

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MWARIJA, J.A., KWARIKO, J.A., and KEREFU, J.A.)

CIVIL APPEAL NO. 239 OF 2017

JOSEPH NDYAMUKAMA (Administrator of
the Estate of the late GRATIAN NDYAMUKAMA)**APPELLANT**

VERSUS

1. N. I. C BANK TANZANIA LTD
2. ALBINUS KALABA MTESIGWA
3. NDERA AUCTION MART AND
GENERAL BROKER } **RESPONDENTS**

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
at Mwanza)**

(De-Mello, J.)

**dated the 9th day of January, 2014
in
Land Case No. 03 of 2004**

JUDGMENT OF THE COURT

08th & 11th December, 2020

KEREFU, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Mwanza (De-Mello, J.) dated 9th January, 2014 in Land Case No. 03 of 2004. In that case, the late Gratian Ndyamukama sued the Savings and Finance LTD (currently the N.I.C Bank Tanzania Ltd) the first respondent herein for breach of contract and unlawful withholding of his title deed and purportedly auctioning his landed property situated at Plot No. 54

Block "A" Penda Street, Kirumba within Mwanza Municipality (the suit property). However, the said late Gratian Ndyamukama passed away on 19th September, 2010 and his son Joseph Ndyamukama was appointed an Administrator of his estate and he was accordingly joined in the suit in the place of the deceased. On 18th August, 2011, the appellant prayed to amend the plaint and joined the second and third respondents as necessary parties to the suit. He also prayed for a declaration that the sale of the suit property conducted by the third respondent on 27th May, 2001 was null and void, hence he claimed for vacant possession. The appellant also claimed for the payment of general damages at the tune of TZS 450,000,000.00 for the death of the deceased wife which he claimed to have been caused by the said sale of the suit property, payment of TZS 250,000,000.00 for withholding his title deed and costs of the suit.

In the amended plaint, the appellant alleged that on 13th April, 1999 the late Gratian Ndyamukama (the deceased) entered into mortgage agreement with the first respondent to secure a loan of TZS 30,000,000.00 in favour of M/S Oil Products Limited. That, on 26th March, 2001, the appellant received a letter from the third respondent dated 24th

March, 2001 with Ref. No. NAMBCB/DC/Vol.06/5 2001 informing him about the intended public auction in respect of the suit property which was to be effected on 27th March, 2001 for failure to make a follow up of the outstanding loan. The appellant alleged further that although the said letter did not comply with the notice prescribed under the mortgage deed, but on 27th May, 2001 the third respondent conducted illegal sale of the suit property to the second respondent and purported to issue a certificate of sales over a right of occupancy thereto.

Subsequently, the third respondent on 4th August, 2011 issued a letter to the appellant demanding vacant possession of the suit property. The appellant resisted on account that the mortgage deed was null and void for lack of consent of the deceased's wife which culminated into the filing of Civil Case No. 38 of 2001 in Mwanza District Court and later on Misc. Civil Application No. 104 of 2001 in the High Court of Tanzania at Mwanza by the said wife against the deceased to rescue the matrimonial home. However, the said wife did not prosecute the said matters as she passed away on 6th November, 2001. The appellant alleged that the death of the deceased's wife was caused by severe hypertension due to the alleged illegal sale of the suit property together with the disturbances

caused by the respondents. It was the further contention of the appellant that the third respondent had no mandate to conduct the said auction and there was no legal order to execute it.

In their joint written statement of defence, the first and second respondents denied the appellant's claims by contending that the sale of the suit property was lawful as the guaranteed company failed to discharge the loan. They also denied the claim by the appellant that the said sale caused the death of the deceased's wife as they alleged that she had full knowledge of the proposed sale and her death occurred several months after the sale of the suit property had been done. They thus prayed for the suit to be dismissed with costs.

