-inclusion of him in that appeal. On this I am guided by the court of appeal decision in **Patrobert D. Ishengoma versus Kahama Mining Corporation Ltd and 2 Others**, Civil Application No. 172 of 2016 CAT at Mwanza (unreported) where, at page 12, stated thus: -

*"The Court was confronted with similar situation to the present situation in Civil Appeal No. 129 of 2016 between **Onesmo Nangole versus Dr. Steven Lemomo Kiruswa** (unreported). It has to ponder on **the issue of non-inclusion in appeal the Attorney General and the Returning Officer of Longido who were respondents at the trial.** As such, the Court ordered the amendment of the record of appeal and that the Attorney General and Returning Officer be impleaded having said thus: -*

*"...if we decide to deliberate this appeal in their absence, **we will offend the audi alteram partem rule of natural justice**".*

Although the Respondent has the right of appeal guaranteed under the constitution of the united republic of Tanzania, as she has asserted in her submission, that right does not do away the duty to her to have impleaded her co – defendant one SAMWELI JULIUS as the respondent so as to make her appeal before the district court maintainable. Her co – defendant before the trial court was therefore denied a right of hearing by the first appellate district court. Therefore, I agree with the Appellant that the appeal before the district court filed in exclusion of the co-defendant of the respondent was an incompetent appeal.

In line with what was held in **Patrobert D. Ishengoma versus Kahama Mining Corporation Ltd and 2 Others'** case (**supra**) the learned magistrate who presided over the appeal ought to have ordered for amendment of the respondent's appeal to include the excluded party, SAMWELI JULIUS. Amendment cannot be ordered at this stage where already the first appellate court proceeded in such fatal illegality. Therefore, as long the appeal was incompetent before it, the district court proceedings are nullity proceedings as well the resultant judgment. Henceforth, in my considered view, no valid appeal emanating from such a nullity proceedings and judgment which can be filed in this court.

Following the above, I hereby quash the first appellate proceedings and set aside the judgment thereto. Further, I struck out the Respondent's Civil Appeal No. 14 of 2022 before Temeke District court for its failure to include SAMWELI JULIUS a party to it. I make no order as to costs. It is so ordered

Right of Appeal explained

Dated at DAR ES SALAAM this 12th day of June, 2024



MUSA K. POMO
JUDGE
12/06/2024



Court: - Judgement delivered on this 14th day of June, 2024 in the presence of the Appellant and the Respondent both unrepresented.

Sgd: S. B. Fimbo
Deputy Registrar
14/06/2024