

TANZANIA / JUDGMENT

geofrey kabaka vs farida hamza and another 2023 tzca 210 28 april 2023

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA fCORAM: NPIKA. 3.A.. KOROSSO. 3.A..
And KIHWELO. 3.A.^ CIVIL APPLICATION NO. 215/08 OF 2019 GEOFREY
KABAKA..... APPLICANT VERSUS FARIDA
HAMZA FIRST RESPONDENT ISANGI COURT
BROKER.....SECOND RESPONDENT (Application for revision from the
Order of the High Court of Tanzania at Mwanza) (Rumanvika, 3.) dated the 23rd day of April, 2019
in Civil Reference No. 7 of 2018 RULING OF THE COURT 24th & 28th April, 2023 NPIKA, 3.A.: The
applicant, Geoffrey Kabaka, is aggrieved by the order of the High Court at Mwanza (Rumanyika, 1,
as he then was) dismissing with costs his Civil Reference No. 7 of 2018. He now seeks the revision
of that dismissal pursuant to section 4 (3) of the Appellate Jurisdiction Act, Cap. 141. The
applicant and his opponents, Farida Hamza and Isangi Court Broker, the first and second
respondents respectively, have been embroiled in a long-drawn-out dispute whose genesis was a
claim by the applicant as i a tenant against his landlord, Hamza Adam, now deceased, in
Application No. 130 of 2008 in the District Land and Housing Tribunal of Mwanza, At some point,
the first respondent stepped into the shoes of the decedent after being appointed the
administratrix of the estate. The dispute went back and forth through the High Court but what is
pertinent to this matter is that on 7th December, 2018 the applicant instituted Civil Reference No.
7 of 2018 in the High Court at Mwanza under Order XU, rules 1 to 5 as well as section 95 and 96 of
the Civil Procedure Code, Cap. 33. In the chamber summons, he moved the court to revisit
certain orders of Hon. E.G. Rujwahuka, the Deputy Registrar of the High Court, in execution
proceedings in connection with Land Appeal No. 155 of 2016 in that court. In particular, the
applicant primarily urged the court to issue the following orders:

1. That the order in Execution No. 10 o f 2017 confirm ing the attachment and eviction in
respect o f landed property described as Plot No. 246, Block V , Pamba Road, Nyamagana M
unicipality in Mwanza C ity fth e property") be quashed.
2. That the first respondent be ordered to vacate and hand over the property to the decree-ho/
der or its purchaser.

3. That permanent injunction be issued against the first respondent and/or her agents from attaching the property and evicting the purchaser therefrom.
4. That the second respondent be ordered to return all possessions which she confiscated from the property. In determining the reference, the learned judge observed, at first, that since the original proceedings before the District Tribunal were nullified on 17th November, 2016 by an order issued by the High Court at Mwanza (Bukuku, J.) in Land Revision No. 10 of 2015, any subsequent orders specifically those perpetuating the reliefs awarded to the applicant by the District Tribunal had no legal force. Owing to that, he held that: "It follows therefore that the order in Execution No. 10 of 2017 against which the reference is now sought was ineffective since [it was] issued on a nullity. It is very unfortunate that the instant application was preferred and admitted. It crumbles. It can't survive anymore." The applicant assails the legality and propriety of the above finding and order on three substantive grounds as well as one alternative ground. At the hearing of the matter before us, the applicant and first respondent appeared self-represented whereas the second respondent had her principal officer, Mr. Gibson Mtegea enter appearance. Addressing us on the first ground in his oral and written submissions, the applicant censured the High Court for dismissing the matter without according the parties a hearing. He recalled that although the court had set down the matter to come up for hearing on 16th May, 2019, the parties were surprisingly summoned to appear on an earlier date i.e., 23rd April, 2019 only to learn of the summary dismissal. The applicant posited that the summary dismissal was out of order and urged us to revise and vacate the aberrant dismissal. As to the way forward, he entreated us to remit the matter to the High Court for hearing on merit. Rebutting through her written submissions, the first respondent mainly contested the competence of the matter before the High Court, contending that the said court had no jurisdiction to hear and determine the reference. Rather oddly, she did not address her mind to the contention that the High Court wrongly determined the matter without according the parties a hearing. The second respondent, who had filed no written submissions, had nothing useful to say on the matter. We have examined the record and duly considered the submissions of the parties. It is so evident from the record that the learned judge having initially set down the matter to come up for hearing on 16th May, 2019, he brought it forward and summoned the parties to appear in court whereupon they learnt the outcome of the matter. However, at this point, we need to pause and set the record straight: although the applicant claimed that the impugned order was delivered on 23rd April, 2019, the record indicates that the said order was dated and signed on 23rd April, 2019 but that it was subsequently handed down by the Deputy Registrar on 30th April, 2019 in the presence of the applicant in person and Ms. Dorothea Method, learned counsel for the first respondent. Be that as it may, there is no denying that the reference was dismissed summarily without the parties being heard orally or by written submissions. It is too plain for argument that the course taken by the High Court amounted to an egregious and indefensible abrogation of the applicant's right to be heard guaranteed under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977. The applicant was entitled to be heard on the substance of the reference

before an adverse decision was made. The course taken by the court rendered the purported dismissal a nullity - see this Court's decision in *Director of Public Prosecutions v. Sabina I. Tesha & Others* [1992] T.L.R. 237. See also *Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma*, Civil Appeal No. 45 of 2000; *Abbas Sherally & Another v. Abdul S.H.M. Fazalboy*, Civil Application No. 33 of 2002; and *Dishon John Mtaita v. The Director of Public Prosecutions*, Criminal Appeal No. 132 of 2004 (all unreported). In *Sabina I. Tesha* {supra}, for example, the Court was categorical that a denial of the right to be heard in any proceeding would be fatal. Subsequently, in *Mbeya-Rukwa Auto Parts & Transport Limited* (supra) the Court held quite firmly that: 7/7 th is 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 the equality before the law" Perhaps, to clinch the matter, we should also recall the view we took in *Abbas Sherally* (supra) that: "The right of a party to be heard before adverse action or decision is taken against such a 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". Perhaps we should interject a remark that we still have in mind the first respondent's contention that the applicant's reference was utterly incompetent for want of jurisdiction. Even if that were so, the court was enjoined by a constitutional imperative to hear the parties, either on the competence or merits of the matter before deciding the matter one way or the other. In the premises, we find merit in the ground at hand and hold without demur that the impugned order is a nullity. Given this outcome, we find no pressing need to consider and determine the other substantive and alternative grounds on record. In consequence, we nullify the impugned order and remit the reference to the High Court for it to be heard and determined according to the law by another judge. Each party shall bear its own costs. It is so ordered. DATED at MWANZA this 27th day of April, 2023. G. A. M. NDIKA JUSTICE OF APPEAL W. B. KOROSSO JUSTICE OF APPEAL P. F. KIHWELO JUSTICE OF APPEAL The Ruling delivered this 28th day of April, 2023 in the presence of Mr. Geoffrey Kabaka the Applicant, Ms. Farida Hamza 1st Respondent appeared in person and Mr. Gibson Mtegea Principal Officer for the 2nd Respondent, is hereby certified as a true copy of the original. A.L. KALEGEYA DEPUTY REGISTRAR COURT OF APPEAL 8

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