

TANZANIA / JUDGMENT

DANIEL EPHATA LYIMO

COURT
TANZLIIDECIDED
14 February 2025

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA DODOMA SUB REGISTRY AT
DODOMA CIVIL REVISION NO. 24996 OF 2024 (Arising from the Decision of Dodoma District
Court in Miscellaneous Application No. 56 of 2023) DANIEL EPHATA
LYIMO.....APPLICANT VERSUS EDWARD RASHID
MGOMBA..... 1st RESPONDENT MATERA & CO. LTD..... 2nd RESPONDENT
TANADEC E.A LTD..... .3rd RESPONDENT

RULING

6th & 14th February 2025 MASABO, J:- By a chamber summons filed in court under section 43(3) and 44(1)B of the Magistrate Court's Act, Cap 11 R.E 2019 read together with section 79(1)(b)(c) of the Civil Procedure Code, Cap 33 R.E 2019, the applicant is praying that:

1. This Honourable Court be pleased to call for the records of the Dodoma District Court in Miscellaneous Civil Application No. 56/2023 for the purposes of satisfying itself as to the correctness, legality or propriety of the decision of the Dodoma District Court
2. This Honourable Court be pleased to quash the decision of the Dodoma District Court in No. 56/2023
3. Costs be provided Page 1 of 8 The application is braced by the applicants affidavit in which it is deponed that, the applicant was a bonafide purchaser of a mining license described as PML No.991969CZ which was auctioned at a public auction conducted by the 3rd Respondent on 10th October 2023 in the execution of an order of Dodoma District Court in Execution No.8 of 2023. Having purchased it, he had it transferred and registered in his name on 14th February 2024. Surprisingly, on 25th September 2024, he was made aware that the sale had been nullified by the same court in Miscellaneous Civil Application No.56 of 2023 that was prosecuted and decided in his absence thus he did not defend his interest and was therefore condemned unheard. It was deponed further that the court suppressed its jurisdiction when it entertained the application for nullification of the sale. The respondents objected to the application. The hearing was scheduled to proceed in writing. The applicant had to file his written submission by 10/12/2024. The respondents were to file their reply submission by 24/12/2024 and a rejoinder if any had to be filed by 31/12/2024. Thereafter, the parties had to appear in court to schedule the ruling date on 6/2/2025. On that date, it was

observed that the order had been partially complied with. Only the applicant complied by filing his submission in chief. The second and the third respondents did not comply. They also defaulted appearance on that date. The first respondent who was present submitted that he recalled that he was given a control number and paid the filing fees for the reply submission. He further stated that his counsel had assured him Page 2 of 8 that he had filed it. He prayed that he be granted leave to rectify the anomaly. Although he produced no proof, I found it in the interest of justice to allow him to rectify the anomaly. Leave was therefore granted for him to properly file his reply submission by 10/2/2025. Since the applicant had no intention to file a rejoinder, the application was subsequently set for ruling on 14/2/2025. The first respondent defied the extension of time as he did not file the reply submission within the extended time and up to the time of composing this ruling, he has not filed it. This means that there is only one submission for consideration and I will, consequently, proceed to determine the application based on the arguments raised in this sole submission. This is in line with the trite law prevailing in our jurisdiction that failure by the party to file a written submission when ordered is tantamount to a default appearance on the date scheduled for a hearing. Dealing with a similar issue in *Godfrey Kimbe vs Peter Ngonyani* (Civil Appeal No. 41 of 2014) [2017] TZCA 1 TanzLII, the Court of Appeal while reckoning its previous decisions held thus: In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case- see: *National Insurance Corporation of (T) Ltd & another v. Shengena Limited*, Civil Application No. 20 of 2007 and *Patson Matonya v. The Registrar Industrial Court of Tanzania & another*, Civil Application No. 90 of 2011 (both Page 3 of 8 unreported). In both cases, among many others, the Court held that failure by a party to lodge written submissions after the Court has ordered a hearing by written submissions is tantamount to being absent without notice on the date of hearing. In the *Shengena* case, for instance, we observed: "The Applicant did not file his submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case. [Emphasis supplied]. By not filing any reply submissions contrary to the order of the Court of 16.06.2017, the appellant has therefore failed to defend the preliminary objection and the Court is entitled to proceed with the ruling as if he did not appear at the hearing despite being duly served with the Notice of Hearing. Guided by this trite principle I will proceed with the ruling as if the respondents deliberately defaulted appearance on the date of the hearing to which they had notice. That said, I will now move to the applicant's submission. Submitting in support of the application the applicant represented by Mr. Wilson Mafie, learned counsel for the applicant reiterated the averments in the affidavit. He then submitted that, once the court has determined a certain matter it becomes *functus officio*. It cannot reopen and entertain the same matter. Therefore, in this case, when the Dodoma District Court ordered the sale of mining License No. PML No.991969CZ in Execution No.8 of 2023, it became Page 4 of 8 *functus officio* and had no jurisdiction to entertain the application for nullification in *Mise*. Civil Application No. 56 of

2023. Moreover, while citing the case of Mbeya Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma [2003] T.L.R. 251, Mr. Mafie submitted that the right to be heard is a fundamental constitutional right and principle of natural justice. And, it is now trite in our jurisdiction that no one should be condemned unheard. The failure to observe this principle is fatal as it nullifies not only the proceedings but the decision arrived irrespective of whether the same decision would have been arrived had all the parties been afforded the right to be heard (see Abbas Sherally & Another vs Abdul S. H. M. Fazalboy, Civil Application No 33 of 2002. Based on these authorities, he submitted that the applicant being the purchaser of the mining license ought to have been joined in Mise. Civil Application No. 56 of 2023 so as to give him the right to defend his right. To the contrary, he was not made a party and the proceedings proceeded in his absence. Thus, he was condemned unheard. He concluded that it was materially wrong for the district court to entertain and determine Mis. Civil Application No. 56 of 2023 in the absence of the applicant and he prayed that the proceedings and the ruling be nullified and set aside. I have carefully considered the submission by the applicant's counsel, the ultimate issue for determination is whether the application has merit. As stated above the applicant's major complaint in the affidavits are two. First, being the bonafide purchaser of the mining license PML No.991969CZ, he Page 5 of 8 ought to have been afforded the right to be heard before the nullification of the auction by which he bought the mining license. Second, the district court erred in entertaining Mise. Civil Application No.56 of 2023 as it was functus officio. In my perusal of the record, I have observed that the kernel of the present application is a suit between Matela & Co. Ltd and Edward Rashid Mgomba which was litigated before Dodoma District Court. The suit was resolved amicably through a deed of settlement. By that deed which was duly executed by the parties and recorded and decreed by the court, Edward Rashid Mgomba had to pay Matela Co. Ltd TZS 117,000,000/= but he did not fully comply. He paid TZS 40,000,000/= only and defaulted thereafter. Matela and Co. Ltd moved the court for execution in execution number 08 of 2023 seeking attachment of a mining license No. PML 00196962 in the recovery of the decretal sum in default. The application was granted and as a result, the mining license was sold to Mr. Daniel Ephata Lyimo the applicant herein at a public auction conducted by the third respondent. Edward Rashid Mgomba was not amused with the procedure employed in the attachment and sale of the mining license. He went back to the same court and successfully challenged it through Mise. Civil Application No. 56 of 2023 whose proceedings and decision are the subject of this application. In my further scrutiny of the record, I have observed that the applicant herein was not a party to the Application No. 56 of 2023 and there is no indication that he was anyhow involved. Considering that he was the Page 6 of 8 bonafide purchaser of the mining license it was incumbent for him to be made a party to the application for nullification of the auction and to be availed the right to defend his interest. Since he was not, it is crystal clear that Mise. Application No. 56 of 2023 abrogated the right to be heard, which as correctly submitted by Mr. Mafie is a fundamental constitutional right and a principle of natural justice as stated in Mbeya Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma (supra) and plethora of similar authorities from the apex court and this court which have consistently underscored that, the right to be

heard is a fundamental constitutional right and a rule of natural justice. Having established this, the next question is what should happen to the proceedings and the decision arrived at by the district court in Mise Civil Application No. 56 of 2023. This question will not detain me because, as correctly submitted by Mr. Mafie, it is now a trite law in our jurisdiction that, abrogation of the right to be heard adversely affects not only the proceedings but the decision arrived at by the court or tribunal as it vitiates them and renders both, the proceedings and the decision thereof a nullity. Underlining this rule in *Abbas Sherally & Another vs Abdul S. H. M. Fazalboy*, Civil Application No 133 of 2002 [2005] TZCA 105 TanzLII the Court of Appeal instructively stated that: "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 Page 7 of 8 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." In the foregoing, I have found merit in the applicant's first complaint and based on this sole complaint, I allow the application, nullify and set aside the proceedings and ruling of the District Court of Dodoma in Mise. Civil Application No. 56 of 2023. Costs to be borne by the respondents. DATED and DELIVERED at DODOMA this 14th day of February 2025. J. L MASABO JUDGE Page 8 of 8

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