IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KWARIKO, J.A And KENTE, J.A.)

CIVIL APPEAL NO. 80 OF 2016

NUTA PRESS LIMITED.....APPELLANT

VERSUS

MAC HOLDINGS.....1st RESPONDENT

FOMA INDUSTRIES LIMITED..... 2ND RESPONDENT

(Appeal from the decision of the High Court of Tanzania, (District Registry) at Dar-es-salaam)

(Shangwa, J.)

dated the 5th day of May, 2015

in

Civil Case No. 127 of 1996

RULING OF THE COURT

29th October & 3rd November, 2021

MUGASHA, J.A.:

In this appeal the appellant/defendant is challenging the decision of the High Court of Tanzania at Dar-es-Salaam, which determined a suit and the counterclaim in favour of the 1st respondent/ plaintiff in the judgment of that court which was delivered on 5/5/2015. The facts underlying the present appeal are briefly as follows: the 1st respondent/plaintiff instituted a suit against the appellant/defendant claiming to be paid a sum of TZS. 47,336,841.00 being outstanding loan plus interest advanced to the appellant/defendant. This was pursuant to the appellant's request dating

back in July, 1988, to be lent by the 1st respondent a loan for a total sum of TZS. 9,800,000.00 which the appellant herein intended to utilise for payment to M/S Pindoria Construction Company Limited for moneys due and unpaid in respect of the construction of a godown at the appellant's property known as Plot No. 14 Pugu Road area in Dar-es-Salaam and for completion of the remaining part of the godown which also happened to be the appellant's property mortgaged to Tanzania Housing Bank (THB) as collateral on a loan given to the appellant by the bank. The said loan amount was split into two components whereby a sum of TZS. 4,500,000.00 not chargeable with interest was to be treated as rent in advance of the godown which the appellant had rented to the appellant in the initial lease, whereas the sum of TZS. 5,300,000.00 would be charged compound interest.

After expiry of the initial lease, the appellant and the 1st respondent entered into the second lease of five years whereby it was agreed that, the outstanding debt which stood at a sum TZS. 31,502,037.07 would be finally settled through being off-set by appellant renting the godown to the respondent at a monthly rent of TZS. 900,000.00. However, the plan was

cut short on or about November, 1994 after the defunct (THB), in the exercise of power of sale under mortgage over the appellant's property sold it to the 1st respondent vide an auction sold. The said property was a subject of the second lease. This was followed by the transfer of respective Right of Occupancy to the 2nd respondent herein, Foma Industries Ltd, one of the 1st respondent's companies and as such, the second lease of five years as between the appellant and the 1st respondent came to an end. During such time, the loan amount had accrued to TZS. 37,948,405.00 which prompted the 1st respondent's claim against the appellant before the High Court for payment of the outstanding balance of unpaid loan plus interest, costs and other reliefs which the court deemed fit.

In the written statement of defence, the appellant herein opposed the claims and raised a counterclaim, contending among other things that, the entire loan was offset because suit premises were let at a monthly rent of TZS. 175,000.00 which was TZS. 10,500,000.00 for a period of five years. It as well challenged the validity of the sale by THB on grounds that: **one,** the bank had stopped the auction so as to enable the appellant to discharge payment vide monthly rentals; **two,** that the property sold is not

what was advertised for the auction whereas the title was wrongly transferred to the 2nd respondent who apart from being a separate legal entity did not take part in the alleged auction. In this regard, the appellant raised a counter claim against the respondents seeking annulment of the sale and among others, be given vacant possession of the property.

As earlier stated, after a full trial, the suit was successful while the counterclaim was dismissed with costs upon the learned trial Judge declaring *inter alia* that, the sale of plots No. 14 and 15 Block D at Kariakoo to the highest bidder was validly conducted by THB through a public auction by Tanzania Auction Mart and Court Brokers Ltd and as such, the appellant is not entitled to any mesne profits. Aggrieved, the appellant has lodged the present appeal fronting eight (8) grounds of complaint. However, on account of what will be apparent in due course, we shall not reproduce those grounds.

