IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CIVIL APPEAL NO. 110 OF 2018

1. HAI DISTRICT COUNCIL
2. MWANANCHI ENGINEERING & CONSTRACTING COMPANY (MECCO) ..... **APPELLANTS**

VERSUS

1. KILEMPU KINOKA LAIZER
2. STEPHEN KIMANI LAIZER
3. THOMAS SINYOCK LAITAYO
4. THOMAS MORINGE MAKESEN
5. JULIAS KESOI LAITAYO
6. NOEL MAYASEK LAITAYOK
7. RICHARD LERUNDA MOLEL
8. NOAH KILEMPU LAIZER
9. SINJORE THOMAS LAITAYOK ..... **RESPONDENTS**
10. AMIRI PANGAN
11. MONICA JACKSON
12. CHARLES KAAYA
13. LAZARO THOMAS
14. KUYA KIMANI
15. MAGUYA MEZEJI
16. BARAKA KENYATTA

(Appeal from the Judgment and Decree of the High Court of Tanzania at Moshi)
(Sumari, J.)

dated the 18th day of October, 2016
in
Land Case No.21 of 2014

JUDGMENT OF THE COURT

15th & 26th February, 2021

MWARIJA, J.A.:

The appellants, Hai District Council, a local Government Authority established under the Local Government (District Authorities Act) [Cap.

287 R.E. 2002] and Mwananchi Engineering & Construction Company (MECCO), a limited liability company established under the Companies Act [Cap. 212 R.E. 2002], the 1st and 2nd appellants respectively, were the plaintiffs in the High Court of Tanzania at Moshi. They instituted Land Case No. 21 of 2014 (the suit) against the 16 respondents (the defendants in the High Court), Kilempu Kinoka Laizer, Stephen Kimani Laizer, Thomas Sinyock Laitayo, Thomas Moringe Makesen, Julias Kesoi Laitayo, Noel Mayasek Laitayok, Richard Lerunda Molel, Noah Kilempu Laizer, Sinjore Thomas Laitayok, Amiri Pangan, Monica Jackson, Charles Kaaya, Lazaro Thomas, Kuya Kimani, Maguya Mezeji and Baraka Kenyatta, the 1st – 16th respondents respectively.

The suit arose from a dispute over parcels of land situated at Mlima Shabaha area between Moshi – Arusha road and Moshi – Arusha railway line (the suit land). The respondents claimed that the suit land was allocated to each of them on 24/3/1992 by the Sanya Station Village Land Allocation Committee (the Committee). They claimed further that, on 16/8/1994, following an arrangement between the Sanya Station Village Council and some of the respondents, an agreement was entered between the said Village Council and a construction company known as M/S Ing. F. Frederici (the company) allowing the company to occupy on temporary basis, part of the suit land measuring 8 acres on conditions of *inter alia*,

payment of rent of TZS 6,000,000.00 per year until the company completes its project. The respondents claimed that 6 out of the 8 acres belonged to the 1st respondent who was to be paid 80% of the rent.

When the company finished its construction works in 2005, the respondent came to realize that the leased land and another area of the respondents' land which together measured a total of 24 acres had been transferred to the 2nd appellant. After having unsuccessfully sought the assistance of the 1st appellant, the respondents decided to institute the suit seeking among other things, a declaration that they are lawful owners of the suit land, an order evicting the 2nd appellant from the suit land, payment of mesne profits and costs of the suit.

In its written statement of defence, the 1st appellant denied the claim contending that the suit land had never been allocated to the respondents by any authority having the power of doing so. On its part, the 2nd appellant's defence was that the suit land was transferred to it on 15/1/2004 by Victoria Barabara Tanzania Ltd, the company which owned it as Plot No. 278 Block 'H', Bomang'ombe Urban Area. It contended further that the land was transferred to Victoria Barabara Tanzania Ltd by M/S Ing. F. Frederici which acquired it in 1990's.

Having heard the evidence of four witnesses for the respondents and three witnesses for the appellants as well as one court witness, the learned trial Judge was satisfied that the respondents had proved their case to the required standard. She thus declared them the lawful owners of the suit land. They were consequently granted all the reliefs sought in the plaint. The 2nd appellant who was ordered to give vacant possession of the suit land was also ordered to bear the costs of the suit. Aggrieved by the decision of the High Court, the appellants preferred this appeal raising a total of seven grounds of appeal.

At the hearing of the appeal, the 1st appellant was represented by Mr. Peter Musetti, learned Senior State Attorney assisted by Mr. Mkama Musalama and Ms. Glory Issangya, learned State Attorneys. The 2nd appellant had the services of Mr. Gwakisa Sambo, learned counsel. On their part, the respondents were represented by Mr. John Lundu, learned counsel. The learned counsel for the 2nd appellant complied with the provisions of Rule 106 (1) by filing his written submission. However, the learned counsel for 1st appellant did not do so. On the other hand, the learned counsel for the respondents did not comply with the requirement of Rule 106 (7) of the Rules, of filing written submission in reply to the submission filed by the counsel for the 2nd appellant.

As pointed out above, the appellants raised a total of 7 grounds of appeal. For reasons which will be apparent herein, however, we are not going to consider all of them. In the second ground, the 2nd appellant's counsel complains that at the trial, the trial court did not afford him the right to make a rejoinder to the reply submission made by the respondents' counsel. The reply submission was in respect of the arguments opposing admission of the documents which Mr. Lundu sought to tender in evidence. In that ground, Mr. Sambo who filed the memorandum of appeal for both appellants states as follows:

> *"That, the High Court erred in law and in fact by failure to afford the appellants' right to make rejoinder on whether to admit or not on all the exhibits admitted in court hence denying the appellants their constitutional right to be heard."*

Submitting on that ground of appeal, Mr. Sambo argued that, during the hearing of the case, when the counsel for the respondents sought to tender the documents which were admitted in evidence as exhibits P1, P2, P5 and P6, the appellants' advocates raised objections giving their reasons thereof. After the reply by the counsel for the respondents however, the appellants' advocates were not given the right to make a rejoinder, instead, the learned trial Judge proceeded to make a ruling admitting the documents in evidence. Mr. Sambo went on to submit that he was also denied that right when the appellants' witnesses sought to

tender exhibits D1 – D4 in the proceedings appearing at pages 170 and 171 of the record of appeal.

Relying on the decisions of the Court in the cases of **Shomary Abdallah v. Hussein and Another** [1991] T.L.R 135, **National Housing Corporation v. Tanzania Shoe and Another** [1975] T.L.R 261, **Ndesamburo v. Attorney General** [1997] T.L.R 137 and the **Director of Public Prosecutions v. Sabinis Inyasi Tesha and Raphael J. Tesha** [1993] TLR 237, Mr. Sambo argued that the trial court's failure to afford the appellants the right to be heard on the reply made in opposition of the objections amounted to denial of the right to be heard, the effect of which is to render the proceedings a nullity. He urged us to nullify the proceedings and the judgment of the High Court and order a retrial.

Mr. Lundu did not have much to submit on this ground of appeal. He did not dispute that failure to afford a party an opportunity to make a rejoinder amounts to denial of a right to be heard. He argued however, that the advocates for the appellants were not denied the opportunity of making rejoinder submissions because according to the procedure, it was the counsel for the respondent who was to make a rejoinder. This he said, is because he was the one who sought to tender the exhibits.

Having heard the submissions by counsel for the parties on the 2nd ground of appeal, we wish to start by looking into the applicable procedure when a party seeks to tender a document in evidence. We are, with respect, unable to agree with Mr. Lundu that when the opposite party objects to admission of the intended exhibit, it is the person who seeks to tender it who begins to make submission. The procedure is clear, that it is the person raising an objection who starts to submit in support of his objection followed by a reply from the person who intends to tender the document. The party who raised the objection then concludes by making a rejoinder.

For that reason therefore, the counsel for the appellants had the right to make rejoinder submissions after the reply submission by the respondents' counsel. Having perused the record of the proceedings, we agree with Mr. Sambo that the advocates for the appellants were not afforded that opportunity. Had they been so afforded but did not have any rejoinder to make, ordinarily, that should have been reflected in the record of proceedings.

It is not disputed that failure to afford the appellants the right to make rejoinder submissions amounted to denying them the right to be heard. Since that is a fundamental right, its breach had the effect of

vitiating the proceedings because it offended the principle of natural justice. In the case of **Abbas Sherally and Another v. Abdul Fazalboy** Civil Application No. 33 of 2002 (unreported), the Court observed as follows:

> *"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 which is 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."*

- See also the cases of **DPP v. Sabinis Inyasi Tesha and Another** (supra) cited by Mr. Sambo and **Mbeya – Rukwa Auto Parts & Transport v. Jestina George Mwakyoma** [2003] TLR 251. In the latter case, the Court had this to say:

> *"It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard,* ***audi alteram partem****. In* ***Ridge v. Baldwin*** *[1964] AC 40, the leading English case on the subject it was held that a power which affects rights must be exercised judicially, i.e. fairly. We agree and therefore hold that it is not a fair and judicious exercise of powers, but a negation of justice, where a party Is denied a hearing before its rights are taken away. As similarly stated by Lord Morris in* ***Furnell v. Whangarei High School Board*** *[1973] AC 660,*

natural justice is but fairness writ large and juridically."

On the basis of the above stated position, there is no gainsaying that the breach vitiated the trial. In the event we quash the proceedings, set aside the judgment and order a retrial. Since the unfortunate situation was occassioned by the court, we order each party to bear its own costs.

DATED at **ARUSHA** this 25th day of February, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 26th day of February, 2021 in the presence of Mr. Valentine Nyalu, learned advocate holding brief for 1st appellant also holding brief for Mr. Gwakisa Sambo, learned advocate for the 2nd appellant and Mr. John Lundu, learned advocate for the Respondents, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL