IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: SEHEL, J.A., FIKIRINI, J.A, And ISSA, J.A.)

CIVIL APPEAL NO. 22 OF 2021

EMMANUEL STEPHANO NGEGA (Administrator of the Estate of theLate **NGEGA STEPHANO KIBOKO** ..... **APPELLANT**

VERSUS

BUTIAMA DISTRICT COUNCIL ..... **1ST RESPONDENT**

MASURURA VILLAGE COUNCIL ..... **2ND RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Musoma)

(Kahyoza, J.)

dated the 29th day of July, 2020

in

Land Appeal No. 39 of 2019

.....

JUDGMENT OF THE COURT

22nd & 30th April, 2024.

FIKIRINI, J.A.:

This appeal stems from a dispute over a piece of land measuring about 1 ¼ acres located at Masurura Village, Butiama District. The conflict prompted Emmanuel Stephano Ngega (Administrator of the Estate of the Late Stephano Emmanuel Ngega), the appellant, to take legal action against the respondents, Butiama District Council and Masurura Village Council,

before the District Land and Housing Tribunal (DLHT) for Mara in Application No. 74 of 2018. He alleged that they encroached upon his land (the disputed land), destroyed erected structures, building materials and uprooted plants. He sought to be declared the rightful owner of the disputed land and compensation of TZS. 101,650,000/= for the destroyed properties, along with general damages and application costs. The respondents refuted all allegations.

During the hearing at the DLHT, the appellant presented four witnesses, while the respondents presented five. A total of eleven exhibits from the appellant's side and four from the respondents were admitted. Following a full trial and examination of evidence and exhibits, the DLHT ruled in favour of the appellant. Dissatisfied with the decision, the respondents appealed to the High Court in Land Appeal No. 39 of 2019.

At the High Court, the Judge overturned the DLHT's decision. Despite acknowledging the absence of the original receipts, which had been returned to the appellant, the Judge examined photocopies attached to the application, even though he was not sure if they were made from the original receipts or if at all were those admitted in evidence. In the end the High Court Judge reversed the DHLT's decision. Unhappy with the outcome, the

appellant appealed to the Court, in Civil Appeal No. 149 of 2019, raising three grounds of appeal initially, but later adding a fourth ground.

The fourth ground, reads as follows:

> *"The High Court Judge erred in law and fact by re-evaluating mishandled exhibits from the DLHT."*

In the alternative, the counsel argued the second ground, that:

> *"The Judge erred in giving more credibility to the evidence of DW3 over that of PW1, without considering their strained relationship."*

Present at the hearing were Mr. Deogratius Ogunde, learned advocate appearing for the appellant whereas, Ms. Subira Mwandambo, assisted by Ms. Joyce Yonazi, Anesius Kamugisha and Joseph Lyakurwa all learned State Attorneys appeared for the respondents. Preceding his address to the Court, Mr. Ogunde, learned advocate abandoned the first and third grounds of appeal and adopted the appellant's written submissions filed on 12th March, 2021 pursuant to rule 106 (1) & (2) of the Tanzania Court of Appeal Rule, 2009 (the Rules). In his brief but focused submissions, Mr. Ogunde contended that the High Court Judge as shown on page 163 of the record of appeal never saw the original receipts but only saw photocopies of the

exhibits and proceeded to re-evaluate the evidence faulting the DLHT's decision. According to Mr. Ogunde that was erroneous on the part of the first appellate court which sits in the form of rehearing. To bolster his submission the learned counsel referred us to the case of **Japan International Cooperation Agency (JICA) v. Khaki Complex Ltd** [2006] T. L. R. 343, in which the Court held that documents not admitted in evidence cannot form part of the record although found amongst the papers on record. The Court allowed the appeal and ordered a retrial. He equally, cited to us the case of **Ismail Rashid v. Mariam Msati,** (Civil Appeal No. 75 of 2015) [2016] TZCA 786 (29th March, 2016; TANZLII). In that case, there were documents not admitted as required by the law, yet relied on by the court in its decision. The Court concluded that the mishandling of the said documentary evidence occasioned a miscarriage of justice. In this instance, the Court allowed the appeal but declined to order a retrial.

On the way forward to address the complaint, Mr. Ogunde urged the Court to allow the appeal and order retrial, since the mishandling of exhibits led to injustice as it had occurred in the present situation. Supporting his preposition, he referred us to the case of **JICA** (supra).

On her part, Ms. Subira Mwandambo learned State Attorney who addressed us on behalf of the respondent be began by adopting the submissions filed on 16th April, 2021, under rule 106 (8) of the Rules. In her submission, she highlighted the High Court's error in re-evaluating evidence without proper exhibits. Ms. Mwandambo acknowledged that mishandling exhibits affected the decision and led to a miscarriage of justice. However, she opposed a retrial, stating there was no valid reason. As for the cases cited, she distinguished the scenario in the two cited cases, namely **JICA** and **Ismail Rashid** (supra) as different from what transpired in the appeal currently under scrutiny.

Briefly rejoining to the issue of mishandled exhibits, Mr. Ogunde expressed astonishment at Ms. Mwandambo's position. Despite admitting the mishandling of exhibits and that there was a miscarriage of justice occasioned, still, the learned State Attorney maintained that there was no valid reason to warrant a retrial. Mr. Ogunde contended that this assertion was made in light of ample evidence, as shown on page 163, that the Judge re-evaluated evidence not on record. He concluded his submissions by urging the Court to allow the appeal and order a retrial as the appropriate cause of action.

From the contrasting positions, we are thus invited to determine whether the re-evaluation of evidence including some which was not on record, by the High Court Judge was proper and if not, whether there was a miscarriage of justice caused.

The High Court being the first appellate court, handling of the appeal before it amounted to a rehearing which would entail carrying out a critical analysis, re-evaluation of the evidence which includes the exhibits admitted before the lower court or DLHT. In the present appeal, both counsel agree that it was erroneous for the High Court Judge to re-evaluate the evidence amidst some exhibits not being before the Judge. And photocopies found on record, which the Judge was not even sure were generated from the original receipts tendered before the DLHT, raised concern.

Counsel for the parties had no qualms about this, that there was mishandling of exhibits which occasioned a miscarriage of justice. Their point of departure is in the circumstances of the present appeal whether it is appropriate or not to order retrial. Whereas Mr. Ogunde considers it the correct measure to remedy the irregularity, Ms. Mwandambo thinks otherwise, although she did not give any reasons disproving the order for retrial.

This Court has on numerous occasions dealt with the kindred issue. In the case of **Shemsa Khalifa & Two Others v. Suleiman Hamed**, Civil Appeal No. 82 of 2012, which was referred to in **Ismail Rashid's** case, the Court faced with the same scenario had this to say:

> *"It is trite law that judgment of any court must be grounded on the evidence properly adduced during trial otherwise it is not a decision at all. As the decision of the High Court is grounded on improper evidence, such a decision is a nullity."*

In the appeal before us, the root of the dilemma originated from the DLHT, where the appellant submitted only four attachments with their application, of which three were admitted and marked as exhibits P1 – P3. Later during the hearing several receipts which were not attached to the application were admitted and marked as exhibits P4 – P11. It came to light that all original copies of these admitted documents, i.e., exhibits P1 – P11, were ordered to be returned to the appellant on 14th May, 2019, as indicated on pages 42 - 43 of the record of appeal. However, the record is silent, on whether any copies were made from the originals before they were returned. This lingering question raises uncertainty regarding whether the copies found in the High Court record were indeed generated from the original documents

and it was for all the exhibits. This apprehension has even been expressed by the Judge, as noted on page 163 of the record of appeal. In his own words, this is what he said:

> *"Whereas the respondent attached four receipts to the claim, he tendered nine receipts which were marked exhibits P4 – P11. For that reason, it is not clear whether the photocopies attached to the claim were taken from original exhibits tendered to the Tribunal. I cannot tell if there was evidence to prove the respondent's claim for specific damages."*

Notwithstanding, the uncertainty surrounding the origin of the documents, the High Court Judge, as indicated on pages 163 – 164, proceeded to re-evaluate the evidence. Consequently, he overturned the DLHT's decision, despite concluding that the appellant's structures erected on the disputed land, though their value could not be established, were demolished.

The brief overview of events at both the DLHT and later the High Court, as acknowledged by counsel for the parties, reveals clearly irregularities indicating mishandling of exhibits. Undoubtedly, the mishandling resulted in a miscarriage of justice. However, Mr. Ogunde's plea for the appeal to be

allowed and a retrial ordered, drawing on the decisions in the **JICA** and **Ismail Rashid** cases (supra), has not convinced us. We say so, bearing in mind that in the cited cases, the issue revolved around reliance by the court on documents though found on record but were not admitted into evidence and therefore could not form part of the record. It was therefore incorrect for them to be relied on in arriving at the respective decisions. This differs from the issue in the current appeal under scrutiny.

In the appeal before us, not only there was mishandling of exhibits but also that the appellant tendered and were admitted in evidence receipts which were not part of his pleadings. While the return of original copies to the owner is permitted by law under Order XIII, Rule 9 (1) and (2) of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC), the failure to produce copies to remain on the record constituted a lapse that, in our view, lacks a valid explanation. These distinguishes the cited cases from the present appeal.

The decision of the High Court is unequivocally a nullity, as the Judge proceeded to entertain the appeal despite being aware that exhibits P4 – P11, which were crucial evidence admitted before the DLHT, were not included in the record before him. Besides, that the fact the original copies

were returned before composition of the judgment and the record is silent if there were any copies made, it would not be an overstretch to conclude that even the DLHT decision was made in the absence of the admitted exhibits. As a result, any decision made without the complete record, was a nullity, that of the DLHT and the first appellate court, since no appeal can result from a nullity decision.

The usual recourse to rectify the observed irregularity would involve permitting the appeal and ordering a retrial. However, we are of a view that the absence of the exhibits from the record could not be easily remedied without furtherance of miscarriage of justice. Unlike in **JICA** and **Ismail Rashid's** cases, where the pertinent documents, albeit not formally admitted, were part of the record that is missing in the present appeal. In the circumstances of the present appeal, we find ordering a retrial is not worthwhile.

We find this one ground of appeal sufficient to dispose of the appeal. We shall therefore not embark on discussing the second ground of appeal.

In conclusion, we nullify and quash the entire proceedings and judgments of the DLHT in Application No. 74 of 2018 and the High Court in

Land Appeal No. 39 of 2019. Parties are free to pursue their claims if they so choose, taking into account the limitations of time. The appeal is thus allowed and considering the nature of the case, we order that each party shall bear its own costs.

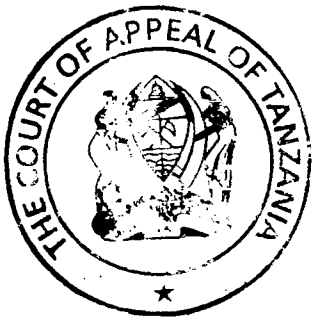
DATED at **MUSOMA** this 29th day of April, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of April, 2024 in the presence of the appellant in person and Ms. Neema Mwaipyana, learned State Attorney for the 1st and 2nd Respondents, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL