IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 81 OF 2017

CHARLES CHRISTOPHER HUMPREY KOMBE ..... APPELLANT

VERSUS

KINONDONI MUNICIPAL COUNCIL ..... RESPONDENT

[Appeal from the Judgment and decree of the High Court of Tanzania (Land Division), at Dar es Salaam]

(Mgetta, J.)

dated the 5th day of June , 2015
in
Land Case No. 107 of 2007

.....

JUDGMENT OF THE COURT

1st & 12th June, 2020

MWAMBEGELE, J.A.:

This appeal arises from the decision of the Land Division of the High Court of Tanzania (Mgetta, J.) pronounced on 05.06.2015 in Land Case No. 107 of 2007. In that case, the appellant was the plaintiff and the respondent was the defendant. Before we go into the determination of the appeal in earnest, we find it deserving to narrate the background facts of

the appeal before us, albeit briefly, as they could be gleaned from the record of appeal.

Sometimes in 1993, the appellant sought and was granted a permit for unspecified period to use an open space at Msasani Shamba along Old Bagamoyo Road and erected a stall to run his building materials business. Later; in 1999, the respondent commenced criminal proceedings against the appellant (Criminal Case No. 2310 of 1999) accusing him of erecting the stall without a valid permit contrary to section 100 and 16 of the Dar es Salaam City Council Bylaws, 1991. In connection thereof, the respondent seized some items from the appellant's stall. The Resident Magistrate Court, in which court those criminal proceedings were instituted, decided in favour of the appellant. Despite that finding, the respondent never returned the seized items and, in consequence whereof, the appellant filed Land Case No. 107 of 2007 in the High Court Land Division claiming, *inter alia,* Tshs. 1,293,347,000/= being the value of the seized items. After hearing both parties, the High Court retreated to compose a judgment during which it realized that it had no jurisdiction to entertain and try the matter on account that the subject matter of the suit was not a land

dispute but, rather, it was a suit to recover the seized items or the sum of Tshs. 1,293,347,000/=. On this premise, the High Court dismissed the suit.

The appellant was not amused with the decision. He thus lodged this appeal on the following three grounds of complaint:

1. *"The learned Judge erred in law in failing to determine the case according to the issues in declining jurisdiction;*
2. *The learned Judge erred in law in declining jurisdiction to determine the case on merit; and*
3. *The learned Judge erred in law in failing to accord the parties a right to be heard, having formed the opinion that the court had no jurisdiction."*

When the appeal was placed for hearing before us on 01.06.2020, the appellant appeared through Mr. Julius Kalolo-Bundala, learned advocate. Mr. Vicent Tangoh and Ms. Grace Lupondo, respectively, learned Principal State Attorney and learned State Attorney, joined forces to represent the respondent. At the very outset, the learned Principal State Attorney rose to intimate to the Court that the respondent was conceding

to the third ground; a complaint that the parties were denied the right to be heard. He submitted that the court, having formed an opinion at the moment of composing the judgment that it lacked jurisdiction to entertain the matter, ought to have accorded the parties an opportunity to be heard on that matter. In the premises, the learned Principal State Attorney prayed that the matter should be remitted to the High before the same judge for the parties to be heard on whether the High Court had jurisdiction to entertain the matter.

Responding, Mr. Kalolo-Bundala for the appellant, having heard Mr. Tangoh's concession, prayed that the appeal should be allowed as prayed in the memorandum of appeal. He also implored us to remit the matter to the High Court before the same judge to rectify the mishap.

We have considered the conceding arguments of the parties in respect of the third ground of appeal. Admittedly, the High Court formed the opinion at the time of composing the judgment that it lacked jurisdiction to entertain the matter. Having so realized, like the learned counsel for the parties, we are certain in our mind that the High Court ought to have accorded the parties the right to be heard on that point. We

are alive to the fact that the learned trial judge was quite in the right track to raise the issue on its own motion. Order XIV rule 5 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2019 (henceforth to be referred as the CPC) provides that the court may, at any time before passing a decree, frame new or additional issues apart from ones framed. The order reads:

> *"The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit; and all such amendments of additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed."*

However, case law has it that, upon raising new or additional issue, the court has to accord the parties the right to address it on that new or additional issue. That this is the position of the law founded upon prudence in this jurisdiction has been heard in a number of decisions of the Court. In **Raza Somji v. Amina Salum** [1993] TLR 208, for instance, referring to Order XXXIX rule 2, we observed:

> *"...the ground of undue influence was, on the evidence, disclosed but was not set forth in the*

memorandum of appeal. Rule 2 of order 39 of the Civil Procedure Code empowered the learned Judge to raise it suo motu. However, under the proviso to that rule the Judge was enjoined to give the appellant the opportunity to contest the issue before resting his decision on it as he did;"

Corresponding remarks were made by the Court in **John Morris Mpaki v. NBC Ltd and Ngalagila Ngonyani**, Civil Appeal No. 95 of 2013 (unreported). In that case, the Court made reference to its previous decision in **Deo Shirima and Two Others v. Scandinavian Express Services Limited**, Civil Application No. 34 of 2008 (unreported) and observed:

"The law that no person shall be condemned unheard is now legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard. This principle of law of respectable antiquity needs no authority to prop it up. It is common knowledge."

The Court went on to reproduce the following excerpt from **Deo Shirima and Two Others**:

> *"We have already shown that the order of 8th June, 2007 was made suo motu. None of the parties had pressed for that order. None of the parties was heard at all before the order was made. As it turned out, the order, made in breach of the rules of natural justice, immediately adversely affected the plaintiffs in the suit and subsequently the current applicants who were the agents/servants of the former.* ***It is established law that any judicial order made in violation of any of the two cardinal rules of natural justice is void from the beginning and must always be quashed, even if it is made in good faith.***
> *In view of the above, we have found ourselves constrained to rule that the High Court order dated 8th June, 2007 was bad in law and therefore a nullity."*
>
> [See also: **Ibrahim Omary (Ex.D 2323 Ibrahim) v. The Inspector General of Police and 2 others,** Civil Appeal No. 20 of 2009, **Mire Artan Ismail & Another v. Sofia Njati**, Civil Appeal No.

75 of 2008 and **Scan-Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012 (all unreported decisions of the Court)].

On the authority of the decisions cited above, we are certain in our mind that the High Court erred in basing the decision of the case on the issue raised *suo motu* without according the parties the right to be heard on that issue. In **John Morris Mpaki** (supra) we held that any decision affecting the rights or interests of a party is a nullity even if the same decision would have been arrived at had the affected party been heard. This ground only disposes of the appeal. We shall not consider the other two grounds of appeal, for doing so will not change the outcome of the appeal.

For the reasons we have assigned, we are constrained to allow this appeal on the strength of the third ground of appeal. We quash the decision of the High Court and order that the record be remitted to the trial court before the same judge for composition of a fresh judgment after hearing the parties on the issue of jurisdiction. As Mr. Kalolo-Bundala did

not press for costs, we order that each party shall bear its own costs in this appeal.

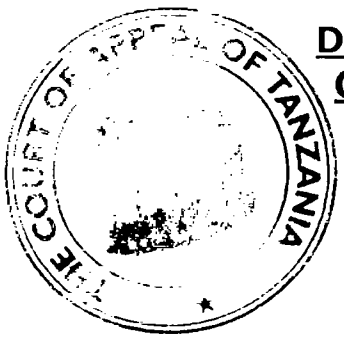
DATED at **DAR ES SALAAM** this 9th day of June, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 12th day of June, 2020 in the absence of the appellant duly served and in the presence of the Ms. Kause Kilonzo learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL