

IN THE HIGH COURT OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CIVIL APPEAL NO. 20 OF 2023

(Arising from the District Court of Lushoto in Miscellaneous Civil Application No. 08 of 2022)

HERMAN ERDTSIECK APPELLANT

VERSUS

GIJS DE WITRESPONDENT

JUDGMENT

K. R. Mteule, J

11/12/2023 & 15/12/2023

This appeal arises from the decision of the District Court of Lushoto in **Miscellaneous Civil Application No. 08 of 2022** which was filed by the instant Appellant seeking for orders for security of costs to be paid by any defendant in **Petition No. 5 of 2022**. The Respondent in the application raised a point of preliminary objection to the effect that **Miscellaneous Application No 8 of 2022** was incurably defective for being supported by a defective affidavit. The preliminary objection was heard orally and ruling thereof was reserved. On 3rd April 2023, the ruling was delivered. In the Ruling, the Hon trial Magistrate noted that the chamber summons did not disclose the amount of security for costs



sought to be granted. She was of the view that the court could not grant something which was not sought for. She therefore proceeded to dismiss the application. This decision aggrieved the Applicant who preferred this appeal.

The Appeal contains the following grounds of appeal:

1. That the Trial District Court denied the Appellant his right to be heard as he was not invited to address on the issues raised by the Court suo moto.
2. That the Trial District Court erred in law and in fact by determining the application on the basis of jurisdiction and failure to state the amount for security of costs in the chamber summons thereby occasioning injustice to the Appellant.

The Appellant is praying for the following orders:-

1. To nullify the ruling and the resultant orders of the Trial District Court.
2. To remit the file back to the Trial District Court so that the Application can be determined on merits before another magistrate.



3. The Appellant to have the costs of this appeal and the proceedings at the Trial District Court;
4. Any other or further reliefs that this Honourable Court may deem fit to grant.

This appeal was heard by a way of written submissions. The Appellant was represented by Hendry Njowoka Advocate while the respondent was under the representation of Linda Lugano Advocate.

Arguing the **first** ground of appeal Mr. Njowoka submitted that the Trial District Court denied the Appellant his right to be heard as he was not invited to address the court on the issues raised by the Court suo motu.

He referred at page 5 of the Trial Court Ruling where the Trial Magistrate dismissed the application on the ground that the amount for security of costs was not mentioned in the chamber summons. He argued that the proceedings of the Trial Court and the judgment are clear on the fact that parties were never invited to address the Court on the matter.

In his view the omission by the Trial Court denied the Appellant with his right to be heard which is not in line with the direction in the case of

Shule ya Sekondari Mwilamvya vs Kaemba Katumbu (Civil



Appeal No.323 of 2021) [2023] TZCA 17316 (9 June 2023, TANZLIT) in which at the last paragraph of page 6 and first paragraph of page 7 the court found that;

"From the parties' submissions, it is without doubt, and as conceded by the respondent that, the CMA raised and answered the issue of time limitation in the course of composing its ruling. It did not invite parties to address on that issue. It is a cardinal principle of natural justice that a person should not be condemned unheard, and that, fair procedure demands that both sides should be heard"

Therefore, in terms of the above position and the whole decision of the CAT in the case, Mr. Njowoka prayed for the merits of the first ground of appeal.

Regarding the second ground of appeal that the Trial District Court erred in law and in fact by determining the application on the basis of jurisdiction and failure to state the amount for security of costs in the chamber summons, Mr. Njowoka submitted that the decision of the Trial Court was made without any legal justifications, and supported with zero authorities. In his view the inclusion of the amount for the security of costs in the chamber summons is not a legal requirement as the same is

not provided for in **Order XXV Rule.1 (1) of the Civil Procedure Code [CAP 33 R.E. 2019]**.

He referred to Paragraph 7 of the Affidavit in support of the Application at the Trial Court which mentions the amount. In his view, an affidavit and the chamber summons are complimentary to each other as per the case of **Lyamuya Construction Co Ltd vs Board of Registered of Young Womens Christian Association of Tanzania (Civil Application 2 of 2010) 2011 TZCA 4 (3 October 2011, TANZLII)**.

That pages 3, 4, 5 and 6 the Court discussed an issue as whether failure to state the grounds of an application in terms of **Rule 48(1) of the Court of Appeal Rules 2009** is fatal and with reference to their previous case of **The Principal Secretary, Ministry of Defence And National Service vs Devram Valambhia (1992) TLR 387 at page 5 the CAT** which found that in general terms, if something is missing in the notice of motion (chamber summons in our case) and the same is found in the affidavit, there is nothing bad as the affidavit and the notice of motion are one thing. He therefore submitted that there were no justifications for the Trial Court to dismiss the application.

Mr. Njowoka challenged the act of the Trial Resident Magistrate to peg the decision on jurisdiction which he speculated to mean pecuniary jurisdiction. In his view, Pecuniary jurisdiction is not determined in



security of costs which is like the bill of costs. He submitted that in terms of order **46 of Advocate Remuneration Order, G.N No. 264 of 2015** bills are taxed on prescribed scales and that **Order 41** of the same **Advocate Remuneration Order**, states that in contentious proceedings, Bills of costs are taxable according to the rates prescribed in the Tenth, Eleventh and Twelfth Schedules. He submitted that looking at the schedules, one can note that the costs can in no way exceed 8% of the value of the subject matter and that some are very minimal compared to the value of the subject matter as the scales have been mentioned directly. He is of the view that if the main suit has been well entertained in terms of pecuniary jurisdiction, there is no way the issue of pecuniary jurisdiction can arise on bill of costs and the related proceedings.

Considering the High Court being a Court of Record/Reference Mr. Njowoka prayed for a directive on the matter to assist litigants and the legal fraternity in general on similar issues in the Lower Courts.

He finally, prayed for the merits of the appeal with costs as per the memorandum of appeal.

In reply, starting with the first ground of appeal, that the appellant was not afforded right to be heard on the issue raised by the court suo moto,

Ms. Linda drew the attention of this Court at the trial court reason for dismissing the application being, lack of amount mentioned in the chamber summons which the applicant (now appellant) was requesting as security of costs. She is surprised that the appellant's counsel terms that as an issue raised by the court suo moto while in fact the chamber summons did not state the amount the applicant (now appellant) was praying as security for cost from the respondent. She argued that it is a cardinal principle that, in chamber applications prayers are contained in the chamber summons and facts supporting such prayers are contained in the affidavit and that the court is not supposed to separate the seed from the chaff.

In view of Ms. Linda, if the chamber summons did not have the amount prayed as security for cost, then it ought to be dismissed for such failure.

Regarding the second ground of appeal faulting the trial Court for dismissing the application without legal justification and zero authorities. Ms. Linda claimed that this ground is highly misconceived and ought to be disregarded from the outset. She restated what she submitted in the first ground of appeal that the trial Court legally and lawfully dismissed the application as it was not in conformity with the law as prayers are



always contained in the chamber summons and facts supporting the said prayers are then found in the affidavit.

She challenged the authorities cited by the Appellant that they are to that effect are miles apart from the point of controversy in this appeal hence they should be disregarded. In her view, it is obvious that when the conditions set by the law for grant of an application for security of cost are not met by the applicant in applications of this sort, they ought to be dismissed forthwith. She submitted that it is clear that the application for security of costs by the applicant (now appellant) did not comply with the law hence the only remedy at the disposal of the trial Court was to dismiss it entirely.

She thus prayed for this ground of appeal to be dismissed for lack of merit.

The Appellant filed a rejoinder in which he challenged the Respondent's submission for not containing any authorities to back up her position in the first ground of appeal. Mr. Njowoka called this as a replica of what the Trial Court did. He submitted that the ground is not about the trial court failure to state reasons for the decision, but the decision was made on an issue which the Appellant was not invited to address in line with the referred position in **Shule ya Sekondari Mwilamvya vs**

Kaemba Katumbu (Civil Appeal No.323 of 2021) [2023] TZCA 17316 (9 June 2023, TANZLII).

He reiterated that, chamber summons and an affidavit are complimentary and therefore they are read together, and this is per the referred position **in Lyamuya Construction Co Ltd vs Board of Registered of Young Womens Christian Association of Tanzania (Civil Application 2 of 2010) 2011 TZCA 4 (3 October 2011, TANZLI)** and the **Principal Secretary, Ministry of Defence and National Service V Devram Valambhia (1992) TLR 387.**

The contents of the rejoinder are more or less reiterating what was submitted in the submission in chief and therefore I see no reasons to restate it at this juncture. I will proceed with the determination of the merits of the application.

Having considered parties submission, one issue calls for consideration. The said issue is whether the appeal has merits. In responding to this issue, the two grounds of appeal will be considered starting with the first one.

In the first ground, the appellant is challenging the decision of the Trial Court to dismiss the application on legal ground without affording the parties right to be heard by addressing the ground by which the

application was dismissed. It is a cardinal principle of law that the court should not decide on a matter without affording the parties a right to be heard on it. In **Margwe Erro Margwe And 2 Other Versus Moshi Bahalulu, Civil Appeal No 111 Of 2014, Cat, At Arusha (Unreported)** the Court of Appeal had the following to state:

"As indicated earlier, the learned judge in the present appeal, in the course of composing her judgment posed a question suo motu on whether the exclusion of period of obtaining the Decree can be dealt in the appeal 4 (sic!). She did not invite the parties (as she ought to have done), to address her on this question which in the light of things she found to have been necessary in the determination of the appeal before her. Instead, she went ahead and suo motu ruled that.

'The court cannot in an appeal automatically exclude the time used to obtain copies of Judgment and Decree...."

The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that in the circumstances of this case the denial of the right



to be heard on the question of time bar vitiated the whole judgment and decree of the High Court."

From the above authorities, it is apparent that the court must invite parties to address an issue raised suo motto and failure to do so constitutes denial of a right to be heard which vitiates the proceedings.

The question for determination at this juncture is whether the issue which determined the application was raised by the trial court suo motto. As to whether this fact is disputed, this has not been vivid in the Respondent's submissions. I could not find a direct statement in the Respondent's submissions which dispute the assertion that the issue of the amount sought to be granted as security for costs was raised suo motto. Nevertheless, it is on record before the trial court that parties argued points of preliminary objection which was challenging the affidavit for failure to be verified, signed and attested and for containing argumentative paragraphs with legal opinions. None of the said points of preliminary objection raised any issue of the failure of the applicant to specify the amount of security for costs sought therein. But while composing the ruling, the magistrate stated as I quote hereunder:

"This court perused careful on the chamber summons and the affidavit brought before the court to support the application and



came up with the following findings. The chamber summons itself did not disclose the amount which the applicant is seeking to grant. Even if this court can decide otherwise then how this matter can be executed at the end. No specific amount claimed by the applicant to determine the jurisdiction of the court. The court cannot grant something which one did not pray. It is the requirement of the law.

The chamber summons usually supported by affidavit. Referring to paragraph 7 of the affidavit the applicant prays TZS. 20,000,000/=twenty million, but in the chamber summons something the applicant mention only costs. The court cannot give someone something he/she did not pray.

For those reasons, the application sis dismissed with costs for the reasons stated above.

It is so ordered"

It is apparent that the decision of the magistrate purely based on the issue she raised after having perused the record and it came out while composing the Ruling. Nothing on the record indicates that parties were summoned or called upon to address the court on the issue. As held in



Margwe Erro Margwe And 2 Other Versus Moshi Bahalulu, this amounts to denial of right to be heard to the parties.

In the same case of **Margwe Erro Margwe And 2 Other Versus Moshi Bahalulu**, the court had the following to say:

*"This Court has held time and time again that a denial of the right to be heard in any proceeding would vitiate the proceedings. See for example, **ECO-TECH (Zanzibar) Limited vs Government of Zanzibar, ZNZ Civil Application No. 1 of 2007 (unreported)**, **Mbeya-Rukwa Auto Parts & Transport Limited vs Jestina George Mwakyoma- Civil Appeal No. 45 of 2000 (unreported)**, **D. P. P. vs Sabina Tesha & Others [1992] T. L. R. 237**, **Dishon John Mtaita vs D. P. P.- Criminal Appeal No. 132 of 2004 (unreported)** to mention just a few.*

Referring to the right to be heard as enshrined in the Constitution the Court in the Mbeya- Rukwa case (supra) held:

"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law and

declares in part: (a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu. "

In another case, Abbas Sherally & Another vs Abdul S. H. M. Fazalboy - Civil Application No 33 of 2002 (unreported) the Court held:

"The right of a party to be heard before adverse action 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. "

It is the same position which was reiterated in the more recent case of 2023 in **Shule ya Sekondari Mwilamvya vs Kaemba Katumbu** cited supra by Mr. Njowoka as per the words quoted therefrom in the Applicant's submission.

From the above discussion and the cited authority, it is my finding that since the parties were not called to address the court on the issue of the

application's failure to mention the amount claimed as security for costs this was a denial of a right to be heard. In light of the cited authorities, denial of the right to be heard vitiates the proceedings. It is on this reason I find the proceedings of the trial court liable to vitiation for having the court denied right to be heard to the parties.

Since conclusion in the first ground vitiates the proceedings in the trial court, and that it is on a point of law, I do not see any basis of proceeding with the second ground in determining as to whether the ground of trial decision was correct or not. This Appeal is therefore disposed of basing on the first ground alone.

As such, the appeal is allowed, and the prayers sought by the Applicant are granted except for the prayer of costs which should not cover the proceedings in the District Court. In my view, costs in the proceedings in the District Court need to be determined by the District Court and not this court. Therefore, I make the following orders:-

1. The ruling of the District Court of Lushoto dated 4th April 2023 in Miscellaneous Civil Application No. 08 of 2022 and the resultant orders are hereby nullified.



2. I remit the file back to the Trial District Court so that the Application can be determined on merits before another magistrate.

3. The Appellant to have the costs of this appeal.

As said earlier, I do not agree with them on the costs emanating from the proceedings in the District Court will should be considered in the said District Court and not in this appeal. It is so ordered.

Dated at Tanga this 15th Day of December 2023



A handwritten signature in blue ink, appearing to be "Ry", is written above the judge's name.

KATARINA REVOCATI MTEULE

JUDGE

15 DECEMBER 2023

Court:

Judgment delivered this 15th Day of December 2023 in the presence of Hendry Njowoka Advocate for the Appellant and Ms. Linda Lugano, Advocate for the Respondent.



A handwritten signature in blue ink, appearing to be "Ry", is written above the judge's name.

KATARINA REVOCATI MTEULE

JUDGE

15 DECEMBER 2023