

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MKUYE, J.A., LEVIRA, J.A. And MAIGE, J.A.)**

**CIVIL APPEAL NO. 19 OF 2019**

**CHARLES CHRISTOPHER HUMPHREY KOMBE**

**t/a KOMBE BUILDING MATERIALS .....APPELLANT**

**VERSUS**

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

**[Appeal from the Judgment and Decree of the High Court of Tanzania  
(Land Division) at Dar es Salaam]**

**(Mziray, J.)**

**dated the 17<sup>th</sup> day of December, 2014  
in**

**Land Case No. 161 of 2007**

**.....**

**JUDGMENT OF THE COURT**

14<sup>th</sup> March & 14<sup>th</sup> April, 2022

**MKUYE, J.A.:**

This appeal originates from the High Court decision in Land Case No. 161 of 2007 in which the appellant had sued the respondent and sought for a judgment and decree as follows:

- a) Payment of Tshs. 822,004,000/= being the value of the container, items and materials unlawfully taken by the respondent from the plaintiff in the disputed plot.
- b) Interest on (a) above at the rate of 30% from the date the items were taken by defendant to the date of payment in full.

- c) Interest on the decretal sum at Court rate from the date of judgment until the date of payment in full.
- d) Costs of the suit.
- e) Any other or further relief(s) this Court deems fit and just to grant.

After a full trial, the High Court dismissed the suit on the ground that it lacked jurisdiction to adjudicate the matter which did not have land features.

Before embarking on the merit of the appeal, we find it appropriate to narrate albeit briefly, the background of the facts leading to this appeal as they can be gleaned from the record of appeal.

The appellant engaged himself in the business of selling cement and making bricks and operated his activities at the open space at Mwananyamala area. While the appellant claimed to have been allowed to conduct his activities at that place by the local leadership of that area, the respondent, on her part, maintained that the appellant illegally conducted his affairs at the said open area without a permit. Sometimes in 1999, the respondent came at the appellant's business and demolished the structures thereat. This culminated into the

appellant claiming that the respondent, apart from effecting the demolition, seized from the site a consortium of items.

Subsequently, the appellant was arraigned before the Resident Magistrate's Court of Dar es Salaam vide Criminal Case No. 1223 of 2001 faced with two counts: the 1<sup>st</sup> count of conducting business at an unauthorized place contrary to paragraph 13 and 16 of the Dar Es Salaam City Council (Hawking Street Trading) Byelaw of 1991 and the 2<sup>nd</sup> count of causing nuisance contrary to paragraph 11 and 8 (1) of the same Byelaw.

At the conclusion of the trial, the appellant was convicted of the 1<sup>st</sup> count and sentenced to pay a fine of Tshs. 50,000/=. His appeal to the High Court was unsuccessful and a further appeal to this Court vide Criminal Appeal No. 51 of 2011 was successful whereby the appellant's conviction was quashed and the sentence was set aside.

Following that decision, the appellant instituted Land Case No. 161 of 2007 in the High Court, the subject this appeal as alluded to earlier on.

The High Court heard the matter from both sides and in the course of composing the judgment, raised the issue of jurisdiction and made a determination on the basis of such issue. It found that it lacked

jurisdiction to entertain the matter whose cause of action did not emanate from land matter and dismissed it with costs.

Aggrieved by that decision, the appellant has appealed to this Court on four grounds of appeal as follows:

- 1. The Honourable Court erred in law in failing to compose and pronounce judgment according to law.*
- 2. The learned High Court Judge erred in law in failing to invite the parties to address him on the question of jurisdiction, which he has raised suo motu and which became a ground for dismissing the suit, and erred further to dismiss the suit on ground of want of jurisdiction.*
- 3. The Honourable Court erred in law in ignoring the framed issues and in considering matters and evidence outside the framed issues.*
- 4. The Honourable High Court erred generally in declining jurisdiction or in failing to transfer the suit to the proper registry of the High Court.*

When the appeal was called on for hearing, the appellant was represented by Mr. Daniel Ngudungi and Ms. Jackline Kulwa, both learned advocates while holding brief for Mr. Kalolo Bundala, learned advocate, with instructions to proceed. On the other hand, the respondent had the services of Mr. Deodatus Nyoni, learned Principal

State Attorney assisted by Mr. Boaz M. Msoffe and Ms. Meto Mwambalaswa, both learned State Attorneys.

At the outset, Mr. Nyoni rose and intimated to the Court that they conceded to the appeal particularly on the basis of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal hinging on the issue of jurisdiction which was raised *suo motu* by the trial judge and determined the matter on that basis. He pointed out that, though at page 139 of the record of appeal issues for determination were framed, the trial judge determined the matter on the issue of the jurisdiction without affording the parties the right to be heard on that aspect. Mr. Nyoni, therefore, urged the Court to allow the appeal and remit the matter to the High Court so that the parties can be given a chance to address the court on the issue of jurisdiction.

To bolster his argument, he referred us to the unreported case of this Court in Civil Appeal No. 81 of 2017 between **Charles Christopher Humphrey Kombe v. Kinondoni Municipal Council** and the unreported case of the High Court in Land Case No. 107 of 2007 between **Charles Christopher Humphrey Kombe v. Kinondoni Municipal Council** where the trial High Court Judge also came up with the issue of jurisdiction *suo motu* and dismissed the suit for lack of jurisdiction. On appeal to the Court, the Court found that the High Court

erred in basing its decision of the case on the issue raised *suo motu* without according the parties the right to be heard on the issue. In the end the Court stated that:

*"For reasons we have assigned, we are constrained to allow the appeal on the strength of the third ground of appeal. We quash the decision of the High Court and order that the record be remitted to the trial court before the same judge for composition of a fresh judgment after hearing the parties on the issuing jurisdiction."*

Nevertheless, the learned Principal State Attorney prayed to be pardoned from paying costs following their concession to the appeal.

In response, Mr. Ngudungi welcomed the concession by the learned Principal State Attorney, particularly in showing appreciation of the law. However, he pressed for costs arguing that the appellant has incurred expenses in preparing the record of appeal, service to the respondents and that he has engaged advocates to represent him. In that case, he was of the view that he is entitled to reimbursement. Nevertheless, he conceded to the way forward that the matter be

remitted to the High Court to enable parties to be heard on the issue of jurisdiction.

We have anxiously considered the arguments in concession of the parties from both sides, and we note that it is not disputed as contended by Mr. Ngudungi that the High Court judge was touched during the preparation of the judgment on the issue of jurisdiction. This is clearly shown at page 158 of the record of appeal when the trial judge stated:

*"Having guardedly near the testimonies of witnesses from both sides, having also considered the closing submission of the learned counsel for both parties and pleadings in this case as well as the entire record of the case, **I am touched by the issue of jurisdiction of this court to entertain this matter.** Therefore before I proceed any further to determine the merits of this case I find it pertinent that I determine the issue of jurisdiction first."* [Emphasis added]

Admittedly, the jurisdiction of the court was not among the issues which were framed as shown at page 149 of the record of appeal. The issues were framed as per Order XIV rule 1 (5) of the Civil Procedure Code, [Cap. 33 R.E. 2019] which states:

*"1(5) At the first hearing the suit the court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."*

It is also important to note that under rule 5 (1) of the same Order XIV, the court is empowered at any time before passing a decree to amend or frame a new issue in addition to those framed earlier on. The said provision states as follows:

*"The Court may at anytime before passing a decree amend the issues or frame additional issues on such terms as it thinks fit; and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed."*

Accordingly, the learned trial judge cannot be said to have committed any wrong in framing a new or additional issue which he thought necessary for determining the matter before him since the law



permitted him to do so. The issue is whether after having framed an additional issue the trial judge afforded an opportunity to the parties to address him on that aspect.

Admittedly, the CPC does not specifically provide for that procedure, however, it is a settled law that after a new or additional issue is raised, the court must according, the parties an opportunity to be heard on such new or additional issue. This is in tandem with the fundamental right to be heard enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania [Cap 2 R.E. 2002]. This was also expounded in the case of **Mbeya Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma** [2003] TLR 25 as hereunder:

*" In this country, natural justice is not merely a principle of common law, it has become a fundamental constitution right. Article 13(6) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part:*

*(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi*

*mtu huyo atakuwa na haki ya kupewa fursa  
ya kusikilizwa kwa ukamilifu...”*

[See also **Samson Ngwaliela v. The Commissioner General of Tanzania Revenue Authority**, Civil Appeal No. 86 of 2008 and **Christian Makandoro v. The Inspector General of Police and Another**, Civil Appeal No. 40 of 2019 (both unreported)]

In the case of **Wagesa Joseph M. Nyanda v. Chacha Muhogo**, Civil Appeal No. 161 of 2016 (unreported), the Court was comforted with a situation like in the matter at hand, where the High Court in its appellate jurisdiction raised two issues relating to the court’s jurisdiction *suo motu* in the cause of preparing the judgment and determined them without hearing the parties. In its decision the Court stated as follows:

*"In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts, while composing their decision, discover new issues with jurisdictional implications. The way the first appellate court raised two jurisdictional matters suo motu and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and judgment of the High Court a nullity, and we hereby declare so."*

parties are heard on the issue of jurisdiction. Considering the nature of the matter we order that each party shall bear its own costs.

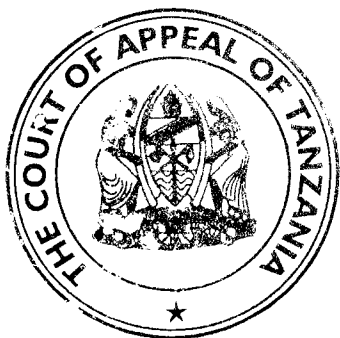
**DATED** at **DAR ES SALAAM** this 12<sup>th</sup> day of April, 2022.


R. K. MKUYE  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

The Judgment delivered this 14<sup>th</sup> day of April, 2022 in the presence of Ms. Jackline Kulwa, learned counsel for the Appellant and Mr. Daniel Nyakiha, learned counsel for the respondent is hereby certified as a true copy of original.



  
J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**