IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: JUMA, C.J., MWARIJA, J.A. And NDIKA,J.A.)

CIVIL APPEAL NO. 161 OF 2016

WEGESA JOSEPH M. NYAMAISA.....APPELLANT

VERSUS

CHACHA MUHOGO.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Hon. Bukuku J.)

dated the 5th day of May, 2016
in
High Court Land Appeal No. 52 of 2013

JUDGMENT OF THE COURT

26th & 28th September, 2018

JUMA, C.J.:

This appeal is in respect of a dispute over a parcel of land measuring about 5 acres lying, being and situate at Weigita Village within Tarime District. On 13th December 2011 the respondent, CHACHA MHOGO, filed a Complaint No. 9 of 2011 at the Village Land Council of Weigita (hereinafter referred as **"the Council"**).

In staking his claim over the disputed land the respondent told the Council that he purchased it 2001 at a price of Tshs. 120,000/= from the appellant's husband. He explained that sometime in 2001 the appellant WEGESA JOSEPH NYAMAISA was sent over to him by her husband who was serving term in prison but needed a loan of Tshs. 80,000/= to bail himself out of prison. When the appellant's husband realized that he could not pay back the loan, he asked the respondent to top up additional Tshs. 40,000 and assume full ownership of the land. The respondent maintained that the transactions later led to a written agreement between the respondent and the appellant's husband the result of which is his ownership of the disputed land.

Asserting her own claim over the same parcel of land, the appellant conceded to the Council that while indeed her then imprisoned husband had sent her to collect Tshs. 80,000/= from the respondent, she nonetheless expressed her surprise how her husband and the respondent could agree to transfer her parcel of land without so much as involving or informing her about the transactions.

The Council's decision went in favour of the respondent, and specifically allowed him to proceed with the economic activities he was carrying over the disputed land.

The appellant was dissatisfied with the decision of the Council, and on 11th April, 2012 filed an Application No. 21 of 2012 in the District Land and Housing Tribunal for Tarime at Tarime (hereinafter referred to as **"the Tribunal"**). In the application she sought a declaration of the Tribunal to the effect that the disputed parcel of land is her property, and the respondent is a trespasser into that land. After hearing the parties on their competing claims over ownership, the Tribunal's Chairman S.M. Mayeye, nullified the land sale agreement between the respondent and the appellant's late husband on the reason that it lacked the consent of the lawful owner of the disputed land, that is, the appellant.

Being aggrieved with the decision of the Tribunal, the respondent preferred three grounds of appeal in the High Court against the Tribunal's decision (Land Appeal No. 52 of 2013). In his first ground of his appeal in the High Court the respondent faulted the Tribunal, for

deciding in favour of the appellant without supportive evidence. His second ground similarly also faulted the Tribunal for finding that the appellant had once rented out the disputed land to the respondent. The third ground faulted the Tribunal for concluding that the sale agreement between the respondent and the appellant's husband was ineffectual for failing to obtain the appellant's consent.

As it turned out, the High Court did not go as far as to consider the three grounds of appeal. Because, after hearing the evidence of the parties, and while composing her judgment, Bukuku, J. discovered what she described as *"a serious legal issue which was not a subject matter of the appeal before the District Court [i.e. **'the Tribunal'**] or before this court [i.e. **the High Court**]."* The learned Judge cited section 9 of the Land Disputes Courts Act, Cap. 216, to emphasize her position that the dispute over land having first been lodged and determined by the Council, it was not proper for the appellant who was aggrieved by the decision of the Council, to prefer a fresh Application No. 27 of 2012 in the Tribunal. Instead, the learned Judge reasoned that the aggrieved appellant should have referred the dispute to the Ward Tribunal.

It was also while the learned Judge was composing her judgment when she also raised and determined *suo motu*, the issue of the pecuniary jurisdiction of the Tribunal to determine the appellant's Application No. 27 of 2012 wherein the appellant had estimated the value of disputed property to be Tshs. 5,000,000/=. The learned Judge reasoned that in the absence of a valuation report attached to her application, the amount she estimated in her application was anything but a conjecture which could not vest the Tribunal with requisite jurisdiction. She concluded that without a valuation report, the Tribunal erroneously assumed the jurisdiction.

For the above reasons, the learned Judge on her own motion revised and set aside the proceedings together with the judgment of the Tribunal.

Being dissatisfied, the appellant preferred the following two grounds of appeal to this Court:

> *(1)- That, the honourable learned appellate judge of the High Court erred in law and fact to raise an issue of*

valuation report suo motu and condemned the appellant unheard on this issue.

(2)- That, the honourable learned appellate judge of the High Court erred in law for narrowly interpreting Section 167 and without due regards to wordings of Section 62 of Cap. 114 RE 2002 and Section 9 of Cap 216 as to the court having jurisdiction to determine the matter and as such occasioned failure of justice in the case.

At the hearing of this appeal on 26th September, 2018, learned Counsel Mr. Mashaka Fadhili Tuguta appeared for the appellant while learned counsel Mr. Adam Robert appeared for the respondent. The appellant and the respondent had earlier filed their respective written submissions on 1st July, 2016 and on 29 July, 2016.

The counsel for the appellant abandoned the second ground of appeal and argued the remaining ground of appeal which faults the trial Judge for raising the issue of valuation report *suo motu* thereby condemning the appellant without affording her a hearing on the appropriateness of the valuation report. Mr. Tuguta submitted that the issue of the valuation report neither featured in the proceedings before

the Tribunal and its resulting judgment, nor was it raised as any of the grounds of appeal before the High Court. This means, the appellant or the respondent in the two courts were not afforded the opportunity to submit on the issue of valuation report. The learned counsel referred to the relevant pages of the judgment of the first appellate court the learned Judge had raised the issue of valuation report while composing her judgment stating: *"In the course of composing this judgment, I have discovered a serious legal issue which was not a subject of the appeal before the District Court or before this court. For that reason therefore, I have found it apposite that I deal with that legal issue* ***suo motu****, which gives no jurisdiction to this court to determine this appeal as it is."*

In urging us to declare as a nullity, the decision of the first appellate court on the ground that it was arrived at without affording an opportunity to the parties to address the court on the issue of valuation report, Mr. Tuguta galvanised the support of several unreported decisions of this Court in **DISHON JOHN MTAITA V. THE DIRECTOR OF PUBLIC PROSECUTIONS**, CRIMINAL APPEAL NO. 132 OF 2004; **KLUANE DRILLING (T) LTD V. SALVATORY KIMBOKA**, CIVIL

APPEAL NO. 75 OF 2006; and **MARGWE ERRO, BENJAMIN MARGWE & PATER MARWE V. MOSHI BAHALULU**, CIVIL APPEAL NO. 111 OF 2014.

In the referred to **MARGWE ERRO, BENJAMIN MARGWE & PATER MARWE V. MOSHI BAHALULU** (supra), this Court stated:

> *"The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that in the circumstances of this case the denial of the right to be heard on the question of time bar vitiated the whole judgement and decree of the High Court.*
>
> *Without much ado we find there to be merit in this appeal which we accordingly allow. We find the judgment of the High Court to have been a nullity for violation of the right to be heard."*

After urging us to allow the appeal, quash both the proceedings including the Judgment of the High Court, and remit the matter to be tried afresh by another Judge, Mr. Tuguta concluded by pressing for costs.

Mr. Adam Robert, learned counsel for the respondent not only supported the appeal, but went further to conceding that after hearing the counsel for the appellant and looking at the authorities which Mr. Tuguta had cited to us, he was left in no doubt that the first appellate High Court had violated the rules of natural justice regarding the parties' right to be heard. In so far as he was concerned the respondent's right to be heard was as much violated as the appellant's rights were. Like Mr. Tuguta, he also urged us nullify the proceedings in the High Court and remit the matter back to the High Court for a new hearing before another Judge.

As rightly submitted by both learned counsel, the first appellate Judge raised two jurisdictional issues, and went ahead to make her own decision thereon without hearing the parties' submissions on the jurisdictional issues concerned. In the High Court, none of the three grounds of appeal upon which the appellant's and respondent's learned counsel made their respective submissions, were concerned with any of the two jurisdictional issues which the learned Judge had raised *suo motu*.

The first legal issue which the learned Judge raised *suo motu* contended that since the parties had earlier litigated their land dispute before the Council, it was not jurisdictionally appropriate for any aggrieved party to file an Application in the Tribunal. Instead, the learned Judge held that the aggrieved should have referred the dispute to a Ward Tribunal in compliance with Section 9 of the Land Disputes Courts Act, Cap. 216. The learned counsel for the appellant is justified to complain that had the parties been invited to address the High Court on this jurisdictional issue, they would most likely have offered their submissions regarding the legal question whether a party aggrieved with the decision of the Council can only refer the dispute to a Ward Tribunal.

Even after concluding that parties dissatisfied with decisions of the Council could not in law file a fresh applications in the Tribunal, the learned Judge nonetheless raised, *suo motu*, another issue regarding the pecuniary jurisdiction of the Tribunal, and determined that the Tribunal cannot assume jurisdiction where an application before it is not accompanied with a valuation report.

On our part, we need not belabour the point that it is unacceptable in law for the learned first appellate Judge to raise the two salient jurisdictional issues while composing the judgment without giving the parties the opportunity to be heard on the issues. Decisions of this Court which the learned counsel for the appellant cited, go out to show that the jurisprudence is well settled on the matter, so much so, in **MBEYA–RUKWA AUTOPARTS AND TRANSPORT LTD V. JESTINA GEORGE MWAKYOMA** [2003] T.L.R. 251 the Court restated that in Tanzania: *"..... natural justice is not merely a principle of the common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard among the attributes of equality before the law."*

Inappropriateness of courts raising jurisdictional matters *suo motu* and determining them without hearing the parties was deplored in **EX-B.8356 S/SGT SYLVESTER S. NYANDA VS THE INSPECTOR GENERAL OF POLICE & THE ATTORNEY GENERAL**, CIVIL APPEAL NO. 64 OF 2014 (unreported). Three issues were framed for determination by the trial High Court. But, while preparing its judgment, the trial court abandoned all the three issues and framed a completely

new issue upon which it based its decision. Before revising and quashing the entire proceedings of the trial High Court, the Court observed:

> *"There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed* ***suo motu*** *which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying of the parties the right to fair hearing."*

In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts, while composing their decision, discover new issues with jurisdictional implications. The way the first appellate court raised two jurisdictional matters *suo motu* and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and the judgment of the High Court a nullity, and we hereby declare so.

We direct that this matter be remitted back to the High Court for the LAND APPEAL NO. 52 OF 2013 to be heard afresh by another judge of the High Court.

In the end result, this appeal is allowed. Each side shall bear its own costs.

DATED at **MWANZA** this 27th day of September, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

G. A.M. NDIKA
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL