IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

AT KIGOMA

CIVIL APPEAL NO. 7 FO 2020

(Arising from the District Court of Kigoma Misc. Civil Application No. 4 of 2019)

ELIKANA BWENDA..... APPELLANT

VERSUS

SYLVESTER KUBOKO.....RESPONDENT

JUDGMENT

Dated: 4/6/2020 & 14/7/2020

Before: Hon. A. Matuma,J

The appellant Elikana Bwenda and 4 others stood sued in the Primary Court of Nguruka for claim of **Tshs 2,781,059/=** being sale price of Tobacco. The plaintiff was Silvester Kuboko now respondent in the instant appeal. It was Civil case No. 48/2017.

The appellant and his fellows were adjudged the losers and the Primary Court **V.L. Kagina** learned Resident Magistrate ordered them to pay the respondent his claims;-

> *"Amri: Wadaiwa wamlipe mdai jumla ya shilingi milioni mbili, laki saba na themanini na moja elfu na hamsini ndani ya siku arobaini na tano kuanzia tarehe ya hukumu hii na kila upande utabeba gharama zake katika uendeshaji wa kesi hii".*

They were aggrieved of the decision but it seems they could not appeal to the District Court within time hence they lodged Misc. Civil Application No. 1/2018 to the District Court for extension of time. That application was dismissed for want of prosecution.

Thereafter, they filed Misc. Civil Application No. 4/2019 in the same Court to have their earlier on application restored and heard on merit.

They faced preliminary objection from the respondent among others that the District Court was wrongly moved through the provisions of the Civil procedure code, instead of the provisions of G.N No. 312 of 1964 which relates to Civil procedure (Appeals originating from Primary Courts).

The District Court upheld such objection holding that the application before it was incompetent for wrong citation. The ruling thereof is the subject of this appeal.

At the hearing of this appeal, the appellant appeared in person unrepresented while the respondent was advocated by advocate Ignatius Kagashe.

The appellant is standing alone as his fellows seems to have surrendered since their application for restoration of their previous application was struck out as herein above stated. He has lined up four grounds of appeal mainly challenging that:-

i. *He was no accorded opportunity to be heard on the preliminary objection so raised.*
ii. *That the laws relied upon for striking out his application i.e G.N No. 312 of 1964 Cap. 11 does not exist.*

The appellant submitted that the resident magistrate dismissed their application on the strength of the preliminary objection upon which he was not accorded opportunity to be heard. About the second set of complaints he submitted that as it is purely a legal matter, he let the court to scrutinize it by itself.

Mr. Kagashe learned advocate, on his party conceded that in fact the parties were not heard on the preliminary objection which was the basis

of the decision subject to this appeal. He therefore argued that the decision thereof is a nullity and the parties should be remitted back to the District Court to have the Preliminary Objection heard on merit between the parties. About the none existing of G.N no. 311 and 312 of 1964 which the District court relied in its decision, the learned advocate argued that such laws are existing and therefore the complaint is unfounded.

I have considerately listened to the parties as well as thorough perusing the lower Court's records in relation to the matter at hand.

It is my humble observation that this appeal has merits just on the complaint that the appellant was condemned unheard. The records are very clear to that effect and even the respondent's counsel has conceded as such.

When the appellant and his fellows lodged their application, they faced preliminary objection as I have said herein above. When the documents were completely exchanged between the parties, the trial Magistrate noted on record that:-

"Pleadings are complete, I proceed to hear the application".

Thereafter he invited the parties for the hearing of the application as the records reveals'

"Court: HEARING OF THE APPLICATION STARTS".

Then the 1st to the 5th applicants including the appellant herein were each recorded to have nothing to add in their earlier on filed chamber summons and affidavit. The respondent was also recorded, ***"I have nothing to add".***

The Court then scheduled a date for the decision and it is when it came with the ruling sustaining the preliminary objection for wrong citation of the relevant law.

The record does not show whether the Magistrate invited the parties to argue for and or against the preliminary objection. He merely invited them to argue for and against the application itself and it is when the parties informed it that they had nothing to add. Unfortunately, the decision came out of context as it came from the preliminary objection which was not heard at all.

Even if it would have been assumed that when the Magistrate invited the parties for submissions, he did so on the preliminary objection but wrongly endorsed that he invited them to argue the application itself, still the procedure adopted was wrong, as it were the applicants who were invited first and they all said they had nothing to add. They were right as they did not hear any submission or argument from the respondent who raised the preliminary objection so that they could respond. In the circumstances, it should have been taken that the respondent failed to prosecute his preliminary objection.

The said preliminary objection was drawn and filed by advocate Kagashe but he did not enter appearance to argue it. The Court then acted itself as if the preliminary points were raised by ***suo motto***. Even though the parties were entitled to be heard before the decision could have been reached.

