

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB- REGISTRY

AT MBEYA

CRIMINAL REVISION NO. 8354 OF 2024

(Originating from Misc. Criminal Application No. 7977 of 2024 in the district court of Mbarali at Rujewa)

JAYUNGA JOHNAPPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION1ST RESPONDENT

EUGEN TEMUGUNGA KISONGA T/A

FAGIO BROKERS & AUCTION CO. LTD.....2ND RESPONDENT

RULING

Date of hearing: 3/5/2024

Date of ruling: 19/6/2024

NONGWA, J.

The applicant has moved the court to revise decision of the district court of Mbarali in Misc. Criminal Application No. 7977 of 2024 in which 549 cows and 3 donkeys were ordered to be forfeited to the Government of Tanzania and sold by public auction.

The application is made under sections 372, 373(1)(b) and 388 of the Criminal Procedure Act [cap 20 R: E 2022] “ the CPA” and supported

by the affidavit of the applicant, Jayunga John. The application is opposed by the 1st respondent through the counter affidavit of Dominic Mushi, the public prosecutor. The 2nd respondent did not file counter affidavit.

The genesis of this matter is that, the 1st respondent successfully filed under Certificate of Urgency Misc. Criminal Application No. 7977 of 2024 against unknown person before Mbarali District Court at Rujewa, under section 392 (1) of the Criminal Procedure Act [Cap 20 R.E 2022], section 47(1) of the Police Force Auxiliary Service Act [Cap 322 R.E 2002] and Section 25(l)(d) of the National Parks Act [Cap 282 R.E 2002] read together with Regulations 7(i) and 20 both of the National Parks Regulations GN. No. 50 of 2002 as amended. The 1st respondent prayed for the court to hear and order forfeit to the Government and to be disposed by way of sell in Public Auction unclaimed 549 cows and 3 donkey found at Njenje area within Ruaha National Park and seized by Park Rangers. The 1st respondent also prayed for the court to appoint Court Broker to conduct the sale of the said 549 cows and 3 donkeys by way of Public Auction and deposit the proceeds in Bank Account No. 52010101511 in the name of the Forfeited Assets and Revenue Collection Account (NMB BANK). The court granted all orders sought by the 1st respondent.

The applicant is aggrieved by the decision and has filed the present application for revision seeking the following orders;

1. That, this honourable Court be pleased to call and examine the records in respect of Misc. Criminal Application No. 7977 of 2024 between The Director of Public Prosecution and Unknown at District Court of Mbarali between the Director of Public Prosecution vs Unknown for the purpose of satisfying itself as to the correctness, legality and as to the regularity of proceedings.
2. That, this honourable Court may be pleased to make any appropriate orders as may think fit for the interest of Justice.

The applicant alleges that he wrote a letter dated 25/3/2024 to DPP expressing his interest in the seized properties. That learning of Misc. Criminal Application No. 7977 of 2024 which was filed on 25/3/2024, he too filed Misc. Application No. 8021 of 2024 for an order to be joined to Misc. Criminal Application No. 7977 of 2024. That, he was not afforded right to be heard in Misc. Criminal Application No. 7977 of 2024 although present in court room on the reason that was not party to the case. Further that there was no summons and notice issued by the court for the interested person to express their willingness in the matter. That the applicant has no any other remedy serve for this application for revision.

When the matter came on for hearing, the applicant was represented by Mr. Faraja Mangula, learned counsel whereas the 1st respondent, DPP by Mr. Deusdedit Rwegira and Ms. Imelda Aluko, both state attorney. The 2nd respondent did not enter appearance despite being dully served, thus hearing was *ex-parte* against him.

When Mr. Mangula took the floor, as expected adopted the contents of the affidavit to be part of the submission. He stated that, the applicant was not party to Misc. Criminal Application No. 7977 of 2024 which was filed by the 1st respondent, that though present in court, the applicant was denied audience by the fact that was not party to the case. That, following the decision to forfeit 549 cows and 3 donkey owned by the applicant the only remedy is to apply for revision. To support the argument the case of **Victor Rweyemamu Binamungu vs Geoffrey Kabaka and another**, Civil Application No. 602/08 of 2017 COA Mwanza was cited.

Further submission from Mr. Mangula was that, the applicant was not heard in the application despite all efforts he made to claim his properties. He referred to Miscellaneous Criminal Application No. 8021/2024 in which he applied to be joined, Miscellaneous Criminal Application No. 8036/2024 praying for stay of execution and a letter by the applicant to and the DPP and copy to TANAPA Mbarali, the head of

Mbarali Police station. He contended that all these efforts informed the 1st respondent that the applicant was the owner of the property but was ignored. That hearing without affording the applicant to be heard was contrary to Article 13(6)(a) of the constitution and all what was done was a nullity. Counsel for the applicant cited the case of **Patrobert D. Ishengoma vs Kahama Mining Corporation ltd and two others**, Civil Application No. 172 of 2016 to support the point.

On issuance of summons, Mr. Mangula forcefully submitted that the court did not issue summons as required by section 100 of the CPA and was not affixed in conspicuous place as per sections 102 and 103 of the CPA. Counsel wondered why the court rushed to receive the case, hear it and deliver the ruling on the same day while the applicant had on the same day filed application to be joined to the case. It was argued that the district court of Mbarali has been warned several times by this court, however, none of the warning and directives has been heeded, citing the case of Criminal Revision No. 4 of 2021 between **Sedi Sinyau and others vs DPP**, Criminal Revision No. 7/2022 between **Itwe Lugwisha Njenjiwa vs DPP** and Criminal Revision No. 1 of 2023 between **Mohoja Lusuga vs DPP**, in which this court directed Mbarali district court to stop the habit of non issuing summons to parties and giving right to be heard

to the parties, and that to date nothing has been done, that is the DPP and the court has defied the high court orders.

From the above, counsel for the applicant prayed orders sought to be granted and once again the district court of Mbarali to be warned for conducting cases without due process of the law.

In reply, the state attorney did not support the application, he submitted that no reason was advanced for the application to be granted for there was no illegality in the decision of the district court.

On non issuance of summons, it was submitted the circumstance of the case did not permit summons to be served as required by the law. He stated that summons was served to nearby villages and no body shown up.

On the letter written by the applicant expressing his interest in the cows, the state attorney submitted that it was not served to the court and thus could not have been relied upon, stating further that it did not disclose if the applicant had legitimate claim over the cows.

On affording the applicant right to be heard, the state attorney stated that the ruling was made while the applicant was within the corridor

of the court and could be not heard for the big reason that he was not party of the case.

Regarding different applications filed by the applicant to express his interest in the case, the state attorney submitted that it did not feature in the court proceedings and was just rumors not substantiated. He contended that stay of execution, was abandoned it in the process. That failure to exercise his rights as per procedure, can not be considered as denial of the right.

On complaint that the district court was not abiding to this court direction, the state attorney praised the trial court for doing well and that has never refused to abide to court orders.

In rejoinder, Mr. Mangula submitted that in the letter it was the same number of cows arrested by the park ranger which was claimed by the applicant. He stated that filing cases against unknown has been discouraged by this court. Counsel submitted that things in the district court were rushed, each and every thing was done in a single day, which is dangerous in determining parties rights and that there was no any notice issued by the 1st respondent it is why was not attached to the counter affidavit.

I have gone through the rival submissions of the parties and examined the records of the trial court and came to the observation that there is no dispute that in the Miscellaneous Criminal Application No. 7977 of 2024 before Mbarali District Court at Rujewa, the court ordered forfeiture to the Government of the 549 cows and 3 donkey and ordered sale through public auction and proceeds to be deposited in the respective account. Moreover, it is of no doubt that the application was heard *ex parte*.

In this application the court is called on to examine the records in respect of decision in Miscellaneous Criminal Application No. 7977 of 2024 for the purpose of satisfying itself as to the correctness, legality and as to the regularity of proceedings. As to what the terms correctness, legality and impropriety and regularity entails, the Court of Appeal in the case of **Patrick Magologozi Mongella vs The Board of Trustees of The Public Service Sorcial Security Fund**, Civil Application No. 342 of 2019 [2022] TZCA 216 (22 April 2022; TANZLII), held that;

'... in determining the legality of a particular decision or order of the High Court, this Court will examine if that decision or order has the quality of being legal; that it has complied with the applicable law or doctrine. As for correctness and propriety of any impugned decision or order, it would involve the same

endeavour to determine if it is legal and proper. The inquiry into the regularity of the impugned proceedings will not go beyond examining whether the proceedings followed the applicable procedure and accorded with the principles of natural justice and fair play.'

The complaint of the applicant is based on right to be heard and non-issuance of summons. It was submitted by Mr. Mangula that the applicant made several efforts to claim and make sure that is involved in the case but in vain. The state attorney was of the view that the efforts did not involve the court and the applicant was not party to the case to be afforded right of being heard.

Right to be heard is one of the tenets of the rules of natural justice which has constitutional recognition under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time which directs that, when rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to among others, a fair and full hearing. The law is settled that any decision arrived at without a party getting an adequate opportunity to be heard is a nullity even if the same decision would have been arrived at had the affected party been heard. In **Director of Public**

Prosecutions vs Rajabu Mjema Ramadhani, Criminal Appeal No. 223

of 2020 [2023] TZCA 45 (23 February 2023; TANZLII) the court held;

'Time without number, the Court has consistently insisted on the need to guard against contravention of the right to be heard (audi alteram partem) in adjudicating the rights of parties. It is a rule against a person being condemned unheard. Any decision arrived at without a party getting an adequate opportunity to be heard is a nullity even if the same decision would have been arrived at had the affected party been heard.'

At hand, Misc. Criminal Application No. 7977 of 2024 was filed by the DPP against Unknown person and it was heard *ex-parte*, this signifies that the applicant was not a party. There is one more thing pecuniary to this case, it is undisputed that the applicant on 25/3/2024 served the 1st respondent with the letter showing his interest in the seized herds of cattle and on the day the application was heard the applicant was present but denied audience. The reason advance by the state attorney is that the said letter was not addressed to the court and the applicant could not have been heard because was not party to the case.

Without being disrespectful to the state attorney his reasoning is misplaced. On the date the DPP filed the *ex-parte* application in the district court was aware on the claim of the applicant in the seized herds of cattle

through a letter attached to the applicant's affidavit under paragraph 14 and indorsed to have been received on 25/3/2024, the same day Misc. Criminal Application No. 7977 of 2024 was filed in court. There is no averment in the counter affidavit that the letter was received lately after filing of the application. Now if the 1st respondent was aware of the claim of the applicant over the herds of cattle why did she rush to file application against unknown person.

There is yet another eyeopener on this aspect, the applicant was present when application was heard but was denied audience, indeed the applicant not being party to the case, ordinarily could not be heard on the matter, however, circumstance of this case militates otherwise. The purpose of Misc. Criminal Application No. 7977 of 2024 was that 549 cows and 3 donkey were unclaimed property and the owner was unknown. Now if the applicant shown up, what was a wrong to allow him express his view and if necessary, allow the 1st respondent amend the application to include the applicant. The applicant was not idle there is evidence that he filed Criminal Application No. 8021 of 2024 to be joined in Misc. Criminal Application No. 7977 of 2024, we are not told if by the time, Criminal Application No. 8021 of 2024 was filed it was taken by events.

In the circumstances of this case, the applicant took several efforts to make sure that the 1st respondent is made aware of his claim in the seized herds of cattle including accessing the court but it would seem, there was plotted intention to make sure that the herds of cattle is forfeited and sold to the detriment of the applicant. The efforts as rightly complained by the applicant were frustrated by the court after failing to dispose first Criminal Application No. 8021 of 2024 for the applicant to be joined to the case.

Coming to the issue of summons, it was submitted by the applicant's counsel that no summons was issued or affixed to nearby village for the public to have knowledge of the pending case, adversely the state attorney argued that the circumstances did not require summons to be issued.

In the district court Misc. Criminal Application No. 7977 of 2024 was made under section 392A(1) of the CPA, that provision provides inter alia;

'392A(1) Every application under this Act shall be made before a court either orally or in written form. (2) An application made in written form shall be by way of a chamber summons supported by affidavit. The Criminal Procedure Act [CAP. 20 R.E. 2019]

(3) The applicant shall –

(a) in case of written applications, serve the respondent with a copy of application within thirty days from the date the application was filed;

(b) in case of oral application, the respondent shall reply to the application within the time as the court may determine. [Emphasize added].

The bolded parts required when written application is made to the court as the case here, summons to be served to the respondent and when it is oral application, the respondent to be given time to respond. In essence any application made to the court the respondent has to be given audience.

The state attorney may be tempted that the application by the 1st respondent was against unknown person. I have already held that the DPP was aware of the claim of the applicant by the time Misc. Criminal Application No. 7977 of 2024 was filed and during court proceedings. Even assuming that the owner was unknown but there was evidence that herds of cattle was seized at Mjenje area, at least summons to general public on conspicuous place was supposed to be issued. I find inspiration from **Karayehema, J.** in the case of **Mwanjiwa Mdashi vs DPP**, Misc. Criminal Revision No. 3 of 2021 [2022] TZHC 370 (20 January 2022; TANZLII) in which he held that;

*'Ms. James argued that summons could not be issued because the respondent was unknown. This argument seems to be attractive as far as she is aware but she had to re-call that posters were affixed in villages close to the Ngiriama areas within the Ruaha National Park. Similarly, the court in executing its noble duty and exercising its power, had to issue summons to the public notifying them that it had received a complaint from the respondent. In so doing, the court would be summoning the owner of herds of cattle to appear and answer the claim. **It will be apposite to insist that where a suit or an application is instituted and the respondent is unknown, the best way is the court ordering the issued duplicates of the summons to be affixed to some conspicuous parts where the unknown respondent is contemplated to be residing.**' [Emphasize Supplied].*

The application filed by the 1st respondent in the district court was clear that herd of cattle was found at Mjenje area within Ruaha national park, under section 101 to 103 of the CPA the court was duty bound to issue summons to general public to be affixed at conspicuous places of Mjenje area so that the owner could turn up and be heard in the application.

In the present matter it was irregular for the trial court to admit the application and try it without issuing summons, without satisfying itself that the public was appraised about the presence of the application in

court and bad enough in presence of a person he claimed to be the owner and while aware of Misc. Criminal Application No. 8021 of 2024 filed by the applicant to be joined in Misc. Criminal Application No. 7977 of 2024. I am saying so because Misc. Criminal Application No. 8021 of 2024 was also filed, heard by the same magistrate on 25/3/2024, serve the ruling was reserved to the next day. While the trial magistrate may have been moved by the fact that the 1st respondent filed under certificate of urgency the same applied to application which was also filed under certificate of urgency and it impeded continuation of Misc. Criminal Application No. 7977 of 2024.

In this jurisdiction Judges and Magistrates are enjoined to timely deliver justice but that should only be done within the confines of the laws of the land. The warning toward speed and *ex-parte* dispose of the case in deliver of justice in defiance of the law was articulated in the case of **Independent Power Tanzania Limited vs Standard Chartered Bank (Hong Kong) Limited**, Civil Revision No. 1 of 2009, CAT at Dar es Salaam (TANZLII) when the court held;

'... Ex post facto hearings, therefore, should be avoided unless necessitated by exceptional circumstances, as they are at times riddled with prejudices apart from being a negation of timely and inexpensive justice, which we all strive for....

It is important always to remember that speed in itself, as courageously commended by Ms. Karume, is not of the essence in the delivery of justice if it does not lead to justice itself. Our conviction is that in the administration of justice, speed is good, but JUSTICE IS BEST...'

What transpired in the district court was not done in the spirit of promoting timely justice, it was not a parody of justice as such. It was, however, a denial of justice of right to be heard to the applicant who had shown up to claim the seized herds of cattle. After all efforts by the applicant to raise his hand through letters to inform the DPP and appear in court in the case filed by the DPP and file application to be joined to that case informing the court that those properties are not unclaimed as alleged by the DPP, still he was denied that fundamental right. It is no doubt, this was a deliberate denial of right to be heard. It is a trite law that not only justice has to be done but it has to be seen to be done.

From the discussion above, I find the application merited, declare the proceedings in Misc. Criminal Application No. 7977 of 2024 a nullity, together with the ruling, orders and directions made therein, they are hereby revised, quashed and set aside. It is directed to recommence the trial by hearing both parties. From the circumstances of this matter, I make no order as to costs. It is so ordered.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

**V.M. NONGWA
JUDGE
19/6/2024**

DATED and DELIVERED at MBEYA this 19th day of June, 2024 in the presence of Applicant, Beatrice Kessy h/b of Faraji Mangula and Ms. Imelda Aliko SA for respondent.

A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

**V.M. NONGWA
JUDGE**