

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

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

CIVIL APPEAL NO. 16 OF 2018

ANZAMEN MALIKI APPELLANT

VERSUS

RASHID HUSSEIN RESPONDENT

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

(Wambura, J.)

dated the 27th day of November, 2015

in

Land Case No. 262 of 2013

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JUDGMENT OF THE COURT

21st June & 5th September, 2019

MWARIJA, J. A.:

This is an appeal against the decision of the High Court of Tanzania, Land Division dated 27/11/2015 in Land Case No. 262 of 2013. In that case, the respondent, Rashid Hussein sought an eviction order against the appellant, Anzamen Maliki from a house situated on Plot No. J 712 in Manzese Kilimani area, within the Dar es Salaam city. The respondent claimed also for damages arising from the appellant's continued occupation of the premises despite the eviction order issued by the District Court of Ilala in Criminal Case No. 463 of 1990.

The facts giving rise to the case filed in the High Court are stated in *inter alia* paragraphs 5, 6 and 7 of the plaint as follows:

- "5 That, the cause of action arose after the Defendant's through negligence or intentionally did not comply with the Court order to vacate from the house of the Plaintiff entered on 26th July, 1995 in Criminal Case No. 463 of 1990 decided by honourable J.S. Mgetta RM of District Court of Kivukoni front.*
- 6. That, the Plaintiff in several occasions strived to get vacant possession of his house from the Defendant in vain.*
- 7. That the plaintiff raised several complaints to courts eventually got advice from Judge In-Charge through office of the Registrar to seek eviction order from the house of Mr. Anzamen Maliki hereinafter referred to as Defendant."*

The appellant denied the respondent's claims. In his written statement of defence, he replied to the contents of paragraphs 5, 6 and 7 of the plaint reproduced above stating as follows:

- "3. The contents of paragraph 5 of the plaint are strongly denied. Further, the Defendant states that the Court order referred to therein has no*

any legal force because it was quashed by the High Court in Criminal Revision No. 43 of 1995. A copy of the High Court order is hereto annexed marked 'MKB-1' and the Defendant shall crave leave of the Court to refer to it as part of this written Statement of Defence.

4. That the contents of paragraph 6 of the Plaint are denied. It is specifically denied that the plaintiff is the owner of the suit premises. It is stated that the Defendant is the lawful owner of the suit premises as per the Letter of Offer of the Right of Occupancy dated 26th July, 1995 with reference No. D/KN/A/34274/4/WKC and had from the date of acquisition of the suit premise been paying all the necessary fees, charges and rents related thereto. Attached hereto and collectively marked 'MKB' are copies of the Leter of Offer of Right of Occupancy and the exchequer receipts evidencing ownership and payment of land rents and other charges respectively and the Defendant shall crave leave to refer to them as part of this written statement of Defence.

5. That the Defendant purchased the suit premises as an unsurveyed plot from Max Massawe in

1989, surveyed it and improved the suit premises by constructing a modern house and is currently staying in the suit premises together with his family. A copy of the Sale Agreement is hereto attached marked 'MKB-3' and the Defendant shall crave leave to refer it as part of this written Statement of Defence."

With regard to the contents of paragraph 7 of the plaint, the appellant replied as follows:

"7. That the contents of paragraph 7 of the Plaint are noted. Further, the Defendant stated that the Judge In-Charge and the Registrar of the High Court were misled by the plaintiff."

The respondent did not give evidence at the hearing of the suit. It was his wife, Asha Mwinyimvua Kilumba (PW1) who testified for his case. Giving evidence in support of the respondent's claims, PW1 who was led by Mr. Payowela, learned counsel, averred that the respondent purchased the suit house in 1988 from one Max Maka Massawe. It was her evidence further that, the respondent took possession of the house after payment of Tzs. 80,000.00 to the alleged seller in the presence of the area's ten cell leader, one Pazi Masongela.

On the other hand, in his defence, the appellant who testified as DW1, stated that he came to know the respondent in 1990 when he was charged in the District Court of Ilala in Criminal Case No. 463 of 1990 with the offence of criminal trespass. He was accused of having trespassed into the suit premises. He testified that he was a witness in that case in which the respondent was acquitted on the ground that there was a dispute over ownership of the house which was the subject matter of the charge. That, according to that decision, the dispute could not be resolved in a criminal proceeding. The appellant stated further that, despite that decision, the District Court proceeded to order him to vacate the suit premises. That order, he said, was later quashed by the High Court in Criminal Revision No. 43 of 1995.

In cross-examination, the appellant disputed the evidence of the respondent that the suit premises belonged to him. According to the appellant, he was the lawful owner of the disputed house, having an offer of a right of occupancy issued by the Kinondoni District Land Office on 26/7/1995. He tendered that document as exhibit DA2 and the receipts evidencing payments of land rent as exhibit D3 collectively.

After the closure of evidence by both parties and while in the course of composing her judgment, the learned trial judge realized that the person who was alleged to have sold the house to the respondent was not called as a witness. She was of the view that his evidence was necessary for just determination of the case and therefore ordered that he be called to testify as a court witness. The learned trial judge observed as follows:

"While preparing and writing the judgment in this matter I realized one Max Massawe is initial witness he has not summoned (sic) by either party to give his evidence. In the circumstance I believe he ought to be summoned so as to reach a fair judgment."

It transpired however, that the said person had passed away and as a result, his son, Heobard Massawe (CW1) was called to testify. His evidence was to the effect that his father, the late Max Massawe, had previously sold the house to the appellant but the appellant failed to pay the balance of the purchase price. As a result, the house was resold to the respondent after the former had been refunded the amount of the money paid by him as part of the purchase price.

In her judgment, although she was of the view that the eviction order which was relied upon by the respondent in his claims was non-

existent, the learned trial judge found that the respondent was the lawful owner of the house by virtue of having purchased it from Max Massawe. She thus ordered the appellant to vacate the premises. The appellant was also ordered to pay Tzs. 20,000,000.00 to the respondent as damages for the hardship which he experienced as a result of the appellant's continued occupation of the suit premises while he was not its lawful owner.

The plaintiff was aggrieved by the decision of the High Court hence this appeal which is predicated on the following four grounds:

- "1. That the Honourable trial Judge of the High Court erred in law and in fact in not dismissing the suit after the Court's finding that there was no Court order for eviction of the appellant capable of execution as against the appellant in Criminal Case No. 463 of 1990 as alleged by the respondent, which was the only central issue pleaded by the respondent, framed by the Court and agreed by the parties.*

- 2. That the Honourable trial Judge of the High Court erred in law and in fact by basing her judgment on an additional issue of ownership of the suit land, framed by the Court suo motu at the time of composing the judgment without calling upon the parties to address the Court on the same.*

3. *That the Honourable trial Judge of the High Court erred in holding that the respondent was the lawful owner of the suit land and thereby granting possession of the suit land to the respondent without any proof in support of ownership of the suit land by the respondent.*
4. *That the Honourable trial Judge of the High Court erred in law and fact in declaring the respondent lawful owner of the suit land relying on a sale agreement and other documents which were not tendered in Court as exhibits."*

At the hearing of the appeal, the appellant was represented by Mr. John Kamugisha, learned counsel. On his part, the respondent appeared in person, unrepresented. On 27/3/2018, the appellant's counsel filed his written submission in compliance with Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The respondent did not however, file any written submission in reply in terms of Rule 106 (8) of the Rules.

In his written submission, which he highlighted at the hearing, Mr. Kamugisha who argued grounds 1 and 2 together, submitted that the learned trial judge erred in failing to dismiss the suit after she had found that the eviction order given by the Ilala District Court was quashed by the High Court. According to the learned counsel, the order which was quashed

by the High Court in Criminal Revision No. 45 of 1995 was central to the respondent's claims in the suit.

Mr. Kamugisha argued further that, the learned trial judge erred in proceeding to determine the suit basing on the ownership dispute which did not arise in the suit, but raised *suo motu* by the Court and determined without affording the parties the opportunity of being heard on it. He stressed that, since the case had been closed and the parties had already filed their final submissions at the time when the High Court recorded the evidence of CW1, they ought to have been heard before the determination of the issue of ownership.

Relying on the decision of the Court in the case of **George J. Minja v The Attorney General**, Civil Appeal No. 75 of 2013 (unreported), the learned counsel submitted that, determination of the issue of ownership which was not one of the framed issues without affording the parties the opportunity of being heard, occasioned miscarriage of justice on the part of the appellant. Bolstering his argument further, he cited the case of **Mbeya-Rukwa Autoparts & Transport Ltd v. Jestina George Mwakyoma** [2003] TLR 252. He added that, although in the course of giving evidence, the witnesses testified on that issue, the suit was not

based on a claim of ownership but rather, on the enforcement of the order of eviction issued by the District Court of Ilala. If the learned trial judge found it apposite to resolve the ownership dispute over the suit premises, Mr. Kamugisha went on to argue, the parties should have been given the opportunity of being heard before the High Court made a decision thereon.

On the 3rd and 4th grounds which Mr. Kamugisha argued in the alternative to the 1st and 2nd grounds, it was his contention that the High Court erred in declaring the respondent the lawful owner of the suit premises without sufficient evidence to that effect. According to the learned counsel, the learned trial judge wrongly acted on the documents which were annexed to the plaint, including the sale agreement which were not tendered in evidence. Relying on the provisions of O. XIII r. 4 of the Civil Procedure Code [Cap 33 R.E. 2002], the learned counsel contended that, in order for a document to have any evidential value in a case, it must first be admitted in evidence and endorsed by the court as an exhibit. Since that was not done, he went on to argue, the High Court wrongly acted on the documents to declare the respondent the lawful owner of the suit premises.

The respondent did not have much in response to the submissions made in support of the appeal. He argued briefly that, the High Court considered the adduced evidence and the supporting documents which were attached to the plaint and arrived at a proper decision. He prayed for dismissal of the appeal on account of lack of merit.

Having considered the rival submissions of the learned counsel for the parties and after having gone through the record, we became settled that, the determination of the 1st and 2nd grounds of appeal should not detain us much. It is not in dispute that the proceedings in the High Court were in the nature of execution of the order of the District Court of Ilala made in Criminal Case No. 463 of 1990.

From the record, the pleadings gave rise to the following issues:

- "1. Whether the defendant failed to vacate from the plaintiff's house as allegedly ordered by the Court in Criminal Case No. 463 of 1990.*
- 2. If the answer in No. 1 above is in the affirmative, whether the plaintiff suffered any damages.*
- 3. What reliefs are the parties entitled to."*

It was also not disputed that, the order of eviction issued by the District Court of Ilala which, as argued by the appellant's counsel, was

central to the respondent's claims in the suit, was nullified by the High Court in Criminal Revision No. 43 of 1995. Indeed, when answering the 1st issue above, the learned trial judge had this to say in her judgment at page 90 of the record of appeal:

"I have been able to go through the judgment which acquitted the plaintiff Exhibit DA1 which is in respect of Provisional Order (sic) in Criminal Revision No. 43 /1995. Unfortunately it does not cite the original case number. I only had the benefit of knowing that the defendant charged the plaintiff in another criminal suit (sic) whether the High Court revised the order of the trial Magistrate and ordered the complaint (defendant) (sic) to file a civil suit by 13/12/1995. It has been submitted that the defendant lost the case and never appealed so the plaintiff is the lawful owner of the suit premises.

***Admittedly there is no order of eviction.** But if the defendant lost in the alleged civil suit it means he is not the lawful owner of the suit premises."*

[Emphasis added].

Apart from acceding to the appellant's submission that the order of eviction, which was pivotal to the order sought by the respondent, was in-existent following its nullification by the High Court in Criminal Revision No. 43 of 1995, the learned trial judge proceeded to determine the dispute

over ownership of the suit premises. As stated above, in so doing she decided to call for additional evidence through CW1, the son of Max Massawe, the person who was alleged by each of the parties that he sold the suit premises to them. At the end, the learned trial judge held as follows:

*" It is evident that the sale between the plaintiff and Massawe was executed in 1988 while that of the defendant and Massawe was in sometime in 1989. While there is no proof that Mr. Massawe returned the plaintiff's money, which would in fact be Tshs. 70,000/= and not Tshs.100,000/=:, there is evidence to the effect that the plaintiff paid the remaining purchase price of Tshs. 80,000/= on 27/2/1988. If that is the case then, the 2nd sale of the said house by Mr. Massawe was unlawful as he did not have a legal title to pass over to the defendant as of 27/2/1988. (See the case of **Farah Mohamed v. Fatuma Abdallah** [1992] TLR 205). The lawful owner of the disputed premises by then was the plaintiff not Mr. Massawe."*

With due respect to the learned trial judge, that decision is erroneous for two main reasons: **Firstly**, as argued by the appellant's counsel, the suit was not based on a claim of ownership of the suit premises. The

respondent was seeking to enforce the order issued by the District Court of Ilala in the above stated criminal case. Having found that the order was no longer in force, the High Court improperly proceeded to decide on the parties rights over the suit premises, the matter which was not pleaded by the respondent in his suit.

It is trite law that in a fit case, the Court is bound to decide an unpleaded issue where the same has been argued by the parties and left for the court's determination. See for example the case of **James Funke Gwagilo v. Attorney General** [2004] TLR 161. In the present case however, the cause of action, as shown in the reproduced paragraphs 5, 6 and 7 of the plaint, did not have anything to do with a dispute over ownership of the suit premises. Clearly therefore, the High Court wrongly entertained that issue. This is more so because the learned trial judge did not consider such pertinent legal matters like the limitation period for institution of a claim founded on a landed property, taking into consideration that, from the evidence, the suit premises is alleged to have been sold for the first time to the respondent in 1988 and resold to the appellant in 1989.

Secondly, in its decision, the High Court relied on a civil suit which was subsequently filed by the appellant. According to the learned judge, the appellant was unsuccessful thus concluding that, in the circumstances, the respondent was the rightful owner of the suit premises. With respect, we do not agree with that line of reasoning. It is evident from the record that, after having found that the prosecution had failed to prove the charge against the respondent because of existence of a dispute over ownership of the suit premises, the Ilala District Court advised the parties that either of them may institute a civil suit with a view to resolving the ownership dispute. On that advise, the appellant instituted Civil Case No. 197 of 1996 in the Resident Magistrate's Court of Dar es Salaam at Kisutu against the respondent. On his part, the respondent raised a counterclaim.

In its judgment dated 24/8/1998, the learned Resident Magistrate did not decide in favour of either party. She was of the view that, whereas the appellant had failed to establish his case, the respondent did not substantiate the prayers made in his counterclaim. She held as follows in her judgment:

" I have good time of perusing the Court file, the evidence in Court, the submissions filed by both sides and it is my view that my hands are tied up to

declare either party the lawful owner of the suit plot In the final analysis I find that the plaintiff has not established his case and I accordingly dismiss it. Likewise, the prayers by the defendant have not been substantiated the same is advised made (sic) application for necessary orders before the High Court if he so wishes. The counterclaim is also struck off for failure to follow appropriate procedures."

The respondent was dissatisfied with the decision of the Kisumu Resident Magistrate's Court and thus appealed to the High Court vide Civil Appeal No. 214 of 2002. In its decision, the High Court (Ihema, J., as he then was) found that the appeal was incompetent and therefore proceeded to strike it out.

In the circumstances therefore, following the two decisions of the Kisumu Resident Magistrates Court and the High Court, there is no gainsaying that none of the parties was granted any right over the suit premises. The effect of the two decisions was to put the parties in their previous positions before institution of Kisumu Resident Magistrate's Court Civil Case No. 197 of 1996. The learned trial judge's finding that, since the appellant was unsuccessful in the original civil suit (Kisumu Resident Magistrate's Court Civil Case No. 197 of 1996) from which he did not

appeal, made the respondent the lawful owner of the suit premises is therefore an erroneous decision.

On the basis of the above stated reasons, we are unreservedly of the view that this appeal must succeed. We accordingly hereby allow it with costs.

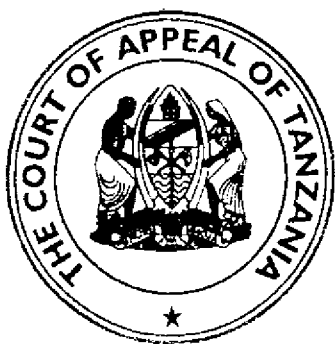
DATED at DAR ES SALAAM this 3rd day of September, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

M.A. KWARIKO
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered on this 5th day of September, 2019 in the presence of Mr. John Kamugisha, learned counsel for the Appellant and the absence of the Respondent who reported sick by his grandson Said Mwinyi; is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL