IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: OTHMAN, C.J., MASSATI, J.A., And MUGASHA, J.A.)

CIVIL APPEAL NO. 75 OF 2015

ISMAIL RASHID.....APPELLANT

VERSUS

MARIAM MSATI .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania At Dar-es-Salaam)

(Mandia, J.)

Dated the 3rd day of September, 2004
In
Civil Appeal No 244 of 2003

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JUDGMENT OF THE COURT

19th February & 29th March, 2016

MUGASHA, J.A.:

This appeal centres on disputed ownership of registered land. In the District Court of Ilala, **MARIAM MSATI**, the respondent unsuccessfully sued **ISMAIL RASHID,** on a claim of ownership of plot No. 252 Block S Tabata in the City of Dar- es Salaam. Aggrieved, the respondent successfully appealed to the High Court which reversed the decision of the trial court and gave judgment and decree in favour of the respondent, hence the present appeal. The appellant has in the Memorandum of Appeal raised four grounds of appeal. However, for reasons to be explained in due course we shall

determine the second ground of appeal which hinges on irregular admission and reliance of additional evidence by the judge to determine the first appeal.

The appellant was represented by Mr. Godfrey Ukwonga, learned counsel and the respondent was represented by Mr. Thadei Hyera, learned counsel. Counsel filed written submissions pursuant to rule 106 (1) of the Court of Appeal Rules, 2009.

Arguing the second ground of appeal, Mr. Ukwonga submitted that, it was improper for the judge to admit a certificate of title which was not tendered in evidence during trial. When the Court drew to his attention that according to the record the certificate of title was not admitted in evidence, he stated that, the certificate of title was considered by the judge in reversing the trial court's decision which is prejudicial to the appellant. He cited to us **MOHAMED A. ISSA vs JOHN MACHELA, CIVIL APPEAL NO. 55 OF 2013** (Unreported). Mr. Ukwonga urged the court to quash the decision of the High Court and restore the decision of the trial court which was decided in favour of the appellant.

On the other hand, Mr. Hyera asked the Court to dismiss the appeal. He submitted that, the certificate of title was properly received as additional

evidence. He added that, though the certificate of title was not admitted in the evidence, it was properly acted upon by the first appellate court to declare the respondent as the rightful owner. He urged the Court to consider that during trial, the respondent's letter of offer was annexed to the plaint but she was not led to tender it as an exhibit. Mr. Hyera asked the Court to dismiss the appeal. In rejoinder, Mr. Ukwonga repeated what he submitted in chief reiterating that, the 1st appellate court erred in reversing the trial court's decision after merely being shown the certificate of title at the hearing of the appeal.

The modality of receiving additional evidence in civil appeals under the CPC is regulated by Order XXXIX rules 27, 28 and 29 of the Civil Procedure Code [CAP 33 RE, 2002] as follows:

Rule 27(1) states:

> *(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court, but if–*
>
> *(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or*

(b) the Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the Court may allow such evidence or document to be produced, or the witness to be examined"

Under sub-rule (2), wherever the Court allows evidence or document to be produced, in terms of sub-rule 2, the Court shall record the reason for its admission.

Rule 28 states:

"Wherever additional evidence is allowed to be produced, the Court may either take such evidence or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it, when taken, to the court".

Rule 29 says:

"Where additional evidence is directed or allowed to be taken, the Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified".

Conditions to be fulfilled to justify receiving additional evidence on appeal were stated in the case **of S.T.PARYANI vs CHOITRAM AND OTHERS (1963) EA 462**, whereby the Court quoted with approval Lord Denning L.J as he then was in the **LADD V MARSHALL (4) (1954) 3 All E.R 745** and clearly enunciated by the Court of Appeal for Eastern Africa in **TARMOHAMED AND ANOTHER V LAKHANI & CO (3) (1958) E.A 567(CA)**

> *"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: **first**, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; **second**, the evidence must be such that, if given would probably have an important influence on the result of a case, although it need not be decisive; **third**, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible...."*

SARKAR LAW OF EVIDENCE 16TH EDITION 2007 at page 2512 discusses grounds upon which additional evidence may be given and the related restrictions as follows:

> *"The appellate court may admit evidence improperly rejected by the lower court or it may allow additional evidence to be given when it is of opinion that it is*

required for a proper decision of a case. The legitimate occasion for admission of additional evidence is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, and not where discovery is made outside the court, of the fresh evidence and the application is made to import it..... The rule is not intended to allow a litigant who has been unsuccessful in the lower court, to patch up the weak parts of his case and fill up omissions in the court of appeal"

In the light of the stated position of the law, the question to be answered is if there was justification to act upon additional evidence at the hearing of the first appeal.

At page 94 of the record, when the first appeal came for a hearing the respondent's counsel addressed the High Court as follows:-

"HYERA: *In the type proceedings of the trial court at pg 4 the trial court stated that the appellant was offered the plot on 17/9/88 the only reason for the trial court holding that my client held the land illegally is that she has failed to develop it. I pray that the appeal be allowed with costs."*

Sgd. W. S. Mandia

Thereafter, the Judge asked if any of the parties had a title and the respondent replied to have a certificate of title No. 49646 issued on 17/12/99 which was also shown to the Judge. The certificate of title was not admitted as an exhibit as there is no order to that effect. However, the judge looked into the additional evidence as he justifies at page 98 of the record as follows:

> *"The learned trial District Magistrate disregarded all the evidence adduced by the land officer from the Headquarters, and against all brown logic, found for the respondent. After the parties had finished arguing their appeal before me I asked both of them to produce any certificate of Title they held. The appellant produced certificate of Title Number 49646 issued on 17/12/99 while the respondent's advocate conceded that his client had no certificate of title."*

At pg. 99 in paragraph 2, the first appellate court treated the certificate of title produced on appeal without justification as follows:

> *"to cap it all, the appellant is shown to be the holder of certificate of Title Number 49646 issued on her on 17/12/99 barely three months after the respondent*

secured his fake letter of offer under section 51 (4) of the Registration of Documents Ordinance, Cap 117, a certificate of title is primafacie evidence of the matter contained therein. Mariam Msati who has a certificate of title is primafacie the owner of Plot 252 Blocks S Tabata area as opposed to Ismail Rashid who has no certificate of Title."

In the light of the above, the reasons for looking into the additional evidence are in the judgment. With due respect such reasons must be given before taking or rather looking into the new or additional evidence and not when acting on such evidence when arriving at a final verdict. This in our view is the spirit under Order XXXIX rule 27 (2) of the CPC which mandatorily requires reasons for taking new evidence to be stated.

In the premises, we are satisfied that the judge had no justification to look into and act upon additional evidence at the hearing of the first appeal because**: One;** the certificate of title was not produced in evidence during trial and rejected so as to necessitate its re- admission on appeal under Order XXXIX rule 27(1) of the CPC; **Two,** it was not established during trial that the documentary evidence could not have been obtained with reasonable diligence for use at the trial.

In the light of the aforesaid, it is clear to us that, the decision of the first appellate court which reversed the decision of the trial court and held in favour of the respondent was wholly influenced by the evidence not properly before the court i.e. the certificate of title. Furthermore, the respondent who was not successful during the trial utilised the opportunity on appeal to patch up weak parts and fill in the gaps of her case which is impermissible. To make matters worse, the appellant was condemned without a hearing for not being availed opportunity to cross examine the respondent on the new evidence which was presented at the hearing of the appeal. The remedial effect is as follows:

Section 178 of the Evidence Act [**CAP 6 RE, 2002**] states:

> *"The improper admission or rejection of evidence shall not, of itself, constitute grounds for new case if it appears to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence ..."*

Looking at the cited provisions and what transpired in the matter under scrutiny, the first appellate court relied on improper evidence to determine

the right of the respondent against the appellant. This is irregular and it affects the merits of the case and the jurisdiction of the first appellate court which determined the rights of the parties acting on evidence which was not admitted at the trial.

We wish to reiterate what we stated in (**SHEMSA KHALIFA AND TWO OTHERS vs SULEMAN HAMED, CIVIL APPEAL NO. 82 of 2012** that, it is trite law that judgment of any court must be grounded on the evidence properly adduced during trial otherwise it is not a decision at all. As the decision of the High Court is grounded on improper evidence, such a decision is a nullity. In this regard, the irregularity vitiated the first appeal and the probable remedy would be a rehearing of the appeal. However, as earlier said, having gone through the record of trial the critical issue that must be settled is the propriety of the handling of the documentary evidence at the trial.

In the pleadings, parties annexed to the pleadings annextures which they intended to rely on to fortify their cases if admitted in evidence during the trial. The documents which are admitted in evidence must be endorsed as specified under Order XXXIX rule 4 (1) of the Civil Procedure Code which requires:

(1) Subject to the provisions of the sub rule (2), there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely–

(a) the number and title of the suit;

(b) the name of the person producing the document;

(c) the date on which it was produced; and

(d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the judge or magistrate".

The Indian Civil Procedure Code has a similar provision. In this regard, C.K Takwani Civil Procedure fifth edition at page 213 cites the Indian case of **SADIK HUSSAIN KHAN V HASHIM ALI KHAN, AIR (1916) PC 27 (41)** where the Privy Council said:

" *The rule as to endorsement must be observed in letter and spirit with a view to insisting observance of the wholesome provisions of these statutes, will in order to prevent abuse of justice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required".*

Furthermore, Order XXXIX rule 7 (1) of CPC reads:-

> *(1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.*
>
> *(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.*

In **JAPAN INTERNATIONAL COOPERATION AGENCY (JICA) VS KHAKI COMPLEX LIMITED TLR 2006 343**: The Court among other things held:

> *"This Court cannot relax the application of Order XIII Rule 7(1) that a document which is not admitted in evidence cannot be treated as forming part of the record of suit".*

In the trial under scrutiny, the Plaintiff had a number of annextures attached to the plaint. However, in her testimony and that of **PW2 TOMAS S/O JERALD MWANDAMINO** the land officer, none of them was led to produce the annextures as dccumentary evidence. This is very clear at pages 42, 43 of and 47 of the record. In the trial court's judgement the plaintiff was penalised for not tendering any documentary exhibit.

On the part of the defendant, the annextures were tendered in evidence and they were mishandled as follows:

After the respondent /defendant was led to tender the annextures for the letter of offer in respect of plot no. 252 and Exchequer Receipts for payment of Land Rent from 1990 to 1992, the trial magistrate admitted them as annextures and did not endorse them in terms of the law. At pages 68, 69 and 71 of the record the respondent's tendered receipts issued by the City Commission and a letter from the Land Commissioner dated 7th April, 1989.These documents were also not endorsed according to Order XIII rule 4(1) as they do not bear endorsement on the number and title of the suit, the name of the person producing such documents, the date when the documents were produced and are not initialled by the trial magistrate. Annexture D7 was signed and initialled by the trial magistrate but the endorsement is in respect of certifying the document as true copy of the original which does not satisfy the requirements of Order XIII rule 4(1) of the CPC.

We had the opportunity to check the annextures in the original case file and we found that documentary evidence falls short of the reception of such evidence as required by law. As such, we are satisfied that, there was

a gross mishandling of evidence by the trial court. However, page 80 of the record shows that the unendorsed annextures and not evidence before the trial court were considered to determine the case in favour of the defendant. With the said shortfalls one cannot safely vouch that, the documentary evidence at the trial was properly handled which is fatal and occasioned a miscarriage of justice.

As the entire evidence at the trial was mishandled, the trial was flawed and in essence there was no trial. In this regard, a rehearing of the appeal would not yield the expected ends of justice and in any case, the irregular handling of the documentary evidence adversely impacts the appeal before the 1st appellate court as no appeal can stem on a nullity.

In the premises, we hereby invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act [CAP 141 RE, 2002] and proceed to nullify and quash the entire proceedings and judgments of the trial court and the High Court (HC Civil Appeal No. 244 of 2003 and Civil Case No. 3 of 2001). Given the land dispute settlement scheme, if the plaintiff wishes to proceed with his action or claim, it is best that she prefers it before the court

Case No. 3 of 2001).Given the land dispute settlement scheme, if the plaintiff wishes to proceed with his action or claim, it is best that she prefers it before the court vested with competent jurisdiction in terms of the Land Disputes Courts Act, Cap 216. The appeal is allowed with costs.

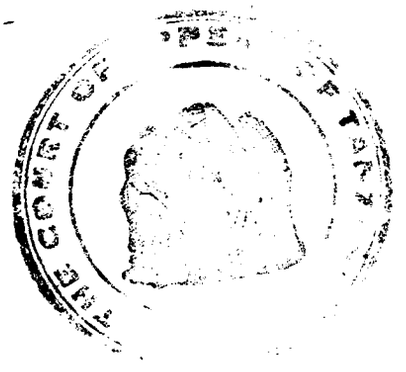
DATED at **DAR ES SALAAM** this 3rd day of March, 2016

M. C. OTHMAN
CHIEF JUSTICE

S. A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL