

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

**(CORAM: MUGASHA, J.A., KOROSSO, J.A. And KITUSI, J.A.)**

**CIVIL APPEAL NO. 110 OF 2019**

**OYSTERBAY VILLAS LIMITED..... APPELLANT**

**VERSUS**

**KINONDONI MUNICIPAL COUNCIL.....RESPONDENT**

**THE ATTORNEY GENERAL.....INTERESTED PARTY**

**(Appeal from decision of the High Court of Tanzania  
at Commercial Division)**

**(Sehel, J.)**

**Dated the 8<sup>th</sup> February, 2019**

**in**

**Commercial Case No. 88 of 2011**

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**JUDGMENT OF THE COURT**

28<sup>th</sup> April & 7<sup>th</sup> May, 2021.

**MUGASHA, J.A.:**

In the High Court of Tanzania, (Commercial Division) the appellant sued the respondent claiming general and specific damages for breach of contract. The facts underlying the dispute under scrutiny are to the effect that: The appellant and the respondent were parties in joint venture agreements concluded on 13/12/2007 and it was agreed among other things, that the appellant will construct residential apartments on Plots. No. 322 and 277 respectively located at Mawenzi and Ruvu roads, Oyster bay within the Municipality of Kinondoni in Dar-es-salaam Region. The said Plots which belong to the respondent are held under the certificates of title

No. 10392 and 10383. According to the joint venture agreements, ownership of the property was on a ratio of 75% by the appellant and 25% by the respondent and that, upon completion of construction, the respondent was to transfer the said titles in the joint names of the parties namely: Kinondoni Municipal Council and the partner, Oysterbay Villas Limited. On her part the appellant discharged its construction obligation following which it notified the respondent who in turn issued a certificate of occupation. Thereafter, the appellant's attempts through several correspondences reminding the respondent to discharge its obligation to transfer the certificates of title bore no fruits and that marked the commencement of litigation in courts. In the initial case before the High Court Commercial Division, the appellant emerged successful in a decision handed down on 11/3/2014 by Nchimbi, J, However, the decision was short-lived following its revision by the Court whereby it was quashed and a retrial was ordered to be conducted before another Judge. The retrial happened to be a twist in turns as Sehel, J (as she then was), dismissed the appellant's case. It is against the said backdrop the undaunted appellant has lodged this appeal to the Court. In the Memorandum of Appeal, the appellant has fronted eight grounds of complaint as follows:

1. The trial Judge erred in law in holding that the Respondent was not in breach of the terms and conditions of the contract as it relates to transfer of property and issuance of title deed in the joint names of the appellant and the respondent.
2. The learned trial Judge erred in law and fact in holding that efforts taken by the Respondent to comply with the contract as they relate to the transfer of 75% of shares in the properties to the Appellant was sufficient compliance with the terms of the contracts.
3. The learned trial Judge erred in law and fact in holding that the joint ownership of the properties was limited to a period of 46 years. In doing so the learned trial Judge erred in failing to note the appellant's right of renewal of the right of occupancy upon expiry of the current tenure.
4. The learned trial Judge erred in law and fact by holding that the appellant had not suffered any loss and or damages from the respondent breach and or refusal to transfer the properties in joint names.

5. The learned trial Judge erred in law and fact in holding that the agreements entered between parties were valid but wholly unenforceable. In doing so the learned trial Judge erred in relying on the decision in *Abualy Alibhai Aziz versus Bhatia Brothers LTD* [2000] TLR 288 which dealt with the effect of the Commissioner's refusal to grant consent for disposition.
6. The learned trial Judge erred in law and fact in raising and dealing with the issue of expiry and effect thereof of the Commissioner for Lands approval disposition without according the Appellant the right to be heard.
7. The learned trial Judge erred in law and fact in misconstruing and misapplying the effect of expiry of Commissioner's approval to disposition to the agreements between the appellant and the respondent.

Subsequent to the filing of the appeal, the appellant filed written submissions to bolster its arguments for the appeal whereas none was filed by it by the respondent or the Attorney General, the necessary party.

At the hearing of the appeal, the appellant was represented by Mr. Gaspar Nyika, learned counsel. The respondent and the necessary party had the services of Messrs. Hangi Chang'a and Mr. Hussein Ugulum, learned Principal State Attorneys and Messrs. Edwin Webiro and Masunga Kamihanda, learned State Attorneys.

Mr. Nyika adopted the written submissions and in addition made clarifications in that regard. In addressing the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grounds of appeal, the appellant faulted the learned trial Judge to have condemned the appellant without according it the right to be heard having held that on account of the expired certificate of approval of the disposition of land (exhibit P14) the joint venture agreement became unenforceable. On this it was argued that, while the certificate of approval of transfer issued by the Commissioner was intended to exhibit a smooth process of the respective transfer, the issue of its expiry was not raised be it in the pleadings or at the trial. To support the propositions Mr. Nyika cited to us the case of **INTERBULK LIMITED VS AIDEN SHIPPING CO. LIMITED [1984] 2 LLOYDS REP 66** Robert Goff I.J had this to say:

*"In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never*

*raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the Tribunal. Ackner I.J held "where there is a breach of natural justice as a general proposition it is not for the courts to speculate what would have been the result if the principles of fairness had been applied."*

However, on being probed by the Court as to the way forward, apart from reiterating what is contained in the written submissions, Mr. Nyika was of the view that although the appellant was not heard, since the issue in question did not arise at the trial, the Court can still evaluate the evidence and make its own conclusion. He thus prayed that the appeal be allowed.

On the other hand, it was Mr. Changa's oral submission that parties were not heard on what the learned trial Judge concluded to have made the contracts unenforceable which is the gist of the appellant's complaint. As such, he submitted, since the appellant is complaining that he was not heard, it is prudent that the judgment of the trial court be nullified and the case file be returned to the trial court for it to hear the parties before making a determination in that regard.

Having carefully considered the submission of learned counsel and the record before us, we have opted to initially dispose of the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grounds of appeal because their determination has a bearing on the disposal or otherwise of the remaining grounds of appeal.

It is not in dispute that, the issue that the expired certificate for disposition approval rendering the joint venture agreements unenforceable was raised *suo motu* and determined by the learned trial Judge in the course of composing her judgment. However, the burning issue and the gist of the appellant's complaint is that the parties were not accorded opportunity to address the learned trial Judge.

We have gathered at page 723 of the record of appeal that, the trial was conducted hinging upon five controlling issues to wit: **One**, whether the defendant breached the terms and conditions of the agreements of joint venture and joint ownership of the properties by refusing to transfer the right of occupancy into joint ownership; **two** whether the agreements entered into between the plaintiff and defendant specified the time limit for joint ownership of the properties; **three**, whether the agreements entered into between the plaintiff and defendant was of joint ownership of properties or build operate and transfer; **four**, whether the plaintiff

suffered loss as a result of the defendant's refusal to transfer the right of occupancy over properties into joint ownership and **five**, to what reliefs are the parties entitled.

According to the record of appeal, the said issues were a subject of the evidence adduced by the witnesses' parties and it constituted the gist of the final submissions of the respective parties. Thus, the adverse effect of expired disposition approval on the joint venture agreements was not among the issues which were addressed by the parties at the trial. However, on 8/2/2019 the learned trial Judge dismissed the case on account of among other things, what is reflected at pages 753 - 754 of record of appeal as follows:

*"... As I said the defendant made all efforts to transfer the properties to the plaintiff but the transfer was not completed. It is not known as to why it was not completed but in any event the final stage at which the process reached was an approval for transfer was obtained from the Commissioner for Lands in terms of Section 39 (5) of the Land Act. Subsection 6 © of section 39 of the Act provides for the lifespan of the approval issued by the Commissioner for Lands. It reads: "an approval of disposition is valid for one year from the date when it was issued." As I said the approval was issued on*



*18<sup>th</sup> February, 2016. Therefore, it expired on 17<sup>th</sup> February, 2017. In all aspects then the agreements entered between the parties herein are valid but wholly unenforceable as the lifespan of the approval expired and the transfer was not completed....”*

It is the said passage which is the gist of the appellant’s bitterness that she was condemned without being heard and a similar grudge seems to be shared by the respondent that all the parties were denied an opportunity to be heard. However, the parties parted ways on the way forward. While Mr. Nyika urged the Court sitting as the first appellate court to re-evaluate the evidence, make its own conclusions and determine the appeal in favour of the appellant, Mr. Chang’a urged the Court to quash the Judgment of the trial court, return the case file thereto with an order that parties be heard on the matter before the judgment is composed.

Natural justice is a cardinal principle which is entrenched as a fundamental right and includes the right to be heard amongst the attributes of equality before the law in terms of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution). In this regard, the Court has in a plethora of decisions emphasised that the courts should not decide on a matter affecting the rights of the parties

without giving them an opportunity to express their views or else that would be a contravention of the Constitution and the decision would be rendered void and of no effect. **See – TRANSPORT EQUIPMENT VS DEVRAM VALAMBHIA [1998] TLR 89, KAPAPA KUMPINDI VS THE PLANT MANAGER TANZANIA, MBEYA RUKWA AUTOPARTS AND TRANSPORT LIMITED VS JESTINA MWAKYOMA [2003] T.L.R 253,** and at page 36 **VIP ENGINEERING AND MARKETTING LIMITED AND OTHERS VS CITI BANK TANZANIA LIMITED,** Consolidated Civil References No. 5, 6,7 and 8 of 2008 **SAMSON NGWALIDA VS THE COMMISSIONER GENERAL OF TANZANIA REVENUE AUTHORITY,** Civil Appeal No. 86 of 2008; **R. S. A. LIMITED VS HANSPAUL AUTOMECHS LIMITED AND ANOTHER,** Civil Appeal No. 179 of 2016 and **CHRISTIAN MAKONDORO VS THE INSPECTOR GENERAL OF POLICE AND ANOTHER,** Civil Appeal No. 40 of (all unreported). In the latter case, the learned trial Judge had dismissed a suit on ground that it had no pecuniary jurisdiction on the matter it had raised *suo motu* while composing the judgment. The Court held:

*"Thus, consistent with the constitutional right to be heard as well as settled law, we are of the firm view that, in the case*

*at hand, the adverse decision of the trial Judge to reject the suit on account of lacking jurisdiction without hearing the parties is a nullity and it was in violation of the basic and fundamental constitutional right to be heard”.*

The Court has also emphasized on the essence of re-summoning the parties and accord them right to be heard once the trial judge raises own point of law in the course of composing the judgment or else the decision will be rendered null. See - **KAPAPA KUMPINDI VS THE PLANT MANAGER, TANZANIA BREWERIES LTD** Civil Appeal no. 32 of 2010, **PETER NG’HOMANGO VS THE ATTORNEY GENERAL**, Civil Appeal No. 114 of 2011, **SHERALLY AND ANOTHER VS ABDUL FAZALBOY**, Civil Application No. 33 of 2002 (all unreported). In the latter case the Court observed:

*“The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.”*

Thus, consistent with the constitutional right to be heard as well as settled law, in the matter under scrutiny the adverse decision of the trial Judge to dismiss the suit on account that the expired certificate of approval of disposition vitiated the agreements without hearing the parties was in violation of the basic and fundamental constitutional right to be heard and is a nullity. In that regard, we decline Mr. Nyika's proposition to dispose other grounds of appeal because **one**, on account of the said breach of natural justice, we are not in a position to speculate what would have been the result if the principle of fairness had been applied and **two**, in the event the decision of the trial court is a nullity, there is nothing upon which the remaining grounds can be prosecuted. Therefore, the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grounds of appeal are merited and we allow them and since they suffice to dispose of the appeal and for reasons earlier stated, we shall not determine the remaining grounds of appeal.

Consequently, the trial court's judgment is set aside and we direct the case file to be returned to the High Court Commercial Division, placed before the trial court to determine the point raised *suo motu* on the effect of the expired certificate of approval of disposition to the joint venture entity of the respondent's two plots namely 322 and 277 held under

certificates of title No. 10392 and 10383 respectively, This should be expedited as soon as practicable as the matter has been pending in courts for almost ten years.

The appeal is allowed to the extent stated with no order as to costs as none of the parties is at fault in the circumstances.

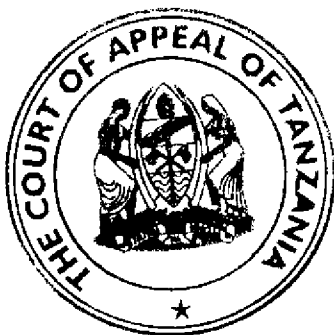
**DATED at DAR-ES-SALAAM** this 4<sup>th</sup> day of May, 2021.

S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

The Judgement delivered this 7<sup>th</sup> day of May, 2021 in the presence of the appellant Mr. Gasper Nyika, learned advocate for the appellant and Mr. Masunga Kamihanda, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



*F. A. Mtaranja*  
F. A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**