

TANZANIA / JUDGMENT

DORA MADUHU FINAL 1

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA GEITA SUB-REGISTRY AT
GEITA CIVIL APPEAL NO. 1039 OF 2025 (Originating from the decision of the District Court of
Geita in Civil Revision No. 21263 of 2024 before MAWEDA- SRM) DORA MADUHU
KIMWAGA----- APPELLANT VERSUS SALUM
SHABAN----- RESPONDENT

JUDGMENT

Date of last order: 06 February 2025 Date of Judgment: 05 March 2025 K. D. MHINA, J. This is an appeal against the Ruling of the District Court of Geita in Civil Revision No. 21263 of 2024 that quashed the proceedings of Nyankumbu Primary Court in Civil Case No. 200 of 2023, set aside the execution proceedings and order, and accordingly ordered the matter to be tried de novo. 1 The facts leading to the present appeal are such that at the trial court, the appellant, DORA MADUHU KIMWAGA, filed a suit against the respondent, SALUM SHABAN, for the claim of TZS. 33,000,000/= as the value of a vehicle which the appellant sold to the respondent. On 10 January 2024, parties informed the trial court that they had decided to settle the matter and, at that time, TZS. 8,000,000/= was already paid. The parties also agreed that the remaining TZS. 25,000,000/= would be paid up to 23 April 2024 as the final date for the payment. Those terms formed the compromise judgment of the trial court titled “uamuzi”, dated 10 January 2024 and marked the end of the matter. Unfortunately, the respondent did not honour the compromise judgment, which triggered the appellant to file execution proceedings. However, the property to be attached was located at Kahama. Thus, the executing court (Nyankumbu Primary Court) transferred the execution of the decree to Kahama Primary Court at Kahama, a motor vehicle with registration no. T 316 DND make Mitsubishi Super Great was attached. Aggrieved with that attachment order, the respondent approached the District Court of Geita by way of revision, requesting that court to call 2 for and revise the proceedings of Nyankumbu Primary Court in Civil Case No. 200 of 2023. During the revision, the appellant raised preliminary objection (s). The objections were argued by way of written submissions. In its decision dated 18 December 2024, the District Court dismissed the preliminary objections raised. However, it went further by disposing of the whole revision after raising the issues for determination suo motu and without hearing the parties on the merits of the revision. This is what the District Court held when it decided to proceed and dispose of the revision; “Further, it is trite law that revision taken under the Magistrates Courts Act has no limitation, as held in *Abdu Hassan V Mohamed Ahmed* [1989] TLR 181. I find it

prudent to deal with the applicant's application, without inviting the parties, by examining the records of the lower court in civil case no. 200/2023 in order to satisfy myself as to the regularity of the proceedings therein". In the end, the District Court quashed the proceedings of the trial court in Civil Case No. 200 of 2023, set aside the order for execution and ordered that the matter be tried de novo before another magistrate of competent jurisdiction. 3 The orders above were given after the District Court held that the trial court proceedings had been tainted with material irregularities for both impropriety procedures and for denying the applicant his right to be heard. Undaunted, the appellant lodged this appeal challenging the decision of the District Court on four grounds, which are:

- i. The district court erred in law and facts by determining the civil revision without inviting the parties.
- ii. The district court erred in law and facts for nullifying judgment of the primary court based on irregularities found in the execution process
- iii. The district court erred in law and facts for ruling that the court did error to attach motor vehicle with registration No T478BLZ instead of T316DND which was subject to the contract
- iv. The district court erred in law and facts by deciding that the respondent was not given the right to be heard. The appeal was argued orally, and both parties were represented. The appellant was represented by Mr. Masanja Emmanuel and the respondent by Mr. Projestus Mulokozi, both learned advocates. In supporting the appeal on the 1st ground, Mr. Emmanuel submitted that there was a violation of the right to be heard. 4 He explained that he was the respondent who filed the revision at the District Court, and the appellant raised the preliminary objections. After the preliminary objections were dismissed on merits, the District Court did not invite the parties to argue the application for revision; instead, suo motu, it disposed of the matter. Therefore, he argued that the District Court erred by not inviting the parties to address the court on the issue raised suo motu. That means there was a failure to accord the parties the right to be heard, and it caused the proceedings of the District Court to be null. To bolster his argument, he cited the decision of the Court of Appeal in *Mary Mchome Mbwanbo and another vs. Mbeya Cement Co. Ltd*, Civil Appeal No 161 of 2019 (Tanzlii) at pages 18-19. On the 2nd ground of appeal, he submitted that the District Court erred in nullifying the Primary Court Judgment based on irregularities found in the execution process and ordered the re-trial based on section 39 (1) of the Magistrate Court Act. He explained that if the District Court found that the execution process at the primary court was not proper, it was supposed to nullify the 5 decision on the execution and not the proceedings, judgment and orders in the main case. Submitting on the 3rd ground, Mr. Emmanuel stated that the District Court erred in deciding that the T 316 DND was not the subject matter of agreement in the main suit and thus not liable for attachment. On this, he explained that the execution was to satisfy the decree holder's decree. Thus, the District Court erred in its decision. On the last ground, he submitted that at the trial Court on the date of the hearing, both parties were present, and the court heard them, where the respondent admitted the claim and the court entered a consent judgment. Therefore, it was not true that the respondent was not heard at the Primary Court. In response, Mr. Mulokozi submitted that the District Court Magistrate gave the reason in its decision why he invokes

revisionary powers suo motu. In support of the District Court decision, he stated that section 22 (3) of Magistrates' Court Act allowed him to dispose of the matter suo moto without accorded the right to be heard to the parties and order re-trial. 6 Further, he stated that in the cited case of Mary Mchome Mmbwambo (Supra), the Court may decide the matter without inviting the parties if there is an affidavit and counter affidavit as evidence, Therefore, after dismissing the P.O., the District Court was correct in disposing of the matter based on the affidavit and counter affidavit. Countering the 2nd ground of appeal, Mr. Mulokozi submitted that the District Court did not nullify the trial court's proceedings and judgment in the main case. It only nullified the execution process conducted by the Primary Court. There was nowhere he discussed the illegality of the compromise judgment. Regarding the 3rd and 4th grounds, he submitted that the respondent's property was attached without being afforded the right to be heard. On this, he argued that it is a position of law that the warrant of attachment must be served to the Judgment Debtor (respondent) and at the District Court; the respondent complained that he was not heard in the execution proceedings and not in the main case. 7 In a brief rejoinder, Mr. Emmanuel reiterated his earlier submission in chief and only clarified on the 3rd and 4th grounds that the execution was conducted by Kahama Primary Court and the parties were heard. I have keenly examined the argument advanced by advocates for the parties in line with the evidence on record, and I will start with the 1st ground of appeal. The issue for consideration in the 1st ground is whether the appellant was condemned unheard by the District Court in the revision proceedings. The entry point in the determination of this appeal is the decision of the Court of Appeal in Salhina Mfaume and seven others vs. Tanzania Breweries Co. Ltd, Civil Appeal No. 111 of 2017 (Tanzlii), where it was held that; "The right to be heard is a cardinal principle of natural justice which is entrenched as a fundamental right and it includes the right to be heard amongst the attributes of equality before the law in terms of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution)". 8 The issue of controversy between the parties herein in this ground of appeal was triggered by an act by the District Court to decide on the revision before it suo motu without affording the parties the right to be heard. On this, raising a matter suo motu by the Court is not a new phenomenon in our jurisdiction. However, there are principles in raising an issue for determination suo motu. In Kumbwandumi Ndemfoo Ndossi vs. Mtei Bus Services Ltd, Civil Appeal No. 257 of 2018 (Tanzlii), the Court of Appeal held that; "... issue raised should be placed on record, and parties must be given an opportunity to be heard by the Court". Therefore; First, the issue should be raised by the Court. Two, the issue raised should be placed on record. Third, the parties must be given an opportunity to argue on the issue raised. 9 In this appeal, it is unfortunate, as per the records, that the issues that the District Court purported to raise suo motu were not raised by that Court, as I will reveal later. When submitting to resist the appeal in the 1st ground of appeal, Mr. Mulokozi submitted that by section 22 (3) of Magistrates' Court Act, the District Court had a mandate to dispose of the matter suo moto without accorded the right to be heard to the parties and order re-trial. The section reads as follows: "(3) In addition to the provisions of subsection (2) of this section, no order shall be made in the exercise of the court's revisional

jurisdiction in any proceeding of a civil nature increasing any sum awarded, or altering the rights of any party to his detriment (other than an order quashing proceedings in a lower court or an order reducing any award in excess of the jurisdiction or powers of the lower court to the extent necessary to make it conform thereto) unless such party has been given an opportunity of being heard”. However, I have the following; One, at the revision, the reasons assigned by the District Court while disposing of the revision were the issues the parties were contesting. They 10 were raised in their pleadings (affidavit and counter affidavit). Therefore, the issues were not raised suo motu by the District Court. For instance, the District Court held that;

- i. There was irregularity in the execution process since the record shows that the execution was to be done at Kahama primary court such that the Nyankumbu primary court sent a mere letter of execution to the executing court rather than the prescribed warrants or execution forms. This was raised in paragraphs 4 and 5 of the affidavit and contested in paragraphs 5 and 6 of the counter affidavit. ii. The property in the sale agreement that gave rise to the compromised judgment is with registration no. T316 DND make Mitsubishi Super Great where it is said that the respondent cannot contract over it. This was raised in paragraph 3 of the affidavit and contested in paragraph 4 of the counter affidavit. iii. The attached motor vehicle is with registration no. T478 BLZ was a different motor vehicle not part of the sale agreement, and the resultant compromised judgment. Also, the respondent was denied the right to be heard in execution proceedings. This was raised in paragraph 4 of the affidavit and contested in paragraph 5 of the counter affidavit. In the end, the proceedings of the trial Court were quashed. 11 Therefore, as previously alluded, nothing was raised by the Court suo motu; both issues, which were purported to be raised by the District Court suo motu, were raised by the parties in their pleadings. From above, it is clear that the appellant was not given an opportunity to address the issues she contested in her counter affidavit. That was an error; it occasioned injustice to her. Two, since the right of hearing is a fundamental constitutional right in Tanzania by virtue of Article 13 (6) (a) of the Constitution, thus, not giving parties an opportunity to be heard is a violation of the Rules of Natural justice and contravention of the Constitution. See the decision of the Court of Appeal in *Mwajuma Bakari (Administratrix of the Estate of the Late Bakari Mohamed) vs. Julita Semgeni and another*, Civil Appeal No. 71 of 2022 (Tanzlii). Therefore, in revision, the right to be heard must be afforded whether the matter is raised suo moto by the court or filed/ raised by the parties. This is a cardinal principle and a matter of great importance in a fair trial, and it is not for compromise. To proceed and dispose of the revision without hearing the parties was a significant departure from the standard legal procedure, potentially undermining the appellant's right to a fair trial. 12 In *Evodius Petro Majura vs. Victor Gervas*, Probate and Administration Appeal No. 10 of 2018, HC-Bukoba (Tanzlii), my bother Kilekamajenga held that; “However, the District Court did not invite the parties to submit on the allegations lodged by the respondent. Therefore, the appellant was not afforded the right to be heard. I am mindful that under the old school of thought and the trend of legal jurisprudence, the court could, suo motto, exercise the revisionary jurisdiction

without affording the parties the right to be heard. Such an approach to justice is waning. Currently, the trend of justice has shifted towards strict observance to natural justice that calls for parties to be heard on every matter that may result to an order affecting their interests. The right to be heard is the fundamental constitutional right.

..... The right to be heard whether the court does any revision suo motto or where the court raises any new issue at the time of hearing or writing the judgment. For instance, when the court raises a new issue during hearing an appeal or writing the judgment, the court must invite the parties to submit on the new issue". 13 Therefore, it is evident that the appellant was not accorded the right to be heard and address the District Court on the issues which triggered that Court to quash the trial court proceedings. There was an issue raised by Mr. Mulokozi that in the cited case of Mary Mchome Mmbwambo (Supra), it was held that the Court may decide the matter without inviting the parties if there is an affidavit and counter affidavit as evidence. However, having gone through the cited judgment from pages 10 to 19, when the Court discussed the grounds of appeal, I did not find that holding by the Court of Appeal. However, I am aware that this is a position in Atuwonekye Mwenda vs. Hezron Mangula, Misc. Land Application No. 5 of 2020, HC- Iringa (Tanzlii). A court may and have a mandate to decide the matter based on the affidavits presented before it. In my view, I agree with that position, but that position is not automatic or at the wishes of the court. There are circumstances in which the court may decide the matter based on affidavits and without submissions from the parties. The circumstances are; 14 One is when parties defaulted to appear on the date of hearing while there is proof that they have knowledge of the date of hearing. Two, when the court ordered the filing of written submissions, but the parties failed to file within the ordered/ prescribed time. At the District Court, the two circumstances never arise. After the preliminary objections were dismissed, the parties were not informed of the date of hearing the application for revision on merits. Instead, the District Court, in the same Ruling in which it disposed of the preliminary objections, deliberated and disposed of the revision on merits. Therefore, the issue raised by Mr. Mulokozi does not have merit. From the above discussion, there was a clear violation of the right to be heard, and its failure vitiates the entire proceedings and causes the resultant decision a nullity. See Wegesa Joseph M. Nyamaisa vs. Chacha Muhogo, Civil Appeal No. 161 of 2016 (Tanzlii). Thus, the 1st ground of appeal has merit. Since the 1st ground disposed of the appeal, I don't see the necessity of determining the remaining grounds of appeal because; First, the remaining grounds will not change the outcome of the 15 decision. This is because the 1st ground alone renders the District Court decision and order a nullity. Two, the 1st ground is a decisive ground in this appeal. On this, the law is clear that when the Court is determining the appeal, it may, if convenient, address the grounds generally, address the decisive grounds of appeal only or discuss each ground separately. See Malmo Montage Konsult AB Tanzania Branch vs. Margret Gama, Civil Appeal No.86 of 2001 (unreported). On the way forward, because there was a denial of the right to be heard on the part of the appellant, I order that;

- i. The second part of the District Court Ruling, from when the Court raised issues for determining the main application for revision, is quashed and set aside. That means the first part of the rulings on the preliminary objection remains valid and intact. ii. The District Court orders for quashing the proceedings, the decision, and the order of Nyankumbu Primary Court in Civil Case 200 of 2023 and the execution proceedings are set aside. 16 iii. The proceedings, decisions and order of Nyankumbu Primary Court in Civil Case 200 of 2023 and the execution proceedings are restored. iv. The application be heard de novo on merits before another Magistrate. In case raising a matter suo motu, parties must be afforded the right to be heard. Flowing from above, this appeal is allowed with costs. It is so ordered. K. D. MHINA JUDGE 05/03/2025 Court: The right to appeal is fully explained to the parties. 17 K. D. MHINA JUDGE 05/03/2025 18

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