THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION NO. 22 OF 2023.

(Arising From the decision of Honourable Shaidi PRM delivered by Honourable Simba PRM in Civil Case No. 107 of 2015 from the Resident Magistrate Court of Dar es Salaam at Kisutu).

THE ATTORNEY GENERAL.....APPLICANT

VERSUS

MOHAMED LIUNDI..... 1ST RESPONDENT

DAR ES SALAAM WATER AND SANITATION

AUTHORITY SUCCESSOR OF DAR ES SALAAM

WATER AND SEWERAGE CORPORATION.....2ND RESPONDENT

RULING

25th October & 12th December 2023

MWANGA, J.

The ruling on a revisional application before this court was made by the Attorney General, the applicant herein. It is against the two

respondents; **Mohamed Liundi** and **Dar Es Salaam Water and Sanitation Authority,** the successor of **Dar Es Salaam Water and Sewerage Corporation** (henceforth the first and Second respondent respectively). The same was preferred under sections 43 (3) of the Magistrate Courts Act, Cap 11 RE 2019, and Section 79 (1) of the Civil Procedure Code, Cap. 33 [RE 2019].

The application is supported by an affidavit of one Edwin Joshua Webiro, learned State Attorney who also represented the applicant during the hearing. Mr. Amosi Enock, learned State Attorney represented the Second respondent in this matter. The 1st respondent was represented by Ms. Mariam Majamba and Ms. Leah Feruz, learned advocates. The Second respondent, however, conceded to the application. On the other hand, the first respondent objected to the application by the counter affidavit affirmed by Mr. Mohamed Liundi.

According to the chamber summons, the applicant prays for the following orders:

i. For this court to call and examine the legality, correctness, and propriety of the impugned Judgment and decree of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case No. 107 of 2015.

ii. For this court to revise the said order of the lower court and set it aside for being improperly procured.

iii. For this court to make any other order it deems fit.

iv. For costs of this application to be provided.

The affidavit and supplementary Affidavit supporting the application essentially stated that the applicant has a legal duty to intervene and protect public interests and public properties at any time in the courts of law and tribunals. It is deponed that, on 7th March 2015 1st respondent herein was arrested by the police officer and charged with the first count of; damage to the waterworks and drawing off water from waterworks of DAWASCO C/S 45 (1) and (2) of DAWASA ACT No. 20 of 2001 at the Resident Magistrate court at Kisutu.

Following the acquittal, the 1st respondent filed a malicious prosecution case against DAWASCO and unfortunately, DAWASCO filed a Written Statement of Defence out of time without leave of the court, the result of which WSD was expunged from the record.

Consequently, the court pronounced judgment on default in favor of the 1st respondent. The court ordered the 1st respondent to pay Thirty million shillings (30,000,000/) as compensation, the interest rate at 27% of the claimed amount, interest at the court rate on the decretal sum

from the date of judgment to the date of final payment, and costs of the suit.

In 2019 the 1st respondent filed Execution No. 40 of 2019 to execute decree in Civil Case No. 107 of 2015, entering a court order for DAWASCO to pay Tshs. 70,800,000/= or the Managing Director of 2nd Respondent is arrested and detained until full payment of the sum of money and the same is still pending in court. The same application was amended in 2023 whereby the respondent applied for a certificate of payment.

On 14th February 2022, the 2nd respondent informed the Solicitor General of the existence of the exparte judgment. After the receipt of the letter Solicitor General applied for an extension of time to apply for revision and the same was granted. The Affidavit deponed that, the impugned judgment is tainted with illegalities which include, the court lacking jurisdiction, the malicious prosecution instituted against the public corporation, the reliefs being granted without proof, general damages granted without reasons, and interest granted against the law.

Also, in the supplementary affidavit, it was deponed that, the judgment was delivered in the absence of the parties without notification. The affidavit further deponed that, the applicant was not

part of the case in the lower court and that the lower court had made the impugned judgment/ order. According to the deponent, the government and the public at large stand to suffer a great irreparable loss and hardship following the order. Adding that, there is, however, a point of illegality and irregularity in the order at issue.

In the counter affidavit, the learned counsel for the 1st respondent did dispute most of the facts narrated in the background of this matter herein above. She, however, basically affirmed that the matter was proved within the standard, and the 2nd respondent failed to file a written statement of defense. According to her, the impugned order was made according to the law as the Attorney general was not a necessary party. Further to that, she emphasized that the court had jurisdiction, and reliefs were granted with proof. It is added that general damages were granted with reasons and interests were awarded as per the requirement of the law.

At the oral hearing of the application at hand, the learned State Attorney for the applicant adopted the contents of the affidavit. He further submitted on the ground that the trial court lacks jurisdiction. According to him, the suit was instituted against the government under the Government Proceedings Act which requires cases against the

government to be instituted in the high court. He stated that the requirement is introduced in Act No. 140 of 1974 and it is couched in the mandatory terms. He submitted that the 1st respondent instituted the case against the 2nd Respondent ie DAWASCO now DAWASA in the year 2015 in which the law was in place. So, the case was supposed to be instituted in the high court. He cited the case of **Ruth S. Mjema versus Ruth Mjema and 2 others,** Land case No. 136 of 2019. He further contended that the issue of jurisdiction can be raised at any time even in the appellate stage and, when the court determines the case without jurisdiction a decree is a nullity. He cited the case of **Sospeter Kahindi versus Mashiri,** Civil Appeal No. 56 of 2017**.**

In her response, counsel for the 1st Respondent submitted that DAWASCO was a separate entity that could sue or be sued, and due to vicarious liability, it was proper for the 1st Respondent to sue the 2nd Respondent. She cited part V1 of the DAWASA Act. She stated further that, she has no objection that cases against the government must be instituted in the high court but DAWASA is a body Corporate. She insisted that it was in the year 2020 when DAWASA was regarded as a government department, and in that view, the 1st respondent would

have joined the Attorney General and the case against the government would be taken to the High Court.

Given that, the counsel argued that the court shall not nullify the proceedings on this ground. About her argument, the counsel cited Act No. 11 of 2020 (Written Laws Misc. Amendment Act). She further distinguished the case of **Sospeter Kahindi versus Mashiri,** Civil Appeal No. 56 of 2017(supra) by stating that, would only be applicable if the matter was against the government. She narrated that the matter was in 2016 and revised in 2023 which is 7 years later. According to the counsel, the applicant wants the court to treat the matter as retrospective. She cited the case **of Gapco T LTD Tanzania Railway Corporation**, Land Case No. 11 of 2018. She also stated that the matter was already provided a certificate of payment in 2023 and more or so, GN 139 of 2005 did not indicate a proper forum on which DAWASCO could be sued. The counsel added that the cases cited and section 6 of the Government Proceedings Act are irrelevant because the issue is not joining AG but rather the forum and, after all, DAWASA agreed to pay the amount; therefore, bringing this application at this juncture is the abuse of court process. She cited the case of **Haroub**

In his rejoinder, the learned State Attorney stated that the issue was not to join the Attorney General because, at that particular time, it was not the requirement of the law. The learned State Attorney insisted on the Court's jurisdiction as DAWASCO was the public corporation owned by the Government 100%. He cited the Office of Attorney General (Discharge of Duties) Act, which empowers the Attorney General to intervene as he was not a party in the trial court.

I have heard the learned counsels and given thoughtful consideration to the respective submissions made by the parties. Notably, Dar es Salaam Water and Sewage Corporation was a body corporate by section 4(1) of the Public Corporation Act, 1992 (through GN No. 139), capable of suing and being sued as provided under Section 4(2) as follows,

> *"Every public corporation established by an Order made under this section shall— (a) have perpetual succession and a common seal;*
>
> *(b)* ***in its corporate name be capable of suing and being sued;*** *and …"*

Given the above provision, the contested issue between the parties is in which Court DAWASCO ought to be sued. This question touches on the issue of Jurisdiction of the court. The law is settled that, jurisdiction

is a creature of statute. In the case of **Commissioner General of Tanzania Revenue Authority versus JSC Atomredmetizoloto (ARM**Z), Consolidated Civil Appeal No. 78 and 79 of 2018 CAT(Unreported) quoted in the High Court case of **Michael Joachim Tumaini Ngalo versus Jitesh Jayantilal Ladwa** Civil case no 18/2021 it was held that;

> ***"Jurisdiction is a creature of statute and as such, it cannot be assumed or exercised based on likes and dislikes of the parties. That is why the court has on several occasions insisted that the question of jurisdiction is fundamental in court proceedings and can be raised at any stage even at the appellate stage. The court suo moto can raise it, in adjudication the initial question to be determined is whether or not the court or tribunal is vested with requisite jurisdiction."***

In the present case, the counsel for the applicant Mr. Webiro contends that, since DAWASCO is a public corporation owned by the government for 100%, it qualifies to be a government and it is supposed to be sued in the high court in the premises of Section 7 of the Government Proceedings Act. For ease of reference, the section 7 of the Act reads;

"Notwithstanding any other written law, ***no civil proceedings against the Government may be instituted in any court other than the High Court" (emphasis is mine).***

I have carefully construed the above provision of the law. And I must state that, with due respect, the learned State Attorney has misapplied the respective provision of the law. In my view, DAWASCO being a Public Corporation alone does not suffice to constitute the meaning of government premised in Section 7 above. Nowhere it is indicated in the Public Corporation Act or (DAWASCO establishment) Order GN No 139 that the forum for instituting the claim against DAWASCO is in the high court.

Because of the above, the suit against DAWASCO can fall under Section 40 of the Magistrate Court Act subject to the pecuniary and territorial jurisdiction of the court. Looking at the plaint the 1st respondent claims, among other things, was Tshs. 95,000,000/= being general damages and the cause of action occurred in Kinondoni district Dar es Salaam Region.

Given the above, I entirely agree with Ms. Miriam Majamba learned counsel that, the court had the requisite jurisdiction to entertain the matter at that particular time. Henceforth, this ground lacks merit and it is dismissed.

Before I go through the 2nd and 3rd grounds of revision, I have a clear reason to deal with the 4th ground of revision. That is judgment was delivered in the absence of the 1st respondent. The learned state attorney submitted that the law requires the issuance of notice on the date of Judgment. And the matter at the trial court proceeded exparte against the 2nd respondent. No notice was issued to the 2nd respondent on the date of judgment which is contrary to Order XX Rule 1 of the CPC. He cited the case of **Cosmas Construction Co. Ltd Vs Arrow Garments Ltd TLR 1992.** Further to that, he stated that failure to issue notice renders the judgment inoperative and invalid. He referred to the case of **Omari Shabani Nyambu vs Doma Urban Water Supply and Sewage Authority (DUWASA),** Civil Appeal No. 303 of 2020, and **Awadhi Idd Khajas versus My Fair Investment Ltd,** Civil Application No. 281 of 17 of 2017.

On the other hand, the learned counsel for the 1st Respondent did not contribute much on this ground, unless it escaped my mind. Notwithstanding, indeed, the law under Order XX rule 1 of the Civil Procedure Code requires the Defendant to be given notice as to the date of Judgment where the case is heard exparte. For ease of reference, let me reproduce the relevant provision as hereunder;

"The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocate"

Without much ado, there are Pythagoras of cases that have settled the matter to the rest. In the case, **Cosmas Construction Co. Ltd Vs Arrow Garments Ltd TLR 127,** the Court of Appeal held:

"party who fails to enter an appearance disables himself from participating when the proceedings are consequently exparte but has to be told when the judgment is delivered so that he may if he wishes, attend to take it as certain consequences may follow"

Another case interpreted the above-quoted provision as mandatory, therefore, no compliance which renders the Judgment invalid. See the cases of **Niko Insurance (T) LTD versus Basila Benedict Chuwa and 2 others,** Civil Appeal No. 155 of 2019 (unreported). Additionally, in the case of **Khadija Rehire Said & 5 Others Vs Mohamed Abdallah Said,** Civil Application No. 39 of 2014 CAT (Unreported), it was held that;

'non-service of the applicant of the date of judgment, the very legality of the judgment is put to question, *and that this constitutes another good cause for an extension of time"* ***(emphasis is mine).***

I have perused the trial court proceedings, it shows that the judgment was delivered twice. On 10th March 2016, it is indicated that the judgment was delivered in the absence of advocates and parties before Shaid PRM; and it was again delivered by T. K Simba on 15/03/2016 in the presence of Thobias Kavishe for the Plaintiff and Sara Mulokozi, Court Clerk. On 15/02/2016 Shaidi PRM fixed a date of Judgment to be delivered on 15/03/2016 and the Defendant was absent. Leave alone such clear confusion on when and how the judgment was delivered, no notice was issued to the Defendant on the date fixed for the Judgment. In the entire proceedings, no proof that a notice was issued according to the law.

That being said, this ground succeeds and disposes of the whole case revision because the judgment is invalid and inoperative. See, **Omary Shaban Nyambu versus Dodoma Urban Water Supply and Sewage (DUWASA**) (Supra) where it was held

> ***"...a purported judgment delivered in the absence of parties was not an effective, operative, or a valid Judgment*** *which could have been appealed against.* ***It was a nullity"(emphasis is mine).***

Given such a position, I exercise my revisional powers under section 43(3) of the Magistrate Courts Act, Cap. 11 R.E 2019, and,

Section 79 (1) of the CPC and nullify the Proceedings dated 10th March 2016 to 15th Mach 2016, quash the purported Judgment dated 15th March 2016 and the decree therein and order that the case file be placed before another magistrate for composing a fresh judgment to be delivered in accordance of the law.

Order accordingly.

H. R. Mwanga

Judge

12/12/2023