IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A, LEVIRA, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 239 OF 2020

THE REGISTERED TRUSTEES OF BAKWATA ..... APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF DODOMA GENERAL MUSLIM ASSOCIATION ..... RESPONDENT

[Appeal from the Ruling of the High Court of Tanzania (Dodoma District Registry) at Dodoma]

(Mansoor, J.)

dated 16th day of June, 2017
in
Misc. Civil Application No. 18 of 2017

.....

JUDGMENT OF THE COURT

05th & 20th December, 2023

MWAMPASHI, J.A.:

The respondent herein, successfully sued the appellant in Civil Case No. 06 of 2001 of the High Court of Tanzania at Dodoma (the High Court). In the said case, the dispute between the parties was over the ownership of a piece of land held under a certificate of title No. 15391 and located within the Municipality of Dodoma, comprising school buildings. In dispute, was also the management and operation of a secondary school known as Jamhuri Secondary School which is being operated in the premises.

In the relevant High Court judgment which was rendered down on 30.10.2009, it was decreed that:

(i) *The disputed piece of land is the sole property of the plaintiff together with the buildings thereto.*

(ii) *The school business known as Jamhuri Secondary School operated by the defendant belongs to the defendant.*

(iii) *The claims that the defendant has failed to operate the school and the prayer for an order that the school business income of the years from 2004 to 2007 be divided among the parties has no leg to stand.*

(iv) *The claims of the payment of Tshs. 200,000,000/= as general damages for inconveniences caused to the plaintiff is refused.*

(v) *The plaintiff is not entitled to any rent for the past period of occupation by the defendant.*

(vi) *The defendant's counterclaims have no merits and all reliefs sought thereof are rejected.*

(vii) *If the defendant is interested to continue with the school business operation on the plaintiff's premises and buildings, he should abide by the tenancy conditions which may be imposed by the plaintiff, otherwise the defendant is required to vacate the premises.*

(viii) *The defendant is condemned to pay the costs of this suit.*

Before the decree could be executed and after several communications and negotiations between the parties, on 30.04.2015, the parties allegedly agreed that, upon being paid Tshs. 330,000,000/=, the respondent/decree holder would surrender its title and ownership of the suit property to the appellant/judgment debtor. After the agreed amount has been paid and received by the respondent/decree holder, it was expected that, in terms of Order XXI rule 2(1) of the Civil Procedure Code [Cap. 33 R.E. 2002] (the CPD), the respondent/decree holder would have certified the payment and would have moved the High Court for the same to be recorded as such. Since the respondent/decree holder did not do so, the appellant/judgment debtor, pursuant to Order XXI rule 2(2) of the CPC, approached the High Court vide Misc. Civil Application No. 18 of 2017, praying for the following orders:

1. *That, this Honourable court be pleased to issue a notice to the respondent to show cause why the payment made to them on 30.04.2015 in adjustment and settlement of the decree in Civil Case No. 06 of 2001, dated 30.10.2009 should not be recorded as certified by the Honourable court as full payment and satisfaction of the said decree.*
2. *Costs of this application to be borne by the respondent.*

3. *That, the Honourable court be pleased to grant any other relief(s) as it deems fit to grant.*

The application referred to above, was greeted by a preliminary objection raised by the respondent/decree holder on three points: **One**, that the application is misconceived and untenable in law since the decree and the mode of satisfaction sought by the applicant are not interrelated, **two**, the application is bad in law for being accompanied by affidavits sworn by persons who have no locus standi to represent the applicant and **three**, the application is bad in law for being premature.

Having heard the submissions for and against the preliminary objection made by the counsel for the parties, the High Court (Mansoor, J.), in the ruling dated 16.06.2017, which is subject to this appeal, upheld the preliminary objection on the first point. The application was found to be misconceived and untenable in law on account that, for the payment in question to be certified as sought by the applicant, the same ought to have been in line with the decree and not in variance with it. It was further held that the payment ought to have the effect of discharging or satisfying the original decree and that any compromise that have the effect of varying the original decree cannot be enforced or certified by the court under the guise of Order XXI rule 2(2) of the CPC. For the above stated

reasons, the High Court dismissed the application with costs hence the instant appeal on the following nine grounds:

1. *The Honourable learned High Court Judge erred in law and in fact in raising the issue of jurisdiction suo motu and deciding on it without giving the parties the right to be heard.*
2. *The Honourable trial Judge erred in law and in fact in deciding that the Court has no jurisdiction to record as certified the settlement/adjustment reached by the parties in the agreement.*
3. *The Honourable High Court Judge erred in law and in fact in deciding that since in the agreement dated 30th April, 2015 the terms of the original decree were varied any question relating to the said execution, discharge or satisfaction cannot be said to be question relating to the execution, discharge or satisfaction of the said decree.*
4. *The Honourable learned High Court Judge erred in law and in fact in deciding that any compromise that have the effect of varying the decree cannot be enforced by the Court.*
5. *The Honourable learned High Court Judge erred in law and in fact in deciding the merit of the application in the course of determining the preliminary point of objection.*
6. *The Honourable trial Judge erred in law and in fact in disregarding the jurisdiction of the court under rule 2 (2) of Order XXI of the Civil Procedure Code [Cap 33. R.E. 2019].*

7. *The Honourable learned High Court Judge misdirected herself to allow the Respondent to raise and argue the preliminary objection without showing cause.*
8. *The Honourable learned High Court Judge erred in law and in fact in disposing the case without hearing the case on merit.*
9. *The Honourable learned High Court Judge erred in law and in fact in disregarding the arguments by the advocate of the Appellant which were justifiable.*

At the hearing of the appeal, the appellant had the services of Mr. Elias M. Machibya and Ms. Magreth Mbasha, both learned advocates, whereas the respondent was represented by Mr. Ally Mussa Nkhangaa, learned advocate.

The advocates for the appellant, through the written and oral submissions, thoroughly and extensively argued all the grounds of appeal. Likewise, the advocate for the respondent, by his oral submissions, responded and argued against all the grounds of appeal. We have however, dispassionately examined the record of appeal and considered the submissions made for and against the appeal. We have also taken under advisement the nature of the application and the reliefs sought in the relevant dismissed application. Having done so, we have come to a considered view that the justice of this appeal does not call for the

determination of all the grounds of appeal as raised and argued by the counsel for the parties. We find that the appeal can be sufficiently and justly disposed of by considering and determining grounds 5 and 8 only. The two said grounds are to the effect that, in the course of determining the preliminary objection, the High Court determined the merits of the application without giving the parties an opportunity of being heard. For purposes of disposing of this appeal, we will therefore, direct our mind into the determination of the above stated two grounds of appeal.

Before we begin determining the appeal in the above stated manner, we find it apt to premise our determination by firstly looking at what rule 2 (1) and (2) of Order XXI of the CPC, under which the application was predicated, provides.

> *"Rule 2(1) Where any money payable under a decree of any kind is paid out of court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree, the decree holder shall certify such payment or adjustment to the court whose duty is to execute the decree and the court shall record the same accordingly.*
>
> *(2) The judgment debtor also may inform the court of such payment or adjustment and*

apply to the court to issue a notice to the decree holder to show cause on a day to be fixed by the court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly".

For purposes of this appeal, it suffices to simply observe that, pursuant to rule 2 (1) and (2) of Order XXI of the CPC, as reproduced above, where upon an agreement made out of court, the parties, that is, a decree holder and a judgment debtor, agree to settle a court decree by payment of money or where the decree is otherwise or in any manner adjusted in whole or in part to the satisfaction of the decree holder, the decree holder is required, under rule 2 (1) of Order XXI of the CPC, to certify the said payment or adjustment to the court and the court is required to record it accordingly. The object is to make it recorded by the court that, to the satisfaction of the decree holder, the court decree has been settled. The law, under that provision, allows the parties to settle a court decree in any manner or way provided it is to the satisfaction of the decree holder.

Where the decree holder does not move the court as required by rule 2 (1) of Order XXI of the CPC, that is when rule 2 (2) comes into play. Under that sub-rule, the judgment debtor is entitled to approach the court and apply for a notice to be issued to the decree holder for him to show cause why the payment or adjustment made should not be recorded as certified. This is what the appellant in the instant appeal did when it approached the High Court vide Miscellaneous Civil Application No. 18 of 2017. As we have alluded to earlier, after the agreed amount, that is, Tshs. 333,000,000/=, had allegedly been paid to the respondent/decree holder, the respondent/decree holder did not certify the payment to the court which prompted the appellant/judgment debtor to apply, under Order XXI rule 2 (2) of the CPC, for the respondent/decree holder to be served with a notice to show cause why the payment of the said amount should not be recorded by the High Court as certified.

Order XXI rule 2 (2) of the CPC, gives the decree holder the right to be heard before the payment or adjustment of a court decree is recorded as certified. The decree holder is given the right to justify, explain and give reasons as to why such payment or adjustment should not be recorded as certified.

With the above observation in preface, let us now turn to the determination of grounds 5 and 8 in which the High Court is being faulted for determining the merits of the application in the course of determining the preliminary objection without according the parties the right to be heard. In support of these grounds, Mr. Machibya referred us to page 249 of the record of appeal where in its ruling the High Court is on record observing that, the compromise, that is, the agreement for payment of Tshs.330,000,000/= in satisfaction of the decree, created a different liability to the judgment debtor not the decreed under Civil Case No. 6 of 2001, and further that, the compromise being not a decree of the court cannot be executed by the executing court simultaneously with the original decree. He thus argued that the appellant was condemned unheard.

On his part, Mr. Nkhangaa was of a different stand. He submitted that the High Court did not determine the merits of the application. He insisted that in determining the preliminary objection, the High Court confined itself to the objection and it never strayed by determining the merits of the application as complained by the appellant.

The fact that what was before the High Court was the determination of the preliminary objection and not the application itself, is common

ground. It is also not in dispute that, as far as the application is concerned, the parties were yet to be heard. What is in dispute and which is an issue calling for our determination in this appeal is on whether in the course of determining the preliminary objection, the High Court did also determine the merits of the application.

As we have alluded to earlier, the application which was dismissed after the preliminary objection raised by the respondent had been sustained, intended to move the High Court to issue a notice to the respondent to show cause why the payment allegedly made to them on 30.04.2015 in adjustment and settlement of the decree in Civil Case No. 06 of 2001 dated 30.10.2009, should not be certified and recorded as a full payment and satisfaction of the decree. The point of objection on which the application was dismissed was to the effect that, the application is misconceived and untenable in law since the decree and the mode of satisfaction sought by the applicant are not interrelated.

In sustaining the preliminary objection on the above point, the High Court, at page 246 of the record of appeal, observed that:

> *"In the compromise or agreement dated 30 April, 2915 entered after the decree was passed in Civil Case No. 6 of 2001, the terms of the original*

decree were varied, thus any question relating to the execution, discharge of satisfaction of this compromise or agreement cannot be said to be a question relating to the execution, discharge or satisfaction of the decree of Civil Case No. 6 of 2001. The compromise must be in line with the decree and not at variance with the original decree. A compromise should have the effect of discharging or satisfying the original decree issued by the court as it was originally issued, any compromise that have the effect of varying the decree cannot be enforced by the court under the guise of Order XXI Rule 2 of the Civil Procedure Code. The compromise shall not have the effect of extinguishing the decree in whole or in part".

Further, at page 249 of the record of appeal, the High Court, in its ruling, observed and concluded that:

"The compromise created a different liability to the judgment debtor not the one decreed under Civil Case No. 6 of 2001, and thus the compromise being not a decree of the court cannot be executed by the executing court simultaneously with the original decree. For the reasons given herein above, the first preliminary objection raised

by the respondent's counsel is upheld, and the application is dismissed with costs."

From the above reproduced excerpts from the High Court ruling, it is apparent that, in the course of determining the preliminary objection, the High Court strayed into an error by determining the merits of the application without having accorded the parties the right to be heard. The observation by the High Court that the agreement by the parties for payment of Tshs. 330,000,000/= was in variance and not in line with the court decree or that the compromise, that is, the agreement for the payment, created a different liability to the judgment debtor were the question that could have been better addressed after the High Court had heard the parties in the application.

The right to be heard is a fundamental principle of natural justice. The principle which is enshrined in the Constitution of the United Republic of Tanzania of 1977, should be observed by all courts in the administration of justice, A denial of the right to be heard vitiates the entire proceedings. See- **Kumbwandumi Ndemfoo Ndossi v. Mtei Bus Services Ltd**, Civil Appeal No. 257 of 2018 and **Abbas Sherally and Another v. Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002 (both unreported). In the latter case, the Court observed that:

> *"The right of a party to be heard before adverse action is taken against such a party has been stated and emphasized by 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".*

In the case of **Dr. C. Mhina v. Natalia M. Mhina** [1984] T.L.R. 144, where the respondent had filed a petition for dissolution of her marriage with the appellant, a chamber application seeking custody of the children of the marriage and maintenance *pendente lite* for herself and the children was also filed by her. A preliminary objection was raised on the maintainability of the chamber application. Having heard the parties on the preliminary objection, the trial judge ruled that there were no exceptional circumstances to warrant the court to make an interim order of custody. That notwithstanding, he proceeded to grant a maintenance order for the respondent and the children. On appeal the Court stated that:

> *"We agree with Mr. Kesaria that the trial judge was empowered to make an interim order for*

maintenance, but he should do so only after hearing the parties. Here the argument before him was on the preliminary objection raised by Mr. Lakha as to the maintainability of the application. he should have confined his ruling to that issue at that stage. However, he went further, and decided the issue of maintenance without giving the appellant an opportunity of presenting his arguments and evidence on the matter in controversy. That is clearly an error".

In the instant appeal, as we have observed above, the High Court failed to confine itself to the preliminary objection. Instead it strayed and decided the merits of the application to which the parties had not been heard. This, as held in the above cited decision of the Court, was an error on part of the High Court. What was before the High Court and to which the court was supposed to confirm itself, was to consider the preliminary objection on whether the application was misconceived and not tenable in law, without more.

For the above given reasons, we find the 5th and 8th grounds of appeal meritorious and as we have alluded to earlier, we find no reason of determining other grounds of appeal because the two grounds suffice to dispose of the appeal. Consequently, we allow the appeal, quash and

set aside the impugned ruling of the High Court. We further direct that the matter be remitted back to the High Court for the determination of the application including the preliminary objection should the respondent maintain it. Considering the circumstances of the matter we order that each party has to bear its own costs.

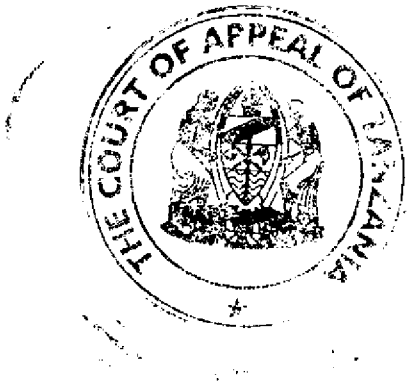
DATED at **DODOMA** this 19th day of December, 2023.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered on this 20th day of December, 2023 in the presence of Ms. Magreth Mbasha, learned advocate for the appellant and hold brief of Mr. Ali Mussa Nkangaa, counsel for the respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL