IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

DC. CIVIL APPEAL NO. 6 OF 2015

(From the decision of the District Court of Lindi at Lindi (G.J. Mhini, SRM) dated 1st October, 2015 in Civil Case No. 4 of 2015)

WANYUMBANI CONSTRUCTION CO. ..... APPELLANT

Versus

MUSTAPHA M. KIMARO t/a ADELA ENTERPRISES ..... RESPONDENT

Date of last order: 01/11/2016

Date of Judgment: 03/11/2016

JUDGMENT

F. Twaib, J:

The respondent herein filed a suit (Civil Case No. 4 of 2015) against the appellant at the District Court of Lindi. He claimed to be paid a sum of Tshs 10,000,000/= being specific damages and Tshs 30,000,000/= as general damages, together with costs of the suit. The defendant (now appellant) contested all the claims. He also raised a preliminary objection to the suit on point of law, to the effect that the trial Court had no jurisdiction to entertain the matter on the ground that the dispute was a landed matter.

The trial Magistrate (Mhini, SRM) having heard the parties on the point, overruled the preliminary objection and allowed the hearing of the suit to proceed. The appellant was dissatisfied, and opted to challenge the decision in this Court. His appeal contains only one ground:

That the Trial Magistrate erred in law and fact by holding that the subject matter of the dispute does not involve land, without considering material facts contained in the plaint are pure land matters therefore the trial Court had no jurisdiction to entertain the same.

Before this Court the appellant was represented by Mr. Mkapa and Mr. Songea, learned advocates, while the respondent used the services of Mr. Dadaya, learned advocate. When the appeal came up for hearing, Mr. Dadaya raised a preliminary objection to the effect that the instant appeal was prematurely referred to this Court, in that the order sought to be appealed from was interlocutory and therefore not appealable. Having heard counsel for both parties, on 2nd August 2016, I overruled the preliminary objection and allowed the appeal to proceed on merits. I however reserved my reasoning and promised to provide the same in this judgment.

Basically, the complaint by the respondent's counsel was that the trial Court order on the preliminary objection raised before it was an interlocutory order as it did not finally decide the main dispute between the parties. The respondent's counsel made reference to section 74 (2) of the Civil Procedure Code, Cap 33 (R.E. 2002) as amended by Act No. 12 of 2004, which bars appeals from orders which have no effect of disposing of the matter. The appellant's counsel on the other hand submitted that the preliminary objection raised at the trial Court had the effect of finally determining the rights of the parties if the same would have been sustained. He opined that the trial Court erred in its decision and that this Court has jurisdiction to entertain this appeal.

In determining whether the interlocutory decision had the effect of finally determining the rights of the parties, we do not look at the point of objection raised in an assumption that if it could have been sustained it could have disposed of the matter as the appellant's counsel tries to imply. Rather, we only

look at the decision itself. In the case of **Bozson v. Artrincham Urban District Council** (1903) 1 KB 547 at 548, Lord Alverston observed:

> *It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.*

The test adopted in **Bozson's** case is in accordance with the language used in section 74 (2) of the Civil Procedure Code Cap 33 R.E 2002 as amended by Act No. 12 of 2004 relied upon by the respondent's counsel which bars appeals on interlocutory orders which have no effect of disposing of the rights of the parties.

However, that rule has an exception. Case law has developed a qualification to that general rule, to the effect that where there are irregularities resulting in injustice, particularly where proceedings are initiated illegally, vexatious or as being without jurisdiction, the Court may be justified in entertaining a revision or even an appeal. I took similar stand in the case of **Hamis Julius and 13 others v Azaramo Mohamed**, Land Appeal No. 3 of 2015, HCT at Mtwara (unreported). The matter involved the issue of *res judicata*, a plea which touched on the jurisdiction of the trial Land Tribunal. I held, *inter alia*:

> It was the Tribunal's refusal to hold that the case was *res judicata* that the appellants are challenging in this appeal. I thus feel that there is need for this Court to enquire into the issue and determine it. This is more so because, if it is found that the matter is indeed *res judicata*, the Tribunal has no jurisdiction to entertain the case, and allowing it to proceed to hear the same on merit would be to allow an abuse of the process of the Court.

Hence, the circumstances