

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., JUMA, J.A., And MZIRAY, J.A.)

CIVIL APPEAL NO. 7 OF 2012

SHAIBU SALIM HOZA APPELLANT

VERSUS

**HELENA MHACHA as a Legal Representative
of AMERINA MHACHA (Deceased) RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania
at Dar es Salaam)**

(Wambura, J.)

**Dated the 15th day of October, 2010
in**

Civil Appeal No. 38 of 2010

JUDGMENT OF THE COURT

24th February & 4th March, 2016

MZIRAY, J.A.:

This is a second appeal. The case arises from a dispute involving the appellant and the respondent over a piece of land formerly known as plot No. 893 now plot No. 959 Block A Mbezi Medium Density, Dar es salaam (Suitland). In the Resident Magistrates' Court at Kisutu, the Respondent Helena Mhacha (legal representative of the late Amerina Mhacha) sued the appellant, Shaibu Salim Hoza together with Dar es salaam City Council claiming against them jointly and severally for the among other things a

declaration that she is the lawful owner of the disputed land and for compensation for the unexhausted improvements effected on the same.

In the course of the proceedings, on 17/10/1996 the suit against Dar es Salaam City Council, who was the second defendant was withdrawn as it was not issued with a statutory notice of 30 days before initiating proceedings, as required by the law. After the withdrawal, the suit against Dar es Salaam City Council was never refiled and the case proceeded in its absence. The trial Court having considered the evidence on record held in favour of the respondent. On appeal to the High Court the appellant was also unsuccessful. Still dissatisfied, the appellant has preferred this second appeal.

In this appeal, Eustace Rwebangira, learned advocate appeared for the appellant and the respondent enjoyed the services of Bernard Ngatunga, learned advocate. The grounds of appeal filed by Mr. Rwebangira were as follows:-

- 1. The Honourable Judge erred in law and fact when she confirmed the judgment of the trial Court to the effect that the respondent was a legal owner of plot No. 893 Block "A" Mbezi, Medium Density, Dar es Salaam without specifying*

under what capacity or title she own the disputed property and without proof of title.

2. *The Honourable Judge erred in law and facts to make the findings that the area was not surveyed whereas the area was surveyed and letter of offer issued to the appellant in respect of Plot No. 893 Block "A" Mbezi (MD) Dar es Salaam.*
3. *That the hounourable Judge erred in law when she confirmed the findings of the trial Court to the effect that the respondent own the piece of Land by virtue of deemed right of occupancy or customary title whereas the operation of "**Kilimo cha kufana kupona**" did not create any right of ownership.*
4. *The Honourable Judge having made a finding that a letter with reference DSM/LD/30832/8 dated 26th January, 1998 was not part of the exhibits, erred in law and fact in dismissing the whole appeal whereas the judgment of the trial court was entirely based on that letter.*
5. *The Honourable Judge erred in law and fact to order compensation of Tshs. 1,000,000/= without proof of the extent of damage and even after ordering compensation she*

proceeded to declare the respondent rightful owner of the disputed plot.

6. *The entire judgment of the Honourable Judge is problematic with contradictions and considered irrelevant matters, non-issues and non-parties to the appeal without having any base or foundation instead of addressing to grounds of appeal.*

Before dealing with these grounds of appeal, we think it is desirable to preface the judgment with a brief outline of the salient feature of the case. As it could be gathered in the record, the suit involved a dispute over a piece of land situated at Mbezi Juu, Dar es Salaam. PW1 testified that she was allocated the suitland by the village authority via village chairman one the late Mzee Hamidu during the *Kilimo cha Kufa na Kuponu* campaigns in 1974 and that apart from cultivating the land she built a house thereon, which house was demolished by the appellant. She claim to have owned the suitland customarily i.e. under deemed right of occupancy. She was supported in her evidence by her neighbours Hamrani Matanu (PW2) and Rashidi Kambona (PW2).

On the other hand, the appellant (DW1) claimed that the suitland belongs to him. He stated that the same was allocated to him by Dar es Salaam City Council.

On scale, the trial Court found the case for the respondent more credible than that of the appellant and for that reason it entered judgment in favour of the respondent. On appeal the first appellate court dismissed the appeal.

A close scrutiny of the plaint filed in the trial court reveals that the suit was jointly and severally against the two defendants, Shaibu Hoza (the appellant herein) and Dar es Salaam City Council who was the second defendant. Ordinarily, the trial Court could not in the circumstance of the case proceed against the first defendant only after the second defendant had been withdrawn from the suit. Practically and in law it was impossible to do so taking into account the contents of paragraph 5,6 and 7 of the plaint in which it was pleaded that the allocation of the disputed land to the plaintiff was done by the village authority and that the notice of demolition and the order to vacate the disputed land was from the second defendant. With these facts, in our view, the joining of Dar es Salaam City Council in the suit would be necessary to enable the trial court to effectually and

completely adjudicate upon the issue raised in the suit regarding the actual and real owner of the suitland. Above all, it would have afforded, Dar es salaam City Council an opportunity of being heard. To do so, would be in conformity with the principles of natural justice i.e. according an opportunity to a party to be heard in a matter which directly affects the party. In **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (CAT) (Unreported) the Court emphasized;

*"The right of a party to be heard before adverse action or decision is taken against such part has been stated and emphasized by the Court in previous 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 the principles of natural justice (see also, **Bank of Tanzania Ltd v. Said A. Marinda and Others**, Civil Application No. 74 of 1998 (unreported).*

Since it was practically impossible in the circumstances of the case to maintain a suit against the first defendant only without making Dar es salaam City Council as a necessary party/defendant, then it was wrong in our view

for the trial court to determine the matter in the absence of Dar es salaam City Council, the necessary party. On appeal, the first appellate court fell on the same trap and proceeded to hear and determine the appeal despite the existence of that glaring anomaly. We have no doubt that had the two courts below examined critically the contents of paragraph 5,6, and 7 of the plaint and considered the fact that the allocation of the disputed land to the appellant was done by Dar es salaam City Council, definitely they would have reached the same conclusion as ourselves that it was necessary to join Dar es salaam City Council in this suit as necessary party defendant.

Without the inclusion of Dar es salaam City Council as a party the suit is unmaintainable, That said therefore, we invoke the revisional powers conferred on us under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 for which we quash and nullify proceedings and judgments of the two courts below. Having done so, we order for fresh proceedings be initiated by the respondent in a court/tribunal competent to determine the matter which will enjoin Dar es Salaam City Council as a necessary party/ defendant. This however will be done after complying with the statutory requirement of serving the said city council with the notice of intention to sue as required by section 97 of the Local Government (Urban Authorities)

Act, 1982. As the fault was not of either party, we make no order as to costs.

DATED at **DAR ES SALAAM** this 03rd day of March, 2016.

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

I certify that is a true copy of the original.




J.R. KAHYOZA
REGISTRAR
COURT OF APPEAL