It is a settled law that the decision reached in violation of the constitutional right to be heard cannot be allowed to stand even if it is the same decision which would have been reached had the parties been heard. See; ***M/S Darsh Industries Limited versus Mount Meru Milleers limited, Civil Appeal No. 144 of 2015 (CAT), Scan-Tan Tours versus The Registered Trustees of the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012, Mbeya Rukwa Auto Parts and Transport Limited versus Jestina George Mwakyoma (2003) TLR***

251 (CAT) and that of Abbas Sherally and another versus Abdul Fazalboy, Civil Application No. 33 of 2002.

In the circumstances, I find the ruling in Misc. Civil Application No.4 of 2019 in the District Court of Kigoma to have been reached in violation of the basic constitutional right; i.e the right to be heard, and as such it cannot be allowed to stand. In **Abbas Sherally's** case supra for example it was held;

> *"The right of the party to be heard before adverse action or decision is taken against such 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".*

I therefore, allow the first complaint in this appeal and quash the entire decision of the subordinate Court herein above impugned. To that extent, it would be superfluous to dwell into the second set of complaint.

Up to this juncture, the readily available remedy as rightly stated by Mr. Kagashe learned advocate is to return the records to the trial subordinate Court to have the parties heard on the preliminary objection before the fate of the application itself is determined.

Even though, I have observed some other unpleasant features on record which I thought better to address them.

As I have stated earlier on, the appellant and his fellows had filed Misc. Civil Application No. 1/2018 for extension of time so that they could appeal to the District Court against the decision of Nguruka Primary Court. Their application was dismissed for want of prosecution. Such dismissal order lead the appellant and his fellows to file another application for restoration which is the subject matter to this appeal. That means had the earlier on

application not dismissed, application No. 4/2019 would have not been born. The issue is whether that earlier on application Misc. Civil Application No. 1/2018 was properly dismissed for want of prosecution. In the exercise of my Revisional powers, I invited the parties to address me on the issue.

Mr. Kagashe in the first instance doubted whether I could exercise Revisional Powers in the cause of hearing the Appeal. I told him I have such powers not only under the Civil Procedure Code, but also under the Magistrate Court Act. He thus reluctantly submitted on the issue doubting my powers. In his submission he shortly sated that the dismissal order for want of prosecution was legally justified because on the date the matter was fixed for mention, there was also an order for the parties to attend. Unfortunately on the due date the applicants defaulted appearance and as such the learned Resident Magistrate was entitled to dismiss such application for want of prosecution.

The appellant on his party, argued that the dismissal was uncalled for and therefore Misc. Civil Application no. 1 of 2018 be restored for hearing.

Before I determine the arguments of the parties on the issue, let me clear first the doubts of Mr. Kagashe learned advocate of the extent and limits of my Revisional Powers.

The Revisional Powers of this Court in Civil Matters are derived from the Civil Procedure Code, Cap. 33 R.E 2002 now R.E 2019 and the Magistrate Court Act, Cap. 11 R.E 2002 now R.E 2019. Under the Civil Procedure Code supra, Revisional Powers are under section 79 which reads;-

"(1) The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears–

(a) to have exercised jurisdiction not vested in it by law; or

(b) to have failed to exercise jurisdiction so vested; or

(c) ***to have acted in the exercise of its jurisdiction illegally or with material irregularity,***

the High Court may make such order in the case as it thinks fit.

(2) Nothing in this section shall be construed as limiting the High Court's power to exercise revisional jurisdiction under the Magistrates' Courts Act"

Furthermore, the CPC supra under section 95 serves inherent powers of the Court in the exercise of its jurisdiction to the better end of justice. It provides;-

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

Under the Magistrate Courts Act supra, this Court's power of Revision are stipulated under section 44 (1) (b) which reads;-

"(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a) N/A

(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit"

With all these provisions, it is obvious that this court may exercise Revisional Powers if it is so moved by either party, or where reference for Revision under section 44 (2) of the MCA supra has been made, or on its own motion when need arises.

The issue is thus whether such powers can be exercised in the cause of hearing an appeal. In my humble view, this court is not restricted to use Revisional powers to remedy the situation when it is seized with the records of the lower courts which has been forwarded for appeal purposes. In the case of ***PAUL JACOB V. THE REPUBLIC, Criminal appeal no. 2 'B'of 2010***, although it was a criminal case, the Court of Appeal set out the principle of law that the appellate Court may not decide to consider the appeal on merit but rather exercise its revisional powers when it observes unpleasant features in the trial court's records. In my view such principle applies mutatis mutandis to Civil Cases. We have also so many Civil cases in which the Court of Appeal in the cause of hearing an appeal observed some unpleasant features on records and thus invoked its Revisional powers to remedy the situation. One of those cases is that of ***Editor, Majira News Paper and 3 Others vrs Rev. Fr. Riccardo Enrico Riccion and 26 Others, Civil Appeal no. 35 of 2013.***

In fact it would be ridiculous and or absurd for this court to stand aside and away of justice, leaving unpleasant features on records of the lower courts on the purportedly; ***those are not the matters before the court.*** The simple logic is; if they are not before the court and the court should restrain itself into looking them; then why did they accompany the appeal records. For what! They are here so that this court can look on them and issue appropriate orders for the better end of justice. In fact that is the spirit in our Constitution of 1977 and the Civil Procedure Code

that Courts of law should dispence justice without undue regard to technicalites.

Revisional Powers of the Court are only restricted to the parties when they tends to use them as an alternative to appeal.

Now let me resume to the issue at hand as herein above stated. According to the proceedings in Misc. Civil Application No. 1 of 2018, on the 19/2/2018 the matter was scheduled for the first time before Hon. E. Baha (RM). On that day both the applicants and the Respondent were absent.

The Court then endorsed; **"Calling for record to be issued".**

Then came on 2/3/2018 in which the coram indicates that the applicant and the respondent were present. The coram does not however indicate whether only one applicant was present or all of them. The Court issued three different orders namely;

"*i. Mention on 20/3/2018*

i. Summons for order to be issued

ii. Parties to attend"

Then it came that date 20/3/2018 and the coram reads that, the applicant was absent but the respondent was present. It is again not clear whether only one applicant was absent or all of them.

The Court without even taking a word from the respondent who was present in Court it jumped to dismiss the application for want of prosecution let me reproduce the coram of that date and what transpired'-

"Date: 20/3/2018

Coram: F.U. Shayo – RM

CC: Veronica

Applicant: Absent

Respondent: Present

Order: This application is dismissed for want of prosecution.

Signed".

The trial Court did not state whatever reason for the dismissal order. The absence of the party in the proceedings might be a good and justifiable reason for dismissing his or her suit or application for want of prosecution, but the Court must state whether the presence of such a party on that day was so necessary for the progress of the matter and whether his absence prevented a step a head in the progress of the matter.

It is a settled law that any decision to be reached, must contain the reasons of the Court for why such decision was so reached.

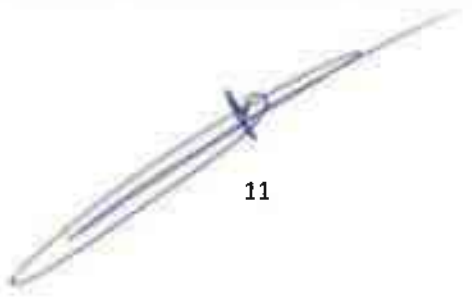
In the instant matter no whatever reason was reflected on record whether the original record by that time had already been brought as per previous calling for records. It is not further reflected whether summons for orders were issued as previously ordered and its compliance.

On that date it was fixed for mention in which the matter could not proceed for hearing unless the parties would have agreed as no one could have been forced for hearing because it was not a date for hearing and therefore, none of the parties was compelled to enter appearance with all necessary supporting authorities for hearing etc.

Such a decision was therefore, reached arbitrarily contrary to the rules of justice. In the case of ***TANESCO VS IPTL and 2 others (2000) TLR 324*** it was held that judicial discretion must be guided by law and rules and not by humor. It must as well be not arbitrary and fanciful but legal and regular.

Such a decision is what brought about all the problems subsequent thereto up to when the appellant reached this Court with this appeal. In fact I have determined several cases relating to the parties herein the source of which is such a dismissal order. This is due to the fact that after the dismissal order, the appellant as stated herein filed an application for restoration (Misc. Civil Application No. 4/2019), that was dismissed as stated above. Together with his fellows they filed a Review application to have the decision in the said Misc. Civil Application No. 4/2019 reviewed (Civil Review No. 2/2019). They were kicked off on the ground that they used Chamber Summons and Affidavit instead of a Memorandum of Review. They then lodged the said memorandum of Review (Civil No. 5/2019) but they faced a blow of time limitation. That made accumulation of Misc. Civil Applications between the parties herein in the District Court. Having been tired with the blows thereat came before this court to have all the decisions looked on. He again faced another blow for the application was omnibus. The appellant herein still eager applied for extension of time before me and was accordingly granted hence this appeal. All these cases and troubles between the parties resulted from a single decision for the dismissal of the appellant's application at the District Court allegedly for want of prosecution. Now, closing my eyes on such illegal dismissal order, it means returning the parties in the subordinate court to continue litigating on technical issues and at the end they will come before this court on the same decision challenging the said dismissal.

In the exercise of my revisional powers as herein above stated, I do hereby quash and set aside the dismissal order in Misc. Civil Application No. 1/2018 and order its restoration and an immediate hearing.



That being said, Misc. Civil Application No. 4/2019 has already been overtaken by event and it ends as if it had not been there.

I direct the parties to go back to the District Court for hearing of the Misc. Civil Application No. 1/2018 as if the same was not dismissed for want of prosecution.

Whether or not the other applicants in that application will be interested with it, it shall be the duty of the District Court so to determine. They shall however be subject to the rules of estoppel under section 123 of the Evidence Act, Cap 6 R.E 2019 if it is truly proved that on their party, they became satisfied with the decree of the Primary Court against them and they have complied to its execution. Their satisfaction if any however does not in any way preclude the right of the appellant to challenge such decision if on his party, he feels aggrieved.

The findings herein having been reached on the strength of legal issues which was the violation by the subordinate Court itself independent of the parties, I order no costs to either party.

It is so ordered.

A. Matuma

Judge

14/7/2020