

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR-ES-SALAAM**

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

**CIVIL APPEAL NO. 155 OF 2021**

**TANZANIA COMMERCIAL BANK PLC**

**(Successor in title to TPB Bank PLC) ..... APPELLANT  
VERSUS**

**REHEMA ALATUNYAMADZA .....1<sup>ST</sup> RESPONDENT**

**LEAH NEEMA ..... 2<sup>ND</sup> RESPONDENT**

**LULU CARMEN ..... 3<sup>RD</sup> RESPONDENT**

**VIOVENA AND COMPANY LIMITED ..... 4<sup>TH</sup> RESPONDENT**

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

**(Wambura, J.)**

**dated the 24<sup>th</sup> day of July, 2015**

**in**

**Land Case No. 203 of 2010**

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**RULING OF THE COURT**

26<sup>th</sup> October & 1<sup>st</sup> November, 2022

**KITUSI, J.A.:**

The first, second and third respondents instituted a suit at the High Court, subject of this appeal, arising from the following background:

The appellant who was the first defendant at the trial is a legally established financial institution whose mandate includes money lending. The fourth respondent, the second defendant at the trial, is a debt collector who was from time to time being employed by the appellant to recover debts from defaulting borrowers.

On 23/7/2010, the appellant assigned the fourth respondent to go to Kunduchi Mtongani area in the City of Dar es Salaam to recover a debt from a borrower who had defaulted in liquidating his loan. The recovery was to be by way of sale of the borrower's house on Plot No. 4556/1 Block A CT 47475.

In compliance, the fourth respondent made announcements mobilizing the public to turn up at the auction. He also posted notices of sale on the house intended to be sold.

However, it turned out that the house which was proclaimed for sale and ultimately sold did not belong to the said borrower. It was a house on Plot No. 2057 Block C jointly owned by the first, second and third respondents to whom we shall henceforth refer as the owners. The owners, who have never borrowed from the appellant, objected to the sale and protested but the fourth respondent scornfully ignored the objections, referring to the owners as people who led lavish life on borrowed money. He went ahead and sold the house.

In the suit instituted by the owners, they prayed for a declaration that the sale was illegally conducted acting on a mistake, but also prayed for general damages arising out of the embarrassment they went through during the sale, and specific damages for loss of projected income. At the end of the trial which proceeded ex parte against the

fourth respondent, the High Court nullified the sale and ordered the buyer of the house to surrender it to the owners and claim refund from the appellant. It also awarded the owners TZS 100,000,000 in damages.

The appellant is discontented by that decision. She has raised four grounds of appeal to challenge it. Since July 2017 when the appeal was lodged to the date when we called it for hearing, some water had gone under the bridge. First, the appellant bank had by operation of the law been succeeded by Tanzania Commercial Bank PLC.

It was Mr. Deodatus Nyoni, learned Principal State Attorney representing the appellant who brought this fact to our attention. The learned Principal State Attorney was appearing before us along with Messrs. Edwin Webiro and Joseph Tibaijuka, learned State Attorneys, as well as Mr. Julius Kalolo Bundala, learned advocate, who had the conduct of the appellant's case during the trial. Mr. Nyoni's prayer that we should invoke rule 111 of the Court of Appeal Rules, 2009 (the Rules) to order change of the appellant's name was not objected to by Mr. Mohamed Tibanyendera learned advocate appearing for the second and third respondents, the only owners who were surviving. As there was no objection, we acted under rule 111 of the Rules, and ordered the successor's name inserted, as indicated above.

Secondly, the first respondent as one of the owners, had passed on since 11<sup>th</sup> July, 2021, according to the copy of the death certificate on the record. As the twelve-month period within which any interested person would apply to be joined as her legal representative had elapsed and none had made such application, we proceeded in her absence in terms of rule 105 (2) of the Rules.

Now back to the appeal. We have taken the view that the whole case before the High Court rested on the legality of the sale. So, we asked the learned attorneys to address a preliminary issue whether that suit was competent without joining the buyer of the house.

Mr. Nyoni was straight to the point in essence submitting that the buyer was condemned unheard and invited us to use our revisional powers under section 4(2) of the Appellate Jurisdiction Act (AJA) to nullify the proceedings and quash the judgment and decree. The learned Principal State Attorney has suggested that we should remit the record to the High Court for it to proceed according to law.

On the other hand, Mr. Tibanyendera was not wholly comfortable with the submissions and suggestion made by Mr. Nyoni. He first submitted that there was no need to join the buyer because the house was not sold, but he faced a blind alley when we drew his attention to

the first item in the decree and asked him what then was the cause of action if the house was not sold.

There is no arguing, in our view, on the principle that parties are bound by their own pleadings. See **Martin Fredrick Rajab v. Ilemela Municipal Council & Another**, Civil Appeal No. 197 of 2019 (unreported).

In this case the plaint alleged that the house had been sold, and the plaintiffs prayed for nullification of that sale. Mr. Tibanyendera submitted that the appellant's written statement of defence disputed the allegation that there was sale. With respect, the fact that sale was disputed only called for proof, but it did not justify the plaintiffs leaving the buyer out.

Besides, the relevant part of the judgment contradicts the learned counsel. It reads:

*"Having found that the defendants sold the plaintiff's house erroneously, I make the following orders:-*

*(a) As it is on record that the plaintiffs are not indebted to the 1<sup>st</sup> defendants, then I declare the said sale to be unlawful. I hereby nullify it and the house to be returned to the plaintiffs forthwith. Buyer to*

*claim for his refund from the defendants if at all payments had been effected.”*

In view of the foregoing finding, Mr. Tibanyendera cannot be heard arguing that leaving out the buyer was procedurally correct for the reason that there was no sale. What if there is a buyer out there who would wish to assert that fact but cannot, because he was not impleaded? This is the reason **Mbeya Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] TLR 251 and many others are authority for the time-tested principle that an adverse decision made without giving the affected person a hearing is null and void for breaching a fundamental principle of natural justice. That is the essence of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. See also the case of **Abbas Sherally and Another v. Abdul S. H, M. Fazalboy**, Civil Application No. 33 of 2002 cited in **Kumbwandumi Ndemfoo Ndossi v. Mtei Bus Services Ltd**, Civil Appeal No. 257 of 2018 (both unreported). In our considered conclusion, this point is sufficient to dispose of the appeal.

Having discussed the arguments of the learned counsel in line with the settled position of the law, we agree with Mr. Nyoni that the proceedings and judgment of the High Court conducted without impleading or hearing the buyer of the house must and are hereby

nullified and quashed. Consequently, we set aside all orders resulting therefrom and in terms of section 4 (2) of the AJA, we remit the record to the High Court for the parties, subject to seeking amendments if they wish, to proceed on the basis of the pleadings on record.

As the appeal turns on a point that was raised by the Court, we make no order as to costs.

It is so ordered.

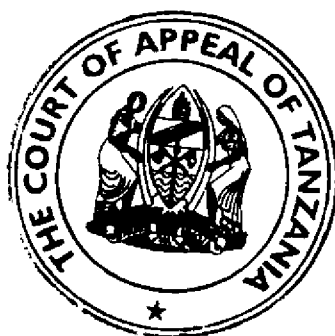
**DATED at DAR ES SALAAM this 28<sup>th</sup> day of October, 2022.**

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

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

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

The ruling delivered this 1<sup>st</sup> day of November, 2022 in the presence of Mr. Edwin Joshua Webiro, learned State Attorney for the Appellant and Ms. Jeddnes Jason, learned counsel holding brief for Mr. Mohamed Tibanyendera, learned counsel for the Respondents, is hereby certified as a true copy of the original.



  
D. R. LYIMO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**