

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 81 OF 2016

**1. SOSTHENES BRUNO }
2. DIANAROSE BRUNO } APPELLANTS**

VERSUS

FLORA SHAURI RESPONDENT

(Appeal from the judgment and decree of the High Court of Tanzania, at Dar es Salaam)

(Feleshi, J.)

dated the 11th day of December, 2015

in

Civil Case No. 272 of 2012

RULING OF THE COURT

16th August & 16th January, 2020

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam in Civil Case No. 272 of 2012. In that case, the appellants, Sosthenes Bruno and Dianarose Bruno sought a declaration that they were lawful owners of plots of land Nos. 1022-1030, Block "A" in Mbweni area, Dar es Salaam (the suit land). They contended that, on 6th November, 2000 the 1st appellant bought the suit land, which was by then unsurveyed, from one Mary Peter Raphrain. They

contended further that later on the land was surveyed and they consequently held it under certificate of title No. 79255 Land Office Number 281729.

In their plaint, the appellants claimed that on or about 17/3/2010, through a Court Broker operating in the name of Eric Auction Mart, the respondent, Flora Shauri unlawfully demolished their two single storey buildings and a 350 metres wall fence, the properties which were built on the suit land. The said Court Broker was initially joined as the 2nd defendant but by an amended plaint filed on 26/6/2015, that person was dropped. In the suit, the appellants claimed from the respondent, payment of TZS. 169,900,000.00 being the value of the demolished properties and TZS. 50,000,000.00 as general damages. They also claimed for interest and costs of the suit.

The respondent denied the appellants' claims contending that the demolition was lawfully done in execution of lawful order of the Resident Magistrate's Court of Dar es Salaam at Kisutu (the Kisutu Resident Magistrate's Court) in Civil Case No. 286 of 2000. It was her contention that the appellants trespassed into her land, the result of which, following the decision of the Kisutu Resident Magistrate's Court in the above stated

case, the structures built thereon by the appellants were demolished. It was her defence that the appellants were not entitled to the claimed damages.

Apart from denying the appellants' claims, the respondent raised a counterclaim. She sought a declaration that she was the lawful owner of the suit land. She disputed the appellants' allegation that they were lawfully allocated the suit land. She counterclaimed, for *inter alia*, general damages of TZS. 100,000,000.00, interest and costs of the suit.

Having heard two witnesses who testified for the plaintiffs' case and four witnesses for the defence, the learned trial Judge found that the appellants had failed to establish their claims. He was satisfied that, according to the tendered evidence, the respondent was the lawful owner of the suit land. She was thus declared the lawful owner thereof. The trial court proceeded to award her general damages of TZS. 15,000,000.00 for loss of use of the suit land and costs of the suit. In addition, the trial court ordered the Registrar of Titles to cancel and rectify title deed No. 79255 L.O. No. 281729 so that any part of the suit land comprised of plots Nos. 1022 -1030 Block "A" in Mbweni area within Kinondoni Municipality, Dar es Salaam remains in the name of the respondent.

The appellants were aggrieved by the decision of the High Court hence this appeal. Their appeal is predicated on nine grounds which, for reasons which will be apparent herein, we are not going to consider them.

At the hearing of the appeal, the appellants were represented by Mr. Pascal Kamala, learned counsel while the respondent had the services of Mr. Gabriel Masinga, also learned counsel.

Having heard the rival arguments of the learned counsel for the parties, upon our deliberation with a view of making a decision on the appeal, it transpired that during the hearing of the preliminary objection, an important issue arose but its determination was deferred until after the parties had been fully heard. The issue arose in the following way. As pointed out above, in her defence, the respondent contended that the demolition complained of by the appellants was lawfully made in execution of the decision of the Kisumu Resident Magistrate's Court in Civil Case No. 286 of 2000. In that case in which John Frank Kinoni and the respondent were the plaintiff and the defendant respectively, the latter was declared the lawful owner of the suit land measuring four (4) acres, situated at Boko Dovyia. Then, in the suit which has given rise to this appeal, the respondent raised a preliminary objection contending *inter alia* that the suit

was *res-judicata* because it involved the same subject matter, the ownership of which had been decided in her favour by the Kisumu Resident Magistrate's Court. In his ruling on that ground of the preliminary objection, although the learned trial Judge found that the dispute did not involve the same parties, he was of the view that, the allegation of fact that the subject matter which was in dispute in Civil Case No. 286 of 2000 is one and the same property in the suit before him is a matter which should be proved at the trial. The learned Judge observed as follows:

"...whereas the subject matter in Civil Case No. 286 of 2000 was a suit premises situated at Boko Dovyia or Boko Mivinjeni-Boko area the subject matter in the present suit is specifically plots Nos. 1020-1030 Block 'A' Mbwani under certificate of occupancy with No. 75255 (sic) jointly allocated to the plaintiffs. Now whether that piece of land is one and the same size or not are matters to be proved at the trial."

Unfortunately however, after the trial, that issue was not decided. Having considered the omission, we re-opened the hearing of the appeal and required the learned counsel for the parties to address us on the effect of the slip made by the High Court to consider and answer the issue which

it differed for determination after hearing the suit. Mr. Kamala and Mr. Masinga were in agreement that, determination of the issue whether or not the disputed land in Kisutu Resident Magistrate's Court Civil Case No. 286 of 2000 is the same subject matter in the case before the High Court was important for determination of the parties' dispute.

On our part, we respectfully agree with the learned advocates for the parties. In the High Court, the appellants claimed that the respondent unlawfully caused their property to be demolished and thus claimed for damages. It was however, the respondent's defence that the demolition was lawfully done in execution of the decision of the Kisutu Resident Magistrate's Court. The appellants were aware of that decision but denied that it concerned the suit land. They stated as follows in paragraph 6(b) of their plaint:-

"The judgment, decree and demolition order in respect of the said case had nothing to do with Plots No. 1022-1030, Block 'A' Mbweni..."

Furthermore, in challenging the decision of the High Court, the appellants have raised a ground which faults the trial court for having failed to make a finding as regards the location and the size of the suit land. In ground 8 of the appeal, they contend as follows:

"8.The trial court erred in law and fact by ordering the Registrar of Titles to cancel and rectify the Registrar for Plot No. 1022-1030 Block 'A', Mbweni Kinondoni, Dar es Salaam without specific evidence of the location and size of the area of the Respondent's purported property."

In view of the above stated considerations, we agree with the learned counsel for the parties that determination of the issue which was left undecided is relevant in resolving the parties' dispute. We are therefore, of the settled view that the omission rendered the judgment of the High Court defective. We are supported in that view by the case of **Truck Freight (T) Ltd v. CRDB Ltd**, Civil Application No. 157 of 2007 (unreported). In that case, 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 as follows:

"If the lower court did not resolved 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..."

-See also the case of **Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 (unreported). Faced with a similar

situation, in that case, the Court 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 in which that court held that:

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

Although in the above cited authorities the court considered the effect of the omission to decide the framed issues, in our considered view, the underlying principle applies to any issue which, being relevant for determination of the parties dispute, was raised and argued at the hearing of a case.

On the basis of the above stated reasons, we hereby quash the judgment of the High Court and set aside the orders arising therefrom. The case is accordingly remitted to the High Court for the learned trial Judge to compose a judgment afresh and determine, together with the framed issues, the issues which as stated above, was raised but left undecided. Costs shall abide the outcome of appeal.

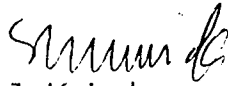
DATED at DAR ES SALAAM this 7th day of January, 2020

A.G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 16th day of January, 2020 in the presence of Ms. Esther Msangi, counsel for the Appellants also holding brief for Ms. Flora Shauri, counsel for the Respondent is hereby certified as a true copy of the original.



S. J. Kainda

DEPUTY REGISTRAR
COURT OF APPEAL