On his part, the second respondent also contested the appellant's claim and stated that the sale of the suit property was lawful and he is a bona fide purchaser thereof having purchased it from the public auction where he emerged the highest bidder. The second respondent also contended further that after the said sale, he processed the transfer of the title of the suit property and the same is currently registered in his name, though to-date the appellant has refused to give him vacant possession hence he instituted Civil Case No. 47 of 2002 in Mwanza

District Court against the deceased claiming to be declared the lawful owner of the suit property and for vacant possession. However, he withdrew the said suit with leave to re-file after he discovered that it was instituted against the wrong party. As such, the second respondent, among other things, prayed the High Court to dismiss the appellant's suit with costs and declare him the lawful owner of the suit property as he is a bona fide, innocent and lawful purchaser of the same and the appellant be ordered to deliver vacant possession of the suit property.

Upon completion of filing parties' pleadings and for the purpose of determining the controversy between the parties, the High Court framed and recorded the following five issues which were agreed upon by the parties as indicated at pages 182 – 183 of the record of appeal: -

- 1. Whether the mortgage deed entered between the appellant and the first respondent was lawful;*
- 2. Whether the appellant discharged the loan with the first respondent;*
- 3. Whether the first respondent was justified to sell the suit property to satisfy the loan to be repaid by the appellant;*

- 4. Whether the sale of the suit property by the first respondent to the second respondent was lawful; and*
- 5. What reliefs, if any are the parties entitled to?.*

Having heard the two witnesses who testified for the appellant's case and three witnesses for the defence, the learned High Court Judge, after considering only the first framed issue above, she found that the appellant had failed to establish his claims. The learned High Court Judge was satisfied that, according to the tendered evidence, the sale of the suit property and all transactions were valid and she thus declared the second respondent the lawful owner of the suit property and proceeded to award him general damages at the tune of TZS 10,000,000.00 for loss of use of the suit property.

Aggrieved by that decision, the appellant lodged this appeal. In the Memorandum of Appeal, the appellant has preferred six (6) grounds contending that:-

- 1. The trial court erred in law under the rules of procedure to determine the suit on one framed issue and leave others without being resolved one way or another;*

2. *The trial court erred in law to rely on case of Idda Mwakalindile on the issue of disposition of matrimonial property without the consent of the other spouse, nor making reference to the earlier case of Mtumwa Rashid which had similar facts but held for the requirement of consent from the other spouse;*
3. *The trial court erred in law and fact for not finding out whether the said deed of guarantee was executed by advancing the loan to the borrower, i.e Oil Products Limited;*
4. *The trial court did not satisfy itself as to whether there was legal notice of default issued to the guarantor of the borrower by the first respondent to justify the procedure of auctioning the said security;*
5. *The trial court did not consider that since the suit property was unlawfully auctioned then no title passed to the second respondent hence the doctrine of Bonafide Purchaser, cannot be invoked; and*
6. *The trial court erred in fact to hold that the late wife of the guarantor designedly and unnecessary delayed to take steps to rescue the matrimonial home.*

At the hearing of the appeal, the appellant was represented by Mr. Al-Muswadiku Chamani, learned counsel whereas Messrs. Silwani Galati Mwantembe and Ndurumah Keya Majembe, both learned counsel appeared for the first and second respondents, respectively. The third respondent, though duly served, did not enter appearance and as such, the hearing of the appeal proceeded in his absence in terms of Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules).

It is noteworthy that pursuant to Rule 106 (1) and (7) of the Rules, counsel for the parties had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition of the appeal, which they sought to adopt at the hearing to form part of their oral submissions. However, for reasons which will be apparent herein, we do not intend to consider the said submissions on each of the grounds raised by the appellant in this appeal. We say so because of the pertinent issue raised by the appellant in the first ground of appeal, we will thus consider the submissions of the parties in respect of that ground.

Submitting in support of the first ground of appeal, Mr. Chamani faulted the procedure adopted by the learned High Court Judge of only

considering one issue among the framed six issues and dismissed the appellant's suit. It was his argument that, the proper procedure which was supposed to be adopted by the learned High Court Judge was to consider all framed issues agreed upon by the parties to resolve their dispute. To buttress his position he cited the cases of **Sheikh Ahmed Said v. The Registered Trustees of Manyema Masjid** [2005] T.L.R. 61 and **Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 (unreported) and argued that since the learned High Court Judge decided the suit only on a single issues framed then the rules of procedure were violated. On that account, Mr. Chamani invited the Court to step into the shoes of the High Court and rectify the pointed anomaly by reviewing or re-evaluating the evidence tendered and come up with its own conclusion.

In response, though Mr. Mwantembe conceded that the learned High Court Judge did not consider all framed issues, but he argued that the same is not fatal as the Court has the power of revisiting the evidence on record, re-consider the unresolved issues and come-up with its own conclusion.

Upon being probed as to whether the Court is entitled to consider issues or matters which were not decided upon by the High Court, Mr. Mwantembe cited Rule 36 (1) (a) of the Rules and argued that the Court has the power to do so and come up with its own decision.

On his side, Mr. Majembe disputed the first ground of appeal as he argued that the learned High Court Judge determined all framed issues by agreeing with the submission made by the counsel for the respondents. To clarify on his position, Mr. Majembe referred us to page 223 of the record of appeal where the learned trial Judge stated that, *"Guided by the issues framed and addressed by counsel mine is to fit in according with a big question to determine..."* As such, Mr. Majembe distinguished the case of **Alnoor Shariff Jamal** (supra) cited by Mr. Chamani by arguing that the facts in that case are not similar to the current appeal because in that case the High Court was called upon to determine as whether there was sufficient grounds for granting extension of time sought which is not the case herein. Based on his submission, Mr. Majembe argued that the first ground is unfounded and liable to be dismissed.

On our part, having examined the record of appeal and considered the submissions made by the counsel for the parties, we agree that the learned High Court Judge did not determine all framed issues. We note that, at page 228 of the same record of appeal the learned High Court Judge after she had considered the first framed issue stated that:-

"This alone disposes the suit... I conclude and, without due regard to the rest of the issues that, the transaction took place in such circumstances and the results were obvious."

Relying on that passage of the trial court's judgment, Mr. Majembe argued that all issues were determined. With due respect, we find that submission wanting, as the same is not supported by the record of appeal.

That said, the issue for our determination is whether or not it was correct under the law for the learned High Court Judge to decline to determine all framed issues to resolve the controversy between the parties.

Before embarking on the determination of the said issue, we wish to note at the outset that, we are in agreement with Mr. Chamani that it is an elementary principle of pleadings that each issue framed should be resolved. Therefore, a trial court is required and expected to decide on each and every issue framed before it, hence failure to do so renders the judgment defective. We are supported in that position by the cases of **Alnoor Shariff Jamal** (supra) cited to us by Mr. Chamani and **Sosthenes Bruno and Another v. Flora Shauri**, Civil Appeal No. 81 of 2016 (unreported). In **Alnoor Shariff Jamal** (supra) the Court being faced with a similar situation, cited with approval the decision of the Court of Appeal of Kenya in the case of **Kukal Properties Development Ltd v. Maloo & Others** [1990 – 1994] E.A 281 where it was held that:-

"A judge is obliged to decide on each and every issue framed. Failure to do so constituted a serious breach of procedure." [Emphasis added].

In the case at hand, it is evident from the record of appeal at pages 182 -183 that, upon completion of filing parties' pleadings, the five issues indicated above were framed. However, in her decision, the learned High

Court Judge considered only the first issue and decided the suit in favour of the respondents.

Being guided by the authorities cited above, it is our considered view that, by omitting to consider the framed issues, the learned High Court Judge strayed into an error which has rendered the judgment defective.

We are mindful of the fact that in their submissions, Mr. Chamani and Mwantembe invited us to step into the shoes of the High Court and make findings on the unresolved framed issues. With due respect, we decline the invitation because it is the settled position of the law that, a matter not decided by the High Court or a subordinate court exercising extended jurisdiction, cannot be decided by this Court. This is the import of Section 4 (1) (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (the AJA), which we hereby reproduce:-

*"4 (1) The Court of Appeal shall have jurisdiction to hear
and determine appeal from the High Court and
from subordinate courts with extended jurisdiction;
and*

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the court from which the appeal is brought.”

From the above cited provisions, it is clear that the jurisdiction of this Court on appeal is to consider and examine matters that have been considered and decided upon by the High Court and subordinate courts with extended jurisdiction. There is plethora of authorities on this matter, a good example is the case of **Celestine Maagi v. Tanzania Elimu Supplies (TES) and Another**, Civil Revision No. 2 of 2014 (unreported) where this Court stated that:-

*“The powers of the Court on matters arising from the lower courts are only exercisable in two ways. First, by way of appeal. And second by way of revision. This is provided under S. 4 (1) –(3) of the Act. **And ordinarily the Court would exercise its appellate and revisional powers only after the***

lower courts have handed down their decisions." [Emphasis added].

Therefore, this Court is required to exercise its appellate jurisdiction after the lower courts have handed down their decisions in respective matters. We are live to the fact that, in his submission, when inviting us to consider the unresolved framed issues by the High Court, Mr. Mwantembe cited Rule 36 (1) (a) of the Rules and argued that the Court has power to consider matters not decided upon by the High Court and come up with its own decision. With respect, we are unable to agree with him on that point as the said Rule provides that:-

"36 (1) On any appeal from a decision of the High Court or Tribunal acting in the exercise of its original jurisdiction, the Court may –

*(a) **Re-appraise the evidence** and draw inferences of fact."* [Emphasis added].

In the **Cambridge Advanced Learners' Dictionary**, available at dictionary.cambridge.org/dictionary/english/reappraise visited on 10th December, 2020 at 10:15 hours, the term '*re-appraise*' is defined as '**The act of examining and judging something or someone again**'. i.e doing it again or in a different way.

Therefore, the High Court having omitted to determine the framed issues, there is no decision of the High Court on the unresolved framed issues to be re-appraised, re-evaluated or re-considered by this Court. The Court in the case of **Mantra Tanzania Limited v. Joaquim Bonaventure**, Civil Appeal No. 145 of 2018 (unreported) while considering a similar situation and the way forward, observed that:-

"On the way forward, it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter.

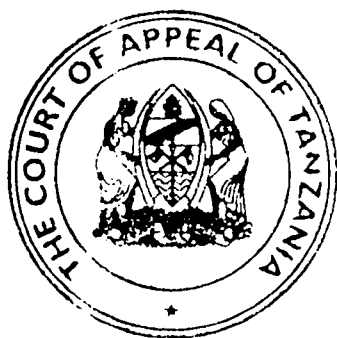
The same position was taken by the Court in the case of **Truck Freight (T) Ltd v. CRDB Ltd**, Civil Application No. 157 of 2007 (unreported) where the High Court failed to determine a framed issue and as a result, the parties' controversy was left unresolved. Having considered that situation, the Court observed that:-

"If the lower court did not resolve the controversy between the parties, rightly or wrongly, what can an

appellate court do? We cannot step into its shoes. We therefore allow the appeal and quash the decision..."

In the premises, and as we are satisfied that the omission done by the High Court is fatally defective, we hereby quash the judgment of the High Court delivered on 9th January, 2014 and set aside subsequent orders thereto. We remit the case file to the High Court for it to render a decision after having considered and determined all framed issues.

DATED at MWANZA this 10th day of December, 2020.




A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 11th day of December, 2020 in the Presence of Appellant in person, Mr. Geoffrey Kange, learned Counsel for the 1st Respondent, Mr. Ndurumah Majembe, learned Counsel for the 2nd Respondent and in the absence of 3rd Respondent is hereby certified as a true copy of the original.


G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL