IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: LILA, J.A., SEHEL, J.A., And LEVIRA, J.A.,)

CIVIL APPEAL No.178/ 2019

OMARY ABDALLAH KILUA .....APPELLANT

VERSUS

JOSEPH RASHID MTUNGUJA ..... RESPONDENT

(Appeal from decision of the High Court of Tanzania at Tanga)

(Masoud, J.)

dated the 13th day of November, 2017
in
Land Case Appeal No. 17 of 2017

.....

JUDGMENT OF THE COURT

18th & 25th Sept, 2020

LILA, JA:

The appellant, Omari Abdallah Kilua, is aggrieved by the decision of the High Court of Tanzania sitting at Tanga in Land Case Appeal No 17 of 2017. Initially, the respondent had instituted an application before the District Land and Housing Tribunal for Tanga (the trial Tribunal) claiming for a piece of land allegedly trespassed by the appellant. He lost. Aggrieved, the respondent successfully appealed to the High Court.

He was declared the rightful owner of the disputed piece of land. The appellant was aggrieved, hence this appeal.

Given the course we have taken in the determination of this appeal, and which will be apparent soon, we shall not recite the appellant's grounds of grievance and even give a detailed account of the expositions by witnesses for both parties before the trial Tribunal. Instead, we find only this brief background factual setting of the case relevant. It appears that the respondent's land is unsurveyed whereas the appellant claimed that his land was surveyed and earmarked as Plot No.1, Block "J", Muheza. Of significance, is the undisputed fact that the pieces of land share a common boundary. Central to the parties' dispute is a parcel of land bordering the respective parties' pieces of land measuring 5 meters width and 30 meters long which the respondent claimed before the Tribunal in Land Application No.34 of 2014 to have been encroached by the appellant. In its judgment dated 25/5/2016, the Tribunal dismissed the claims. On appeal, in its decision dated 31/10/2016, the High Court (Aboud, J.), was minded that it was unfair for the respondent to be denied his right simply because he failed to call the officer from the authority responsible with issuance of the title deed. Exercising her powers of revision in terms of section 43(1)(b) and (2) of

the Land Disputes Courts Act (Cap. 216 R.E. 2002), she nullified the decision of the trial Tribunal dated 25/5/2016 and remitted back the case to the Tribunal with a direction for it to hear only the evidence of the Land /Survey Officer from Muheza District Council and "proceed with the judgment". In compliance, the Tribunal summoned and heard one Louis Nkembo (TW1), Land Officer for Muheza District. In its decision dated 6/6/2017, the learned Chairman was still inclined that TW1 failed to prove that survey procedures were followed. He, as earlier on demonstrated, dismissed the application. On appeal, the High Court (Masoud, J.) overturned the trial Tribunal's decision and declared the respondent the lawful owner of the disputed parcel of land, hence the present appeal by the appellant.

Our serious examination of the record of appeal revealed that in the present appeal, the appellant seeks to impugn the decision and decree of the High Court in Land Case Appeal No. 17 of 2017. The respondent's memorandum of appeal to the High Court found at pages 219 and 220 of the record of appeal suggested that the appeal emanated from two different decisions of the trial Tribunal. We let the relevant part of the memorandum of appeal tell:-

"IN THE HIGH COURT OF TANZANIA AT TANGA LAND APPEAL NO. 17 OF 2017 (Arising from the Judgment and Decree dated 25th May, 2015 and 6th June, 2017 respectively in Application No. 34 of 2014 of the District Land and Housing Tribunal)"

The excerpt above drew our concern as to what decision was appealed against before the High Court. The record is clear that the decree allegedly dated 25th May, 2017 was extracted from the judgment of the trial Tribunal dated 25/5/2016, hence indicating the decree was dated 25/5/2017 was just a slip of the pen. It ought to read 25/5/2016. That decision (judgment) was later nullified by the High Court (Aboud, J.) on 31/10/2016. The decree dated 6th June, 2017 was extracted from the judgment of the Tribunal dated 6/6/2017 which was composed after the former decision dated 25/5/2016 was nullified by the High Court. We had a glance to the two judgments under discussion and realized that, in the judgment dated 6th June, 2017, the learned Chairman of the trial Tribunal considered the evidence of TW1 alone. We asked ourselves whether that qualified to be a judgment under our laws. We accordingly, *suo motu*, raised the issue and engaged the parties to address us on that point.

Mr. Erick Alfred Akaro, learned counsel, who entered appearance for the appellant, was first to address us. He criticized the trial Chairman for not considering in his judgment the evidence of the rest of the witnesses after he had recorded the evidence of TW1. whose evidence amounted to additional evidence. While referring to the learned judge's direction, he argued that the Chairman was obligated to consider the testimonies of all the witnesses in the judgment dated 6th June, 2017. Failure to do so, he stressed, was a fatal irregularity rendering the judgment a nullity. He urged the Court to invoke the revisional powers bestowed upon the Court under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) to quash the judgment of the trial Tribunal dated 6/6/2017 and the proceedings and judgment of the High Court and remit back the trial Tribunal's record for it to compose a proper judgment that complies with the judge's directive and law.

The issue put to the fore being a legal one, the respondent succumbed to the fact that he is a layperson and could not offer material comments on it. He left it for the Court to determine the just way out.

As demonstrated above, the learned judge after subjecting the evidence of both sides before the trial Tribunal to a critical analysis, she arrived at a conclusion that:-

> *"Therefore for the interest of justice, it will be unfair to deny the appellant's right merely because he failed to call an officer from the authority concerned and who issued the title deed. Under the circumstances therefore, the court exercises its revisional powers under section 43(1)(b) and (2) of the Land Disputes Courts act (Cap. 216 R. E. 2002), and hereby nullify, quash and set aside the decision of the trial Tribunal. The matter is remitted back to the Tribunal to hear only the evidence of Land/Survey Officer from Muheza District Council who could testify at the Tribunal on whether the procedure was followed or not then the trial Tribunal should proceed with the judgment.*
>
> *It is so ordered."*

It is discernible and manifest from the above excerpt, that the learned judge nullified the trial Tribunal's judgment dated 25/5/2016. That meant, as from then, such decision ceased to exist. However, the proceedings survived the order hence the evidence already collected remained intact and valid. The learned judge, then, directed the trial

Tribunal to collect additional evidence by summoning and recording the evidence of the Land/Surveyor for Muheza District Council and then proceed to compose a fresh judgment taking into consideration of all the witnesses' testimonies. In compliance with that direction, the Tribunal summoned and recorded the evidence of TW1 and then proceeded to compose a judgment in which he considered only the evidence of TW1.

The crucial issue here is whether there was compliance with the High Court order and whether the judgment composed dated 6/6/2017 qualified to be a proper judgment. As shown above, Mr. Erick vehemently argued that there was total non-compliance to the direction and the judgment was nothing but a nullity for not considering the evidence of all the witnesses for both sides.

Upon a close examination of the judgment dated 6/6/2017, we are satisfied that it did not accord with the High Court direction. We want to say in the clearest terms that in the ordinary course of things, a direction given by a superior court to a court subordinate to it should be observed and complied to the letter. Otherwise it will amount to a breach of the long established principle of *stare decisis*. Clear as it is shown above, the learned chairman was obligated to hear the testimony

of TW1 and then compose a fresh judgment taking into consideration the evidence of all the witnesses. In the circumstances, we are entitled to take the view, as rightly argued by Mr. Erick, that the learned chairman completely disregarded the High Court's direction.

Next is whether, in the circumstances, the judgment legally qualified to be a judgment. In resolve, we seek resort to the definition of what a judgment entails under section 3 and order XX Rule 4 of the Civil Procedure Code, Cap. 33 R. E. 2019 which states:-

Section 3 defines the term judgment thus:-

> *"judgment" means the statement given by a judge or a magistrate of the grounds for a decree or order."*

And, order XX Rule 4 provides for essentials of a judgment to be:-

> *"4. A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."*

Expounding on the contents of a judgment, C. K. Takwani, in his book **CIVIL PROCEDURE**, Fifth Edition, has, at page 21, this to say:-

> *"Sketchy orders which are not self-contained and cannot be appreciated by an appellate or*

revisional court without examining all the records are, therefore, unsatisfactory and cannot be said to be a judgment in that sense.....A judge cannot merely say "Suit decreed" or "Suit dismissed". The whole process of reasoning has to be set out for deciding the case one way or the other....judgments must be intelligible and must show that the judge has applied his mind....the last paragraph of the judgment should state precisely the relief granted. Thus, a judgment contemplates a stage prior to the passing of a decree or an order, and, after the pronouncement of the judgment, a decree shall follow." (Emphasis added)

In line with the above, the Court, in the case of **Lutter Symphorian Nelson vs the Hon. Attorney General and Ibrahim Said Msabaha**, Civil Appeal No. 24 of 1999, faced a scenario where the learned judge, in his judgment, did not consider the evidence of seventeen witnesses. Among other things, the Court observed that:-

"We have paid due attention to the submission by counsel for all the three parties. Having done so, we are left in no doubt that the learned trial judge strayed into some serious errors in his treatment of the evidence laid before him on the

issue of tribalism. First, he did not apply his mind to the evidence of seventeen witnesses, including that of PW8, PW14 and PW15. A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In Amirai Ismail v Regina, 1 T. L. R. 370, Abernethy, J., made some observations on the requirement of judgment. He said:

"A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how."

We entirely ascribe ourselves to the above exposition of the law and affirm it to be the correct stance of the law on essentials of a judgment.

In the instant case, applying the law as expounded above, we have no hesitation to hold that the learned chairman strayed into error when he ignored the evidence of other witnesses in composing the judgment. He did not apply his minds to the testimonies of all the witnesses (witnesses for both sides) so as to reach at a just decision. Before the eyes of the law, therefore, the purported judgment did not meet the test of being a judgment. There was no judgment so to speak. Unfortunately, that fact escaped the eyes and minds of the learned first appellate judge. We are certain that had it come to his knowledge, he would have realized that there was no judgment worth being appealed against.

In fine, invoking our powers of revision under section 4(2) of AJA, we hereby nullify and quash the judgment of the trial Tribunal dated 6/6/2017 and the proceedings and judgment of the High Court in respect of Land Case Appeal No. 17 of 2017 and set aside the consequential orders. We think the appropriate way forward is to order, as we hereby do, the trial Tribunal record be remitted back for it to compose a judgment in accordance with the High Court order dated 31/10/2016. For the interest of justice, we also direct the Tribunal to expedite the matter. Parties are hereby ordered to appear before the

Tribunal on the date as shall be communicated to them. As for costs, justice of the case dictates that we should not, as we hereby do, make an order as to costs. Each party shall bear its own costs.

DATED at **TANGA this** 24th day of September, 2020.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of September 2020, in the Presence of Mr. Abubakar Omary holding brief of Mr. Erick Akaro learned advocate for appellant and Respondent in person is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL