IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CIVIL APPEAL NO. 300 OF 2017

(CORAM: LILA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

THE REGISTERED TRUSTEES OF
ARUSHA MUSLIM UNION ..... APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF NATIONAL
MUSLIM COUNCIL OF TANZANIA alias BAKWATA ..... RESPONDENT

(Appeal from Of Judgment and Decree of the High Court of Tanzania at Arusha)

(Massengi, J.)

Dated the 1st day of October, 2013
in
Land Case No. 29 of 2012
.....

JUDGMENT OF THE COURT

13th & 20th August, 2019

LILA, JA.:

Before the High Court of Tanzania sitting at Arusha was a suit instituted by the Registered Trustees of National Muslim Council of Tanzania alias BAKWATA, the respondent herein, against the Registered Trustees of Arusha Muslim Union, the appellant. The former was seeking for, among other reliefs, a declaration that the latter had fraudulently procured a Certificate of Title over Plot No.34 Block 'G' area 'F' Arusha Municipality, declaration that it was the lawful owner of the said property and permanent injunction restraining the latter, its agents,

workmen, employees and any other person working under his instructions from interfering with its ownership, possession and authority over that property. The High Court found, on the one part, that the appellant was an unlawful society with no capacity to own properties, and, on the other part, the respondent failed to prove ownership of the disputed property. Consequent upon that finding the Administrator General was vested with the supervision of the said property. The appellant felt aggrieved, hence the present appeal.

The appellant has principally fronted three grounds of complaints and one ground being in the alternative, seeking to assail the High Court decision. They run thus:-

"1. *That, the Judge erred in law and in facts when considered issue which was not among of the issues framed by the parties and latter held that the appellant was unlawful society.*

2. *That, the Judge erred in law and in facts when held that the appellant was unlawful society despite of evidence proving that the appellant is a lawful society.*
3. *That, the Trial Judge erred in law and facts when failed to issue a decree which agree with judgment.*

IN ALTERNATIVE

4. *That, after the learned Judge has held that the appellant was unlawful society, the judge erred in law and facts in not held that the respondent's case was bad in law for the respondent could not have sued a person having no locus standi."*

According to the proceedings and judgment of the trial court, the following position is apparent. Upon completion of the pleadings, the following issues were framed and agreed by the parties:-

"1. Who is the lawful owner of the disputed land namely Plot No. 34 Block "G" within Arusha City.

2. Whether the defendant fraudulently procured the Certificate of Right of Occupancy in regard to Plot 34 Block "G" area "F" within Arusha City.

3. To what reliefs are the parties entitled to."

After hearing the witnesses of both sides on the issues framed, the presiding Judge, on 12/07/2013, summoned the Administrator General as a court witness and one Edna Kamara, a learned State Attorney, from that office appeared in court to testify. Apart from confirming that both parties were dully registered trustees and that the office of the Administrator General is the one mandated to register Boards of Trustees, she stated that she could not say that the appellant was a

lawful society and had no directive to strike them off the register. She also denied being aware of the Court of Appeal decision in Civil Appeal No. 33 of 1990 involving the same parties to this appeal.

In its judgment dated 01/10/2013, the High Court (Massengi, J. Rtd) after giving a summary of the evidence by the parties and when considering issue number one, had this to say:-

> *"In disposal of this suit I will start by discussing the first issue on who is the lawful owner of the disputed land namely Plot No. 34 Block "G" area "F" within Arusha City.* ***Before discussing on who is the owner of the disputed property, I find it necessary to discuss the validity of the defendant as raised by the plaintiff's counsel so as to make it clear first because we cannot deal with the issue of ownership before putting it clear on whether the parties exists in law.*** *The law as it is in regard to legal existence of societies has to be registered under the Societies Act, Cap.337 R. E. 2002 as provided under the provisions of section 12(10 which states that;*
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> > *"Every local society, other than a local society in respect of which an order made or deemed to be made under section 8 is in force, shall, in*

the manner prescribed, make application to the Registrar for registration under this Act."

After a society being registered under the Societies Act and its existence being recognized in law, is when the trustees of that society has to be registered under the Trustees' Incorporation Act, Cap. 318 as provided under section 2(1) of the Act so as to be recognized as a body corporate. Referring to the case of The Registered Trustees of Arusha Muslim Union vs. The Registered Trustees of BAKWATA, Civil appeal No. 33 of 1990, Court of Appeal of Tanzania at Arusha (Unreported) the plaintiff were registered under the Societies Act on 17/12/1968 and they were incorporated under the Trustees Incorporation Act on 09/06/1969. As the position stands in that case, the defendant were incorporated under the Trustees' Incorporation Act on 15/04/1964 this is as shown in exhibit DE8 and also the witness from the Administrator General one EDNA KAMARA proved that the defendant are incorporated under the Trustees' Incorporation Act. From the case referred above, the defendant was declared unlawful society for not being registered under the Societies ordinance, even to date there is no

evidence to prove that the defendant are(sic) registered under the Societies Act. ***It appears that from 1991 when the decision of the Court of Appeal as referred above declared the defendant unlawful society, the defendant did not take any further action of registering its society*** *instead probably out of misunderstanding it repeated to re-register in the Trustees' Incorporation Act in 2007.* ***Since there was no further action to register the defendant under the Societies act after the decision of the Court of Appeal of 1991 as already referred, the position remains the same that the defendant is unlawful society with no capacity to own properties..."*** (Emphasis added)

As to whether following the above finding the respondent was then automatically entitled to be the lawful owner of the disputed property, the learned trial Judge stated that:-

"The plaintiff cannot be declared the lawful owner of the disputed land without evidence to prove that the disputed property belongs to them. Having gone through the evidence adduced before this court, there is sufficient to prove that the disputed property was denoted as

> *"wakf" to Bondeni/Swahili mosque to be used as Madrasa...From the evidence above I conclude that the disputed land was denoted to Bondeni Mosque which is under African Muslim Union.* ***But since the defendant is unlawful society with no capacity to own properties, I find for the sake of justice, the disputed property be vested under the trust of Administrator General."*** (Emphasis added).

In respect of issue number two, after considering the procedure followed by the appellant to obtain the Certificate of Right of Occupancy over the disputed property, the judge stated that:-

> *"Considering the above, I find that the defendant did not procure the Certificate of Right of Occupancy fraudulently, only that the purported offer of Right of Occupancy, consent of the Administrator General to own land and* ***the Certificate of Right of Occupancy procured by the defendant were ineffectual as the defendant had no legal capacity to own land."*** (Emphasis added).

It is evident, from the above excerpts, that the High Court formulated the issue pertaining to the legal existence of the parties and reached at the finding that the appellant was an unlawful society with

no capacity to own land and that finding formed the basis of the findings on all the issues framed for its determination.

At the hearing of the appeal the appellant was represented by Mr. Edmund Ngemela, learned advocate and the respondent was represented by Mr. Harun Msangi, learned advocate.

We propose to consider the first ground of appeal which, in our view, is capable of sufficiently disposingof the appeal.

Arguing in respect of the first ground of appeal, Mr. Ngemela submitted that the appellant was a registered Trustee hence it was improper for the Judge to hold that it had no capacity to own land basing on the decision of the Court of Appeal in Civil appeal No. 33 of 1990 which was decided on the basis of the facts that obtained during that material time. He was emphatic that that was not an issue framed during the hearing and parties were not heard on that issue which the Judge raised and determined in her judgment. He was of the view that the file be remitted back to the High Court to enable the parties to be heard before another Judge on that issue.

On his part, Mr. Msangi who, at first, opposed to the contention by Mr. Ngemela, later and upon reflection, conceded that it is true that the

issue of unlawfulness of the appellant was raised and determined by the Judge in the judgment without the parties being accorded an opportunity to be heard. His view was on all fours with Mr. Ngemela on the way forward.

In view of the foregoing submissions by counsel of the parties, it is common ground that the parties were not only not heard on the issue whether or not the appellant was an unlawful society with no capacity to own land, but also the same was neither among the framed issues nor raised by the court and placed before the parties for determination by the High Court. In that accord, both counsel agreed that the record be remitted back to the High Court for the parties to be accorded an opportunity to be heard on that issue. They impressed on us that the hearing should be before another judge.

We, indeed, agree with both learned counsel that the legal existence of the appellant was not among the issues framed for the determination of the High Court. The record, as alluded above, bears out that three issues were framed and the legal existence of the appellant was not one of them.We are, upon a serious examination of the record, satisfied that the discussion before the High Court centred on when were the parties registered and incorporated under the

Trustees Incorporation Act and according to the Court witness one Edina Kamara, both parties were duly incorporated. The issue touching on the legal existence of the parties, let alone the appellant, was never placed before the parties so that they could either argue or lead evidence to that effect.

We are alive that under Order XIV rule 5(1) and (2) of the Civil Procedure Code, Cap. 33 R. E. 2002 (the CPC), a trial Judge has the power to amend, add, or strike out an issue already framed but the parties should be given an opportunity to address the court on the new issue. Basically, cases must be decided on the issues on record and if it is desired by the court to raise other issues either founded on the pleadings or arising from the evidence by witnesses of the parties or arguments during the hearing of the suit should be placed on record and the parties should be given an opportunity to be heard by the court.

Commenting on the foregoing legal position, **Mulla** in his book The Code of Civil Procedure Vol.II 15th Edition at page 11432 cited in the case of **Scan-Tan Tours Ltd vs. The Registered Trustees of The Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (unreported) observes:-

"If the court amends an issue or raises an additional issue, it should allow a reasonable opportunity to the parties to produce documents and lead evidence pertaining to such amended or additional issue. Amendment of issue is the discretion of the trial court. No right or obligation of a party is determined, either by the court refusing to delete issues, or by the court adding more of them. It is only a procedural matter. The trial court is required to determine the controversy between the parties."

In the instant case the complaint is that the Judge reached at the decision that the appellant is an unlawful society with no capacity to own land. She raised that issue and relied on the Court of Appeal decision in Civil Appeal No. 33 of 1990 to arrive at that finding without the parties being accorded the right to address the court on that issue.We are at one with Mr. Ngemela that it was improper for the Judge to rely on that decision as it was decided on the basis of the facts which obtained then without hearing the parties on that issue. In addition, this Court has, in a range of cases, consistently emphasized on the right to be heard (***audi alteram partem***) before deciding the matter in dispute or issue on merit. The Court has insisted that the right to be heard is both elementary and fundamental and its fragrant

violation will of necessity lead to the nullification of the decision arrived at. For instance, in the case of **Mbeya-Rukwa Auto Parts & Transport Limited vs. Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000 (unreported), the Court stated 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 the equality before the law..."*

As for the aftermath of the violation of the right to be heard, the Court in the case of **Abbas Sherally & Another vs. Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) the Court, in no uncertain terms, stated that:-

> *"The right of a party to be heard before adverse action is taken against such a party has been stated and emphasized by court 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 natural justice."*

It is evident in the present case that the parties were not heard on the issue whether the appellant is an unlawful society with no capacity to own land which was raised and determined by the High Court when composing the judgment. The Judge, therefore, arrived at the finding that the appellant was an unlawful society with no capacity to own land in flagrantviolation of the fundamental right to be heard. Consistent with the settled law, the resultant effect is that such finding cannot be allowed to stand. It was a nullity.

As alluded to above and as is apparent in the quoted excerpts of the High Court decision, the finding that the appellant is an unlawful society with no capacity to own land formed the basis of the decision of all the issues placed before the High Court for determination. In the circumstances since we have held that finding a nullity, we are inclined to hold also that both the High Court judgment and the decree thereof cannot stand.

As this ground alone sufficiently disposes of the appeal, we see no reason to consider the other grounds of appeal.

In fine, both the High Court judgment and the decree thereof are hereby quashed and set aside. The record is hereby remitted to the High Court for it to hear the parties on the issue whether the appellant is an

unlawful society with no capacity to own land and then compose a fresh judgment in which all the issues that were framed as well as the above one shall be considered in accordance with the evidence and law. As the parties are not to blame on what transpired, we hereby order that each party shall bear its own costs.

DATED at **ARUSHA** this 19th day of August, 2019.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 20th day of August, 2019 in the presence of Mr. Hemed Semith holding brief for Mr. Edmund Ngemera, for the Appellant and Mr. Hemed Semith holding brief for Mr. Haroun Msangi for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL