

TANZANIA / JUDGMENT

joseph yona scanned

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (IN THE SUB-REGISTRY OF MANYARA) AT BABATI PC. CIVIL APPEAL NO. 13 OF 2023 (Arising from Civil Appeal No. 7 of 2023 Babati District Court, Original Civil Case No. 4 of 2023 Babati Primary Court) JOSEPH YONA..... APPELLANT VERSUS BAI SULTANI..... RESPONDENT Date of last order: 23/2/2024
Date of Judgment: 8/3/2024

JUDGMENT

MAGOIGA, J. The appellant sued the respondent before Babati Primary court (the trial court) for payment of Tshs 1,005,000/= being the value of damaged crops. The matter proceeded ex parte against the respondent and at the end, the trial court decided in favour of the appellant. The respondents attempts to set aside the ex parte judgment were in vain. The respondent, therefore, lodged Civil Appeal No. 7 of 2023 before Babati 1 District Court (the first appellate court) complaining that he was condemned unheard. After hearing the parties, the first appellate court was of the view that not only the respondent was condemned unheard but also the claim was not proved. To this, the decision by the trial court was quashed and set aside. Being aggrieved with the decision of the first appellate court, the appellant preferred the instant appeal with seven grounds of appeal couched in the following language: -

1. That, first appellate court erred in law and fact by delivering a decision in favour of the respondent on the reasons that he was not given the right to be heard while he was given right to be heard more times and he refused to enter his defense.
2. That, first appellate court erred in law and fact for failure to determine that the respondent has never set aside ex- parte judgment. 1 2
3. That the first appellate court erred in law fact by nullifying all judgments of the primary court while the appellant proved his civil case against the respondent on the balance of probability.

4. That the first appellate court erred in law and fact by delivering the decision in favour of the respondent white Civil Case No. 4 of 2023 of Babati Primary court which the respondent was ordered to pay the appellant herein the amount of Tshs 1,005,000/= was emanated from Criminal Case No. 455 of 2022 which the respondent has never appealed against it.
5. That the first appellate court erred in law and fact as he did not manage to evaluate and analyze the evidence of the appellant who was the respondent at the first appellate court henceforth reached unjust decision.
6. That the first appellate court erred in law and fact for delivering the decision in favour of the respondent while 3 the respondent failed to prove the civil case in a required balance of probabilities.
7. That the first appellate court erred in law and fact by delivering a decision without giving legal reasoning. This appeal was disposed of by way of written submissions in which both appeared in person and unrepresented. It is on record that submission in chief by the appellant should have been filed on or before 16/2/2024 and reply thereof by the respondent should have been filed on or before 22/2/2024. While the submission in chief by the appellant was filed timely, the reply thereof by the respondent was filed on 27/2/2024 contrary to the court's order and without leave of the court. Hence the reply submission by the respondent being filed out of time and without court's leave the same will be disregarded. In his submission in support of the first ground of appeal, the appellant contended that respondent was given right to be heard after being issued with summons but he refused to enter his defense. He argued that the trial court correctly proceeded ex parte. 4 In its decision, the first appellate court, was of the view that the respondent was condemned unheard hence violation of Article 13 of the Constitution of United Republic of Tanzania (the constitution) which guarantees right to be heard. I have dispassionately gone through the record of the trial court in which it was ordered that the respondent be issued with summons. The appellant informed the trial court that he served the respondent but the latter refused service. To this end the trial court ordered the matter to proceed ex parte against the respondent. I have seen two copies of summons purported to have been issued to the respondent. They revealed that the respondent refused to sign the summons. But the name of the person effecting the service was not disclosed and there also no affidavit of the person effecting the service. I am of the settled view that there was no sufficient proof that the respondent was served. Hence the first appellate court was justified that the respondent was condemned unheard. 5 It has been emphasized time and again that a denial of the right to be heard in any proceedings would vitiate the proceedings. Further, it is also an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6)(a) of the Constitution. In the case of Mbeya - Rukwa Auto Parts & Transport Limited vs Jestina George Mwakyoma, Civil Appeal No. 45 of 2000 (unreported), the Court of Appeal emphasized that: - "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 kusikiHwa kwa ukamiiifu" The Court of Appeal also had this to say in the case of Abbas Sherally & Another v Abdul S. H. M. Fazalboy, Civil Application No. 33 of 2002 (unreported) that: - ° 6 "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 naturaljustice." Hence, in the circumstances, I find the first ground of appeal lacking in merits and same is accordingly dismissed. However, the first appellate court having found that the respondent was condemned unheard, the remedy was to quash the decision of the trial court and remit the matter before it for both parties be heard. But the first appellate court erred in determining the issues relating to evidence and arrived to the conclusion that the appellant had not proved his claims. This is because the complaint by the respondent before the first appellate court was that he was never issued with a summons and he prayed to be given right to enter his defence. In proceeding to determine the issue whether the appellant proved his case, in my settled view, the first appellate court did a 7 task which the respondent never asked. It is for that reason, in the instant matter, having ruled that the indeed the respondent was condemned unheard, I will not determine other grounds which mainly are on evidence whether the appellant proved his claims. Consequently, I set aside the order of the first appellate court that the appellant did not prove his case and consequently I order the matter be remitted back to the trial court for retrial before another magistrate with competent jurisdiction and all parties be heard. In the circumstance I will not make an order as to costs. It is so ordered. Dated at Babati this 8th day of March,, 2Q^4. IGA JUDGE 08/03/2024 8

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