At the hearing of the appeal, the appellant was represented Mr. Joseph Rutabingwa, learned counsel, whereas the respondents were represented by Mr. Rahim Mbwambo, learned counsel.

In the course of hearing the appeal, we required the parties to address us on the propriety or otherwise of non-joinder of the defunct THB at the trial before the High Court on account of its involvement in the disputed sale of the appellant's property at Plots Nos. 14 and 15 at Kariakoo whose title was ultimately transferred to the 2nd respondent.

On taking the floor, apart from making a half-hearted concession, that THB ought to have been joined, Mr. Rutabingwa was of the view that it was the respondent who ought to have joined the bank subject to furnishing evidence on existence of any valid sale of the appellant's property. On the other hand, it was Mr. Mbwambo's responded that, although it was proper to join THB in the suit, the 1st respondent was not obliged to do so because its claims against the appellant hinged on payment of interest in respect of the loan advanced to it and nothing else.

Although the respective learned counsel shifted blame on each other on joinder of THB, the nature of the dispute can be gleaned by looking at the pleadings of the parties. Whereas the 1st respondent pleaded in paragraphs 9 to 12 of the plaint to the effect that, the second lease agreement with the appellant came to a halt after THB had sold the

property in question and subject of the lease vide an auction. This was opposed by the appellant who in the amended written statement of defence at pages 51 to 53 of the record, challenged the validity of sale on ground that, the auction was stopped by the bank and that Plots Nos. 14 and 15 Pugu Road were wrongly auctioned instead of Plots Nos. 14 and 15 Kariakoo and that, the ultimate transferee, the 2nd respondent was not competent having not attended at the auction.

We found the aforesaid raising the question of non-joinder of a party and the issue for our consideration is the propriety of the trial before the High Court on account of non-joinder of THB. From what we have gathered from the respective pleadings, the conclusive and fair determination of the dispute between the appellant and the 1st respondent could not be attained without impleading the defunct THB. In the circumstances, as the suit was filed before the High Court, it was incumbent on that court to scrutinize the pleadings in order to determine if at all THB was a necessary part in the context of Order 1 rule 10(2) of the Civil Procedure Code [CAP 33 R.E 2002]. This was emphasised in the case of **FARIDA MBARAKA AND**

FARID AHMED MBARAKA VS DOMINA KAGARUKI, Civil Appeal No. 136 of 2006 (unreported), where the Court said:

> *"Under this rule, a person may be added as a party to a suit (i) when he ought to have been joined as plaintiff or defendant and is not joined so; or (ii) when, without his presence, the questions in the suit cannot be completely decided."*

However, from what was submitted by the respective learned counsel, it would appear none of them was willing to join THB and instead, as they concentrated on shifting blame on each other to be bound to make the appropriate action. It is settled law that, once it is discovered that a necessary party has not been joined in the suit and neither party is ready to apply to have such party added, it is incumbent on the court to have such party added. See: **TANGA GAS DISTRIBUTORS LTD VS MOHAMED SALIM SAID AND TWO OTHERS**, Civil Revision No. 6 of 2011 (unreported). In the premises, in view of the state of the pleadings, it was incumbent on the High Court to be keen enough and require the parties to amend the pleadings and join THB which was alleged to have sold the appellant's property in question. See: **TANZANIA RAILWAYS**

CORPORATION (TRC) VS GBP (T) LIMITED, Civil Appeal No. 218 of 2020 (unreported).

That said, next issue for consideration is what would be the fate of this appeal? Although the High Court did not make any order against THB, the appellant's complaint in the grounds 4, 5 and 6 of the Memorandum of Appeal are to the following effect:

> *"4. That, the learned trial Judge erred in law and on evidence by holding that the suit premises were duly advertised for sale and that the plaintiff was successful bidder whereas there was sufficient evidence confirming that the sale was suspended and there was no auction sale as alleged by plaintiff (now respondent) and the trial Judge disregarded the agreed arrangement whereby respondent was to discharge loan due to the Tanzania Housing Bank through rentals remittance.*
>
> *5. That the learned trial Judge erred in law and on evidence by holding that the description of the property, as advertised in the newspapers exhibit D3 as plots number 14 and 15 Block 75 Kariakoo under the certificate of title number 186070/124, did not affect the sale, whereas that misdescription*

greatly affected the auction sale, if any, for a given public auction sale in terms of location and price.

6. That the learned trial Judge erred in evidence by holding that the plaintiff, now respondent, was the highest bidder of the suit premises whereas there was no evidence to confirm the auction sale and consequently there could be no lawful transfer of the property to M/S FOMA INDUSTRIES LTD a subsidiary of the respondent."

Ultimately, the appellant has sought among others, the following reliefs:

"The alleged auction sale was a nullity and landed property under certificate of title number 18670/124 revert to the appellant."

From the above excerpts, irrespective of any adverse order against THB by the High Court, before us the appellant is seeking to have the sale conducted by THB annulled by the Court and the property in question be reverted to the appellant. Mr. Rutabingwa was of the view that this could be decided in the absence of THB because according to the learned counsel there was actually no sale on account of the stated irregularities. Since it is glaring that THB was involved in the sale of the disputed

property and was beneficiary of the proceeds of sale under the mortgage, we found Mr. Rutabingwa's argument wanting and if condoned would result into condemning THB without a hearing. This is against what this Court has always emphasised that the right to be heard is a fundamental principle which is enshrined under the Constitution and the Courts must jealously guard the same. See: **MBEYA-RUKWA AUTOPARTS AND TRANSPORT LTD VS JESTINA MWAKYOMA** [2003] TLR 251, **SELCOM GAMING LIMITED VS GAMING MANAGEMENT (T) AND GAMING BOARD OF TANZANIA** [2006] T.L.R 2000 and **MIRE ARTAN ISMAIL AND ANOTHER VS SOFIA NJATI,** Civil Appeal No 75 of 2008 (unreported). In the case of **MBEYA-RUKWA AUTOPARTS AND TRANSPORT LTD VS JESTINA MWAKYOMA** (supra) in which the English case of **RIDGE VS BALDWIN** [1964] AC 40 was considered, the Court observed that:

> "*In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law, and declares in part:*
>
> *Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kunachohusika, basi mtu huyo atakuwa*

na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..."

In view of the settled law on the right to be heard, we are of a serious considered view that, it will be absurd for this Court to make any order against the THB as prayed by the appellant without availing her opportunity to be heard. It is thus our considered view that, the non-joinder of THB in the suit before the High Court amounted to a fundamental procedural error and occasioned a miscarriage of justice which cannot be condoned by the Court by hearing and determining the appeal as suggested by the appellant's counsel. In the result, we have no option but to declare the trial proceedings and the impugned judgment a nullity and cannot be spared.

On the way forward, we invoke the powers vested on us under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019], and hereby quash the proceedings and judgment of the High Court and the subsequent orders. In this particular case, we refrain to order a retrial having considered that, this matter has been in the court corridors for about twenty-five years from 1996 to date; a different current legal framework governing land disputes resolution and ultimately, the processes

involved in commencing actions against defunct public institutions. Thus, if any of the parties so desire, may institute a fresh suit joining THB in accordance with the law and without being subjected to computation of time limitation during which the matter was pending in courts not later than six (6) months from the date of this Ruling.

Since the issue under consideration was raised by the Court *suo motu*, we make no order as to costs.

DATED at **DAR ES SALAAM** this 2nd day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The ruling delivered this 3rd day of November, 2021 in the presence of Mr. Evodius Rutabingwa, learned counsel for the appellant and Ms. Susan Botto, learned counsel for the respondents, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL