IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J. A., WAMBALI, J.A And SEHEL, J. A.)

CIVIL APPEAL NO. 86 OF 2018

KHAJI ABUBAKAR ATHUMANI.....APPELLANT

VERSUS

DAUD LYAKUGILE TA D.C. ALUMINIUM.....1st RESPONDENT
MWANZA CITY COUNCIL.....2nd RESPONDENT

(Appeal from the Decision of the High Court of Tanzania sitting at Mwanza)

(Matupa, J.)

Dated the 28th day of July, 2017
in
Land Case No. 35 of 2015

.....

RULING OF THE COURT

15th & 24th February, 2021.

SEHEL, J.A.:

The appellant sued the respondents, jointly and severally, in the High Court of Tanzania at Mwanza in Land Case No. 35 of 2015 seeking for; a declaratory order that he was a lawful owner of a suit premises measuring one and half acres land situate adjacent to Airport Road near the Victoria Lake shores; declaratory order that the respondents trespassed into the suit premises and cut down trees and horticultural

plants valued at TZS 1,447,430,133.00; payment of TZS 1,447,430,133.00 being specific damages and TZS 100,000,000/= as general damages and costs of the suit.

In the plaint, the appellant averred that he purchased the suit premises since 1976 and immediately thereafter he developed it by planting trees which by the time he instituted the suit were mature enough to be harvested. He claimed that he occupied it under customary law because he failed to secure a right of occupancy despite endless efforts made to the relevant authorities. He averred that the 1st respondent, acting under the instruction of the 2nd respondent, forcefully entered into his suit premises, cut down trees and cleared almost 1/8 acres of his land.

In his written statement of defence, the 1st respondent, denied the allegation of trespass and put the appellant to strict proof on ownership of the suit premises. Nonetheless, he acknowledged that he entered into the suit premises by the consent of the 2nd respondent who contracted him to build an Environmental Pedagon Centre (EPC). He also filed a counter claim against his co-defendant, the 2nd respondent herein

claiming the outstanding balance of TZS 5,600,000.00 out of the contracted amount of TZS 18,892,521.00.

The 2nd respondent also denied the allegation of trespass and in its written statement of defence raised a preliminary objection on points of law that there was no cause of action and the suit was time barred.

The record has it that on 23rd March, 2016, the trial court ordered that the preliminary objection be heard on 26th May, 2016. However, when the case was called on that date of 26th May, 2016, the preliminary objection was not heard. Instead, the trial court conducted a first pre-trial conference and assigned the case to a mediator judge. The case went through mediation which was unsuccessful. Thus, a final pre-trial conference was held and four issues were proposed by the parties' counsel. The issues were: -

1. *Whether the plaintiff is the lawful owner of the suit land.*
2. *If the above issue is held in the affirmative, whether the defendants jointly and severally illegally trespassed onto the suit land.*

3. *If the issue no. 2 is held in the affirmative, whether subsequent to the trespass the defendants jointly and/or severally destroyed developments made on the suit land.*
4. *What reliefs each party is entitled.*

On 5th December, 2016 hearing of the parties' evidence commenced whereby the appellant called three witnesses, the appellant himself (PW1), Bryson Kayila (PW2) and his son one Mosses Haji Abubakar (PW3). The 1st respondent gave his own evidence as DW1. He did not call any other witness. The 2nd respondent called two witnesses against the appellants claim, Moses Basil Seleki, a Town planner (DW1) and Ayub Rashid Kasuka, a land officer (DW2). Erick Melchior Nyoka, cartography technician (DW3) testified for the 2nd respondent in respect of the 1st respondent's counter claim.

We shall not reproduce the evidence adduced before the trial court for a reason shortly to be apparent. However, we find it prudent to present the findings of the trial court.

After hearing the evidence, the trial court answered the first issue in negative. It was satisfied that the suit property is a public land designed as a recreational ground and for habitation or farming

activities. Hence, it held that the appellant could not claim ownership of it by adverse possession. It reached that conclusion after it had made reference to section 16 of the Land Registration Act, Cap. 334 R.E 2002 and sections 38 and 2 of the Law of Limitation Act, Cap. 89 R.E 2002.

Regarding the second and third issues, the trial court was convinced that there was a collusion on the part of the 1st respondent and some officials of the 2nd respondent in awarding an informal contract to the 1st respondent whose registration status was not made apparent as per evidence of the 1st respondent which was admitted by Erick Melkior. It thus held that since there was no written contract the 2nd respondent could not be held responsible on the acts done by the 1st respondent which were intended to defraud the employer, the 2nd respondent. Hence, the 1st respondent alone was found liable for the destruction of the trees planted by the appellant.

In that regard, the appellant's suit was partly allowed against the 1st respondent on account of admission of the value of the trees destroyed and estimated at TZS. 600,000,000.00 by the 1st respondent, himself. He was also ordered to pay the appellant interest at a court rate from the date of the decree to the final settlement plus costs of the suit.

Aggrieved, the appellant and the 1st respondent each separately lodged their notices of appeal. Thereafter, the appellant filed a memorandum of appeal comprised of seven grounds, namely: -

1. *That, the learned trial judge grossly erred in law in holding that the appellant was a mere invitee to the disputed land as opposed to owner, in absence of evidence to support the denial of ownership and interest the appellant has over the said land.*
2. *That, the learned trial judge grossly erred in law in importing the provision of section 2 of the Law of Limitation Act [Cap. 89 R.E 2002] to define the land in dispute as a public land and subsequently disqualifying the appellant from owning the same.*
3. *That, the learned trial judge grossly erred in law for holding that the land in dispute had been planning area for recreational ground devoid of evidence to support the above notion.*
4. *That, the learned trial judge grossly erred in law for failure to find that the respondents had in their evidence admitted that all properties on the land in dispute had been developed by appellant, and subsequently the respondents had no justification*

in cutting down trees thereon, and constructed the unwarranted building thereon.

5. *That, the learned trial judge grossly erred in law for delivering a judgment which suffered a double standard where on one side the trial judge said the appellant had interests over the said land and it could not be expropriated arbitrarily, and at the end the trial judge failed to declare the said interests in favour of the appellant.*
6. *That, the learned trial judge grossly erred in law for not effecting considerable weight to the evidence for both sides in the case, particularly the contradictions and inconsistencies tainted in the respondent's case and the watertight evidence in the appellant's case instead the trial judge ended in importing extraneous matters to hold otherwise.*
7. *That, the learned trial judge grossly erred in law for not recording in the proceedings what transpired at the locus in quo.*

The 1st respondent cross appealed against the whole of the decision and decree of the trial court with five grounds that: -

1. *The trial judge grossly erred in law and fact for holding that there was collusion on the part of the 1st respondent and some officials of the 2nd respondent devoid of evidence.*
2. *The trial judge grossly erred in law and fact for holding that the 2nd respondent was not responsible for all activities conducted on the suit property even after the 2nd respondent's evidence had indicated so.*
3. *The trial judge grossly erred in law and fact for holding that the suit property belongs to the 2nd respondent and at the same time disowning the 2nd respondent, and her improvements thereto.*
4. *The trial judge grossly erred in law and fact for giving the decision which suffers double standard, and relied on extraneous matters.*
5. *The trial judge grossly erred in law and fact for not considering the counter claim raised in the 1st respondent's written statement of defence.*

At the hearing of the appeal, Mr. Julius Mushobozi, learned counsel represented the appellant. The 1st respondent appeared in person,

unrepresented whereas Ms. Mariam Mkwaju and Mr. Joseph Vungwa, learned State Attorneys, appeared for the 2nd respondent.

From the outset, before the parties were allowed to submit on the grounds of appeal, we invited them to address us on the propriety of the proceedings of the trial court regard being that the record of appeal shows that the 2nd respondent raised a preliminary objection but it was not heard and determined by the trial court.

In responding to the issue posed by the Court, Mr. Mushobozi referred us to the proceedings of the trial court of 23rd March, 2016 when the trial court adjourned the suit to 26th May, 2016 for hearing of the preliminary objection. He submitted that when parties appeared before the trial court on 26th May, 2016 a first pre-trial conference was held and the parties were not heard on the preliminary objection. It was his view that the trial court was supposed to hear and determine the preliminary objection first before proceeding to next stages of the hearing of the suit. He contended that failure by the trial judge to hear and determine the objections first was a fatal irregularity that vitiated the trial court's proceedings conducted from 26th May, 2016 up to the end of the trial together with its attendant judgment and decree. With that

submission, he urged us to nullify and quash all the proceedings that ensued from 23rd March, 2016 and set aside the judgment and decree made therefrom. He also urged us to make an order of retrial before another judge and with no order as to costs.

The 1st respondent being a layperson had nothing much to say other than joining hand with the submission of Mr. Mushobozi.

On her part, Ms. Mkwaju entirely agreed with the counsel for the appellant that the omission was fatal and vitiated the entire trial court proceedings starting from 26th May, 2016. On the way forward, she asked us to nullify and quash the proceedings from 26th May, 2016 and return the case file to the trial court for a retrial of the suit. She did not press for costs.

Having carefully examined the entire record and heard the submission of the parties, it is evident that the preliminary objection raised by the 2nd respondent in its written statement of defence was not heard and determined by the trial court. Although on 23rd March, 2016, the trial judge ordered the preliminary objection to come for hearing on 26th May, 2016 it was not heard. Instead, the trial judge proceeded with the hearing of the suit and ultimately delivered the judgment on the

main suit and a decree was extracted therefrom. That was definitely a fatal procedural irregularity. The trial court ought to have heard the preliminary objection first before going into merits or substance of the suit. This was meticulously stated in **Shahida Abdul Hassanali Kassam Vs. Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (unreported) when the Court considered the issue of jurisdiction of the trial court at the stage of revision. In dealing with the issue, the Court at page 3 of the ruling stated that:

> *"...the whole purpose of a preliminary objection is to make the court consider the first stage much earlier before going into the merits of an application...so in a preliminary objection a party tells the court the existing circumstances do not give you jurisdiction. It cannot be gained said that the issue of jurisdiction has always to be determined first."*

It is in that respect, this Court in the case of **Bank of Tanzania Ltd v. Devram P. Valambhia**, Civil Application No. 15 of 2002 (unreported) expressed its view in similar terms that: -

> *"The aim of a preliminary objection is to save the time of the court and of the parties by not going*

into the merits of an application because there is a point of law that will dispose of the matter summarily."

The above cases were also considered by the Court in the case of **Thabit Ramadhan Maziku and Kisuku Salum Kaptula v. Amina Khamis Tyela and Mrajis wa Nyaraka Zanzibar**, Civil Appeal No. 98 of 2011 when it was faced with almost similar scenario. In that appeal, the defendant raised a preliminary objection in the written statement of defence but the trial magistrate after hearing parties on it did not make a ruling on the same. The Court held that:

"...the failure by the learned magistrate with extended jurisdiction to deliver the ruling on the preliminary objection which he had scheduled to deliver on 16/9/2009 constituted a colossal procedural flaw that went to the root of the trial. It matters not whether it was inadvertent or not. The trial court was duty bound to dispose it fully, by pronouncement of the Ruling before dealing with the merits of the suit. This it did not do. The result is to render all subsequent proceedings a nullity."

In the present appeal, we reinforce the same position that the trial judge ought to have heard first the preliminary objections raised by the 2nd respondent in its written statement of defence before proceeding to the full trial of the suit and issue its findings either before or in its judgment, depending on the circumstances of each case. Given the fact that one of the points of law raised by the 2nd respondent touches the issue of jurisdiction of the trial court which is so basic and goes to the very root of authority of the trial court to adjudicate the case, it was fundamental for the trial judge to determine that issue of time limitation first before proceeding with the trial of the suit (See the case of **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda and 20 others,** Civil Appeal No. 8 of 1995 (unreported)). If the trial judge was of the view that the objection of time limitation required evidence it ought to have made it one of the contested issues which required evidence to be adduced during trial.

Under the circumstances, we are settled in our mind that there was a procedural irregularity committed by the trial judge that vitiated the entire proceedings starting from 26th May, 2016.

Consequently, we invoke our revisionary powers provided under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 and declare the entire proceedings of the trial court starting from 26th May, 2016 a nullity and quash them. We further set aside the judgment and decree arising therefrom and direct that the preliminary objection be expeditiously heard before another judge. We make no order as to costs as none of the parties is at fault.

DATED at **MWANZA** this 23rd day of February, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Ruling delivered on this 24th day of February, 2021 in the presence of Mr. Mwita Emmanuel holding brief for Julius Mshobozi, learned counsel for the appellant and Mr. Daud Lyakugile, first

Respondent appeared in person and Mr. Joseph Vugwa, State Attorney for the second Respondent, is hereby certified as a true copy of the original.

D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL