IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KIHWELO, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 64 OF 2020

WILFRED MARO..... APPELLANT

VERSUS

SARAH LOTTI MBISE.....1st RESPONDENT

FREDRICK GEORGE GITHIRE .....2nd RESPONDENT

VICENT GEORGE GITHIRE.....3rd RESPONDENT

PROSPER PAUL MASSAWE.....4TH RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam
(De-Mello, J.)
dated the 23rd day of July, 2019
in
Land Case No.14 of 2015

.....

JUDGMENT OF THE COURT

25th October & 21st November, 2022

MKUYE, J.A.:

The appellant, Wilfred Maro sued the respondents Sarah Lotti Mbise, Fredrick George Githire and Vicent George Githire, (the 1st, 2nd, and 3rd respondents herein) in Land Case No. 14 of 2015 before the High Court (Land Division) (the trial Court) at Dar es Salaam. Later, Prosper Paul Massawe, the 4th respondent herein, was joined under a third party procedure. In the said suit, the appellant prayed for judgment and decree against the respondents jointly and severally as follows:

i) An order that the respondents hand over to the appellant the unsurveyed three acres piece of land located at Mapinga village in Bagamoyo District at Pwani Region and give vacant possession thereof.

ii) Declaration that the respondents are liable to compensate the appellant for the value of loss of business and loss of profit.

iii) **In the alternative to prayer** (i) above, declaration that the respondents are jointly and severally liable for breach of contract for their failure and/or refusal to avail the appellant the said property and handover the same to the appellant as agreed.

iv) An order that the respondents jointly and severally refund to the appellant the sum of Tanzanian Shillings one hundred million only (Tshs.100,000,000/=) received/paid to them as part/advance payment of the purchase price by the appellant.

v) An order that the respondents jointly and severally refund to the appellant the sum of Tanzanian Shillings Ten million only (Tshs.10,000,000/=) paid by the appellant as Levy Duty to the Village Government over the purported sale transaction.

vi) An order against the respondents jointly and severally for payment of Tanzania Shillings Two Hundred Million (Tshs. 200,000,000/=) being loss of business and loss of profit.

vii) Interest on the decretal sum at the courts rate of 12% from the date of judgment to the date of full satisfaction.

viii) General damages.

ix) Interest on the costs (sic) at the courts rate of 12%.

x) Any other relief(s) as the Hon. Court may deem just to grant.

In their joint written statement of defence, the 1st, 2nd and 3rd respondents partly admitted to the appellant's claim in that they were obliged to hand over the land but denied the claim of payment of Tshs.200,000,000/= as compensation for loss as the delay in handing over the land to him was not due to fraud/or that they acted fraudulently. They, therefore, prayed for among others to be given more time to enable them handover the suit land to the appellant.

On his part, the third party (4th respondent), in his written statement of defence gave a total denial to the appellant's claim and in the end prayed for the dismissal of the suit.

Before commencement of the trial, the court with the assistance of the parties agreed on the following issues:

> *"1. Whether the defendants successfully terminated their contract with the 3d party.*
>
> *2. Who is **a legal owner of the disputed land located** at Mapinga village Bagamoyo?*
>
> 3. *What reliefs are the parties entitled."*
>
> [Emphasis added].

After hearing the case, the trial court and dismissed the suit with costs. Aggrieved by that decision, the appellant has appealed to this Court on a memorandum of appeal consisting two (2) grounds as follows:

> *1. That, the Honourable trial judge grossly erred both in law and fact by failing to determine and answer the issues which were framed by the trial court.*
>
> *2. That, the proceedings of the trial court are fatally defective by failing to adduce the reasons for the transfer of the case from Hon. Ndika J. to Hon. Mzuna J.*

When the appeal was called on for hearing, the appellant was represented by Mr. Michael J. Nyambo, learned advocate whereas the 1st and 3rd respondents appeared in person following the discharge of Mr. Tito Lwila, learned advocate who sought and was granted him leave to be discharged for lack of proper instructions; and the 4th respondent

enjoyed the services of Mr. Thomas Brash, also learned advocate. It is noteworthy at this juncture that despite the fact that the 2nd respondent was not in attendance, we found it appropriate to proceed with the hearing in his absence since he had co-jointly with the 1st and 3rd respondents filed their written submissions as per Rule 112 (4) of the Tanzania Court of Appeal Rules, 2009.

When given an opportunity to expound the grounds of appeal, Mr. Nyambo in the first place sought to adopt the appellant's written submissions filed on 26th May 2020. After having done so, he assailed the trial Judge's failure to determine the issues which were framed particularly the 2nd and 3rd issues. He pointed out that the issues relating to who was the lawful owner of the suit land and reliefs the parties entitled were not determined. He contended that the issue of who is the lawful owner of the suit land was very crucial in this case which ought to be determined instead of just dismissing the suit.

The learned counsel submitted further that, although there was an issue relating to the reliefs which the parties sought to be awarded, the trial judge did not mention anywhere in the judgment the reliefs which the parties were entitled. Instead, the trial judge dismissed the suit with costs. In the written submission, the appellant argued that in determining any suit the court is bound to frame up issues which will

guide it to reach to a fair justice, and has a duty to determine them. To fortify his argument, he sought reliance on the case of **Sheikh Ahmed Said v. The Registered Trustees of Manyema Masjid,** [2005] T.L.R. 61 where it was held that:

> *"It is necessary for a trial court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect."*

Mr. Nyambo went on to submit that, failure by the trial judge to make specific findings on the 2nd and 3rd issues occasioned failure of justice as it is not known as to who is the lawful owner of the suit land and the reliefs to which the parties are entitled. To him the issues were to resolve definitely the matter in one way or the other.

With regard to the 2nd issue, it was Mr. Nyambo's submission that when Hon. Mzuna took over the conduct of the case from Hon. Ndika J. (as he then was) no reasons were assigned for such taking over. On being prompted by the Court whether Hon. Ndika J. had started taking evidence and whether the appellant was prejudiced, he candidly conceded that the said ground lacks basis at the moment and, we think, rightly so for one major ground that the predecessor Judge (Ndika, J.) had not recorded evidence of any witness as the matter before him had

been in preliminary stages. Again, there has been nothing advanced by the appellant that he was prejudiced.

Otherwise the learned counsel beseeched the Court to find merit on the remaining ground of appeal and allow the appeal.

In response to the grounds of appeal, in the first place, each 1st and 3rd respondents after having sought to adopt their joint written submissions argued that the appellant was the lawful owner of the suit land since he paid for its purchase unlike the 4th respondent who did not pay terming him as a conman. They urged the Court to either declare the appellant the lawful owner of the suit land or that the 4th respondent be ordered to return it to them so that they can hand it over to the appellant who is the lawful owner.

On his part, Mr. Brash responding on behalf of the 4th respondent prayed to adopt their written submissions filed on 26th June 2020 to form part of their oral submissions. He then extended appreciation for the appellant's concession that the 2nd ground of appeal relating to change of judges to have no merit.

In relation to the 1st complaint that the 2nd and 3rd issues were not determined he forcefully resisted that proposition contending that the same were determined. He took us at pages 377, 379 and 380 of the record of appeal with captions that ***"The third party came into play***

with defendants long before PW1"..., "A valid agreement in place...as observed above, and DW4 taking possession since 30th November 2012, whoever comes into scene thereafter has no right whatsoever". *And* ***the plaintiff trusting his advocate went ahead to purchase the same suit land at his own risk"*** respectively, to show that they answered the issue of who was the lawful owner of the suit land.

In relation to the complaint that the issue of reliefs was not determined, it was Mr. Brash's argument that although the appellant had sought to be declared the lawful owner of the suit land and be handed over, he would not have been awarded it since he did not win the case. The learned counsel, however, did not explain whether the said issue was determined. On the other hand, he submitted that, the 4th respondent had claimed to be a lawful owner and thus the suit was dismissed. He was of the view that, even the dismissal was part of the reliefs and, thus, it was not necessary to list every relief.

On being prompted by the Court whether the appellant had sought for alternative reliefs and testified on them, it was his submission that he did so as shown at page 101 of the record of appeal. In the end, the learned counsel urged the Court to find that the appeal is unmerited and dismiss it with costs.

Having considered the rival submissions, we think that the issue for our determination is only one, which is whether or otherwise the trial court determined the 2nd and 3rd issues that were framed and recorded on 29th April 2017.

Framing of issues in civil matters is a requirement of law. In terms of Order XIV rule 1(5) and 3 of the Civil Procedure Code, [Cap 33 R.E.2019], the trial court is required after ascertaining matters of facts and law to which the parties are at variance, frame issues which are to be recorded, on which the decision of the case concerned would be based. This is intended to narrow down the controversy at issue to enable the parties confine themselves on it when adducing their evidence and thereby guide the court in reaching to its decision. In other words, the purpose of framing issues is to narrow down the matter in controversy so that the parties may lead evidence which is confined to issues on which the right decision of the case would depend.

In this case, while the appellant contends that the trial judge did not determine the 2nd and 3rd issues, the respondent maintains that they were determined citing the excerpts which we have shown earlier on. However, with great respect to Mr. Brash, we do not agree with him. What can be gathered from the pleadings is that the appellant in his plaint claimed against the defendants for the delivery among others and

handing over of the unsurveyed three acres piece of land he had purchased at Tshs. 240,000,000/=. The 1st, 2nd and 3rd respondents in their joint written statement of defence admitted to be obliged to hand over the suit land to the appellant except that their sale agreement (between the appellant and 1st, 2nd and 3rd respondents) was frustrated by the third party and sought for more time to enable them hand over the said land to the appellant. In the Third Party Notice the appellant's claim was against the 4th respondents' unlawful occupation of the suit land claiming a lawful ownership while he did not honour the agreement and that the purported sale agreement was terminated. The 4th respondent in his written statement of defence claimed to be the lawful occupier of the said land having purchased from the 1st to 3rd respondents by paying the entire purchase price. Looking at the pleadings generally, it is apparent that the issue of ownership was crucial. Since ownership of the suit land seemed to be contentious, the issue as to who was the lawful owner of suit land was framed so as to be addressed by the trial court.

Regarding the issue of who was the lawful owner of the suit land, we saw when Mr. Brash with much struggle tried to convince us that the trial judge had found that, the 4th respondent to be the lawful owner. The excerpts he relied on were "*The third party came into play with*

defendants long before PW1" (See page 377); that *"A valid agreement in place as observed and DW4 taking possession since 30th November 2012, whoever comes into scene thereafter has no right whatsoever."* (See page 379); *and "the plaintiff and trusting his advocate went ahead to purchase the same land at his own risk"*. In our considered view, those excerpts do not by any stretch of imagination show that they meant to declare the 4th respondent the lawful owner of the suit land. At most they were explanations on how the 4th respondent featured in the matter, the existence of an agreement, that the 4th respondent took possession of the suit land since 2012; and how the appellant trusted the advocate and purchased the property. As it is, the issue as to who was a lawful owner of the suit land was left uncertain.

Since the ownership of the said land was at issue, it ought to be determined by the trial court rather than leaving it in speculation whether it was decided or not – See **Sheikh Ahmed Said** (supra). We, therefore, agree with Mr. Nyambo that the trial judge, indeed, did not determine the second issue relating to who was the lawful owner of the suit land.

As regards the 3rd issue relating to what reliefs were the parties entitled, it was Mr. Nyambo's view that it was not determined while Mr. Brash contended that even the dismissal was among the reliefs.

Looking at the pleadings, it is vivid that the appellant's prayers were among others, for the defendants (respondents) to handover to the appellant the suit land; and the respondents to compensate the appellant for the value of loss of business and loss of profit. **In the alternative,** the appellant prayed for a declaration that the respondents are liable for the breach of contract for their refusal or failure to hand over the suit land to the appellant; an order that the respondents refund the appellant a sum of Tshs. 100,000,000/= paid to them as advance payment for the purchase of land; an order that the respondents to pay the appellant a sum of Tshs. 10,000,000/= paid by appellant as levy duty to the Village Government over the sale transaction; an order for the respondents to pay a sum of Tshs.200,000,000/=being loss of business and loss of profit; interest; general damages and any other relief.

The 1st 2nd and 3rd respondents prayed for among other reliefs that they be given time to handover the suit land while acknowledging that the appellant was the lawful purchaser of the suit land. The 4th respondent's prayer was for the dismissal of the appellant's case and the 3rd party notice with costs.

As was rightly contended by Mr. Brash, at page 101 of the record of appeal the appellant prayed for the court to declare that he was a

rightful owner of the suit land as he had been in occupation since June 2014 when he bought it. He further prayed that the defendants (respondents) be compelled to handle the land to him failure of which to refund him Tshs. 100,000,000/= and Tshs. 10,000,000/= being purchase price and village levy plus interest. Further to that he prayed to be paid compensation of Tshs. 200,000,000/= being loss for failure to conduct his business and costs. The 1st, 2nd and 3rd (DW1, DW2 and DW3) respondents confirmed to have sold the suit plot to appellant at 240,000,000/= and that they received a down payment of Tshs. 100,000,000/= from the appellant for the purchase of the said land; and their obligation to hand it over to him; and their failure to do so since the 4th respondent had trespassed into it. Their prayer to the trial court was for the appellant to be handed over the suit land. On his part, the 4th respondent testified to have purchased the said plot at Tshs.100,000,000 and paid the 1st, 2nd and 3rd respondents in three installments and thus prayed to be declared the lawful owner and be paid damages, special damages and costs.

Despite the fact that the appellant, at pages 101 and 102 of the record of appeal testified to substantiate his claim, nothing was stated by the trial judge in that regard. What is vivid in the record of appeal is that the issue regarding reliefs was answered as follows:

"...In this instant suit, the plaintiff has failed to do so more even to the third party considering there is in place a lawful and valid sale of the same suit (sic) to the third party. His agreement if at all is void. A nullity as it seems, the suit is dismissed with costs."

It was expected the trial judge would have considered the reliefs sought in view of the pleadings and the evidence that was adduced before the trial court and say something either for or against awarding such reliefs. That she did not do.

It is cardinal principle in our jurisdiction that the decision of the court must be based on the issues framed by the court and agreed upon by the parties and that failure to do so may have the effect of miscarriage of justice. (See **Hood Transport Company Limited v. East African Development Bank,** Civil Appeal No.262 of 2019 (unreported). In this regard, as was in the 2nd issue, we agree with Mr. Nyambo that even in the 3rd issue the trial judge did not determine it. This was an error on her part which has caused miscarriage of justice as the parties are left uncertain as to what reliefs they were entitled.

Consequently, we find that the anomaly vitiates the decision as it is vivid that it has prejudiced the parties. As it is, it is apparent from the judgment that it is uncertain as to who is the lawful owner of the suit land and also the reliefs of the parties are unknown.

As to the way forward, we must state that it is settled law that this court cannot step into the shoes of the trial court and determine the issue that was not determined by it except on the issue which is based on a point of law. Fortunately, this is not the first time the Court is faced with this situation. In the case of **Hood Transport Company Limited** (supra), the Court was confronted with a similar scenario and it was categorical that, the court cannot, on appeal deal and determine the issue not dealt with by the trial court unless it involves a point of law such as jurisdiction or limitation. (See also **Hotel Travertine Limited and 2 others v. National Bank of Commerce Limited** [2006] T.L.R.133).

The Court in **Hood Transport Company Limited** (supra) refrained to deal with issues not pleaded or dealt with by the trial court. Even in the matter at hand, given the fact that the 2nd and 3rd issues were not dealt with as we have alluded to earlier on, we find that this Court cannot deal with them.

Given the circumstances, we are settled in our mind that the decision of the High Court is a nullity and hence in terms of section 4(2) of the AJA, we quash it and order that the matter be remitted back to the High Court so as a proper judgment can be re-composed by a

successor Judge having regard that the trial Judge may not be in service at the moment. We further order that each party should bear its costs.

It is so ordered.

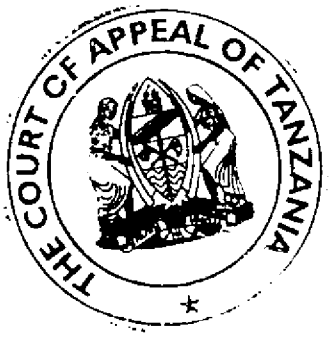
DATED at **DAR ES SALAAM** this 14th day of November, 2022.

R.K. MKUYE
JUSTICE OF APPEAL

P.F. KIHWELO
JUSTICE OF APPEAL

O.O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 21st day of November, 2022 in the presence of Mr. Michael Nyambo, learned counsel for the Appellant, Mr. Erick Simon, learned counsel for the 4th Respondent, 1st, 3rd Respondents appeared in person and in the absence of 2nd Respondent, is hereby certified as a true copy of the original.



A.L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL