

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUSSA, J.A., MUGASHA, J.A., And LILA, J.A.)

CIVIL APPEAL NO. 209 OF 2016

NGERENGERE ESTATE COMPANY LIMITED.....APPELLANT

VERSUS

EDNA WILLIAM SITTARESPONDENT

**(Appeal from the decision of the High Court of Tanzania,
(Land Division) at Dar es Salaam)**

(Mutungi, J.)

dated 9th day of May, 2013

in

Consolidated Miscellaneous Land Applications Numbers 43 and 71 of 2016

RULING OF THE COURT

29th March & 11th April, 2019

MUGASHA, J.A.

In the High Court of Tanzania at Dar-es-Salaam, the appellant filed an application under section 78 (4) of the Land Registration Act, Cap 334 RE.2002 and Order XLIII Rule 2 and section 95 of the Civil Procedure Code Cap 33 RE.2002 seeking the following orders:

1. *That the Honourable Court may be pleased to
summon the Respondent to appear before it to*

show cause why the caveat she filed with the Registrar of Land in respect of the Applicant's right of occupancy on Plots Nos. 458 and 459, Mkono wa Mara, Sangasanga, Morogoro with Certificate of Title Numbers 100620 and Plot No. 332, Forest Hill Areas with Certificate of Titles No. 48432 should not be removed;

- 2. That the honourable Court may be pleased to make an Order removing caveat registered by the Registrar of Titles on September 11, 2009 in respect of the Applicant's rights of occupancy on Plots Nos. 458 and 459, Mkono wa Mara, Sangasanga, Morogoro with Certificate of Title Numbers 100620 and Plot No. 332, Forest Hill Areas, with Certificate of Titles No. 48432;*
- 3. Costs of this Application.*
- 4. Other orders in favour of the Applicants the Honourable Court may deem fit and proper to make.*

What precipitated the said application is a caveat entered by the respondent and registered by the Registrar of Titles as an encumbrance in Land Register in respect of the said pieces of land whereby the respondent being one of the shareholders alleged that, the appellant Company was about to sell the said properties without having conducted the General Meeting where the shareholders would have initially discussed and deliberated on the matter.

The High Court determined the application in favour of the respondent. Aggrieved, the appellant lodged an appeal before this Court raising six grounds of complaint namely:

- 1. That the Honourable Court erred in fact and law by holding in effect that a mere fact of caveator being a shareholder of 10 % of the shares in a company holding a property allegedly being intended to be sold is a sufficient cause not to make an order of removal of the caveat.*
- 2. That the Honourable Court erred in fact and law by holding to the effect that the respondent demonstrated good cause for not removing the*

caveat even after she failed to show that the appellant was intending to sell the properties subject to the caveat, a second reason on which registration of the caveat was based.

- 3. That the Honourable Court erred in fact and law by holding to the effect that the respondent demonstrated good cause for not removing the caveat even after she failed to show that there was a case pending before Rugaziya, J in the High Court, a 3^d reason for filing the caveat, and suppose it were there, by failing to demonstrate its connectivity with the caveat lodged.*
- 4. That the Honourable Court erred in fact and law by ruling to the effect that the caveat registered, which the appellant sought to be removed, had anything to do with the holding or non holding of the general meetings;*
- 5. That the Honourable Court erred in fact and law by ruling to the effect that there was proof that the appellant was not holding general meetings;*

6. That the Honourable Court erred in fact and law by in effect entertaining and remedying the respondent's complaint related with the non holding of general meetings of the appellant which the same Court (Dar-es-salaam Registry) in Civil Case No. 114 of 2008 on October 15 2008 held to be a matter within the exclusive jurisdiction of the Minister of Trade.

Moreover, in addition to stated grounds of complaint raised, the appellant has asked this Court to make among others, the following orders:

- (a) To quash and set aside the whole of the decision of the High Court;
- (b) To grant all the reliefs prayed by the appellant in the High Court.

Parties filed written submissions containing arguments for and against the appeal in terms of Rule 106 (1) and (8) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

At the hearing of the appeal, the appellant was represented by Mr. Ditrick Mwesigwa, learned counsel whereas the respondent had the services of Mr. Melkizedeck Lutema and Ms. Dora Mallaba, learned counsel.

Before proceeding to hear the appeal, we required parties to address us on the propriety or otherwise of the appellant not joining the Registrar of Titles when the matter which is a subject of this appeal was initially before the High Court.

Mr. Lutema submitted that, the failure to join the Registrar of Titles vitiated the proceedings of the High Court because the Registrar of Titles who registered the caveat was not given an opportunity to be heard. In this regard, he argued that the proceedings before the High Court were tainted for contravening the Rules of natural justice as the Registrar of Titles was denied an opportunity to be heard. As such, he urged us to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act Cap 141 RE. 2002 to quash and set aside the proceedings of the High Court.

On his part, Mr. Mwesigwa was of the view that, the failure to join the Registrar of Titles did not occasion injustice to the respondent since the High Court did not make any order to remove the caveat. When we inquired from Mr. Mwesigwa if the determination in favour of the appellant if any, by the Court would not be at the detriment of the Registrar who is yet to be heard, he maintained that no injustice would be occasioned.

The point for our determination is whether the failure to join the Registrar of Titles vitiated the proceedings before the High Court and if the present appeal can be determined without occasioning any injustice to the Registrar of Titles.

It is clear at page 7 of the record of appeal that, before the High Court the appellant lodged an application against the respondent seeking removal of the caveat registered by the Registrar of Titles in respect of the landed assets in question. At page 164 of the record of appeal, in dismissing the application the High Court Judge concluded as follows:

"Once again as submitted by respondent in court and not disputed by the applicant's side the General Meeting has never been held. The only way to safeguard the interests of the respondent would be in the given circumstances to file a caveat as the respondent did before the Registrar of titles. In the premises I do find that the caveats registered by the respondent before the Registrar of Titles should not be removed as they were based on good and

sufficient grounds. I proceed to dismiss the application."

Although the High Court did not make any order against the Registrar of Titles, before this Court the appellant is seeking to be granted all the reliefs prayed before the High Court which includes the prayer for an order against the Registrar to remove the registered caveats. In this regard, we in addition, asked ourselves if the determination of this appeal will not occasion a failure of justice considering that, the Registrar of Titles who is yet to be heard. We are fortified in that account because the law regulating the registration of caveats is governed by Part IX of the Land Registration Act whereby section 78 provides as follows:

(1) Any person who claims an interest in any registered land, or any person who has presented a bankruptcy petition against the owner of any estate or interest, may present a caveat in the prescribed form.

(2) Every such caveat shall be supported by a statutory declaration stating the facts upon which the claim is based.

- (3) Upon receipt of any such caveat, the Registrar shall enter the same in the land register as an encumbrance and shall notify the same to the owner of the estate or interest thereby affected.*
- (4) The High Court, on the application of the owner of the estate or interest affected, may summon the caveator to attend and show cause why such caveat should not be removed and thereupon the High Court may make such order, either ex parte or otherwise as it thinks fit.*
- (5) Any person who has presented a caveat may at any time withdraw the same by a notice in the prescribed form executed and attested in the manner required for deeds by sections 92 and 93.*

(6) If a deed is presented for registration which purports or appears to affect any registered estate or interest in respect of which a caveat is entered, the Registrar shall give notice thereof to the caveator and shall suspend registration of such deed for one month from the date of such notice. At the expiration of such period, the caveat shall lapse and the deed shall be registered as at the date of presentation unless in the meanwhile the application for registration has been withdrawn or the High Court otherwise directs.

(7) The interest protected by a caveat may not be made the subject of a second caveat so as to defeat the provisions of subsection (6).

In a nutshell, by the virtue of the scheming of the law on caveats, in terms of section 78 (3) of the Act, it is the Registrar of Titles who is mandated to register an encumbrance in the land register upon receiving

an application from a person who claims to have an interest in any registered land. Thereafter, the Registrar is required to notify the adverse party on the existence of the caveat so that the caveator may present a deed under section 78 (6) within one month. If the Deed sails through then, the caveat shall be suspended and the deed will be registered by the Registrar of Titles.

We understand that, under section 78 (4) of the Act the owner of the estate can move the High Court to summon the caveator as to why the caveat should not be removed. However, in the case under scrutiny, since before the High Court the appellant pleaded to be seeking an order against the registration of the caveat by the Registrar of Titles in respect of the landed properties in question, the appellant ought to have joined the Registrar as one of the respondents so that the Registrar of Titles could initially be heard by the High Court on the matter. This is in line with the case of **PETER NG'HOMANGO VS THE ATTORNEY GENERAL**, Civil Appeal No 114 of 2011 where the Court said: -

"It is trite law that the parties are bound by their own pleadings. It was therefore not open to the learned High Court Judge to disregard the pleadings

in order to reach a conclusion that he might have thought was just and proper without affording the parties an opportunity to be heard.”

Moreover, notwithstanding that the High Court gave no orders against the Registrar of Titles, as earlier pointed out, before the Court the appellant in the Memorandum of Appeal has maintained to be seeking an order against the Registrar of Titles whereas Mr. Mwesigwa is of the view that, the non-joinder of the Registrar of Titles will not occasion a failure of justice. We found this argument wanting because the Court has always emphasized the right to be heard is a fundamental principle which the courts of law must jealously guard against. This has been emphasized in a range of cases including **MBEYA-RUKWA AUTOPARTS AND TRANSPORT LTD VS JESTINA MWAKYOMA** [2003] TLR 251, **SELCOM GAMING LIMITED VS GAMING MANAGEMENT (T) AND GAMING BOARD OF TANZANIA** [2006] T.L.R 2000 and **MIRE ARTAN ISMAIL AND ANOTHER VS SOFIA NJATI**, Civil Appeal No 75 of 2008 (unreported). In the case of **MBEYA-RUKWA AUTOPARTS AND TRANSPORT LTD VS JESTINA MWAKYOMA** (supra) in which the English case of **RIDGE VS BALDWIN** [1964] AC 40 was considered, the Court observed 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 among the attributes of equality before the law, and declares in part:

Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..."

In view of the settled law on the right to be heard, we are of a serious considered view that, it will be absurd for this Court to make any order against the Registrar of Titles as prayed by the appellant without availing her opportunity to be heard. In this regard, we agree with Mr. Lutema that, the Registrar of Titles ought to have been joined as a party in the application before the High Court failure of which amounted to a fundamental procedural error and occasioned a miscarriage of justice which cannot be condoned by the Court by hearing the appeal.

In the result, we have no option but to declare the decision of the High Court a nullity. We invoke the powers vested on us under section 4 (2) of the AJA, and hereby quash the decision of the High Court and the subsequent orders. If the appellant so wishes to proceed against the Registrar of Titles she may lodge an application before the High Court and implead the Registrar of Titles as one of the parties. Since the issue under consideration was raised by the Court *suo motu*, we make no order as to costs.

DATED at DAR ES SALAAM this 8th day of April, 2019.

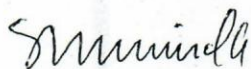
K. M. MUSSA
JUSTICE OF APPEAL

S. E. A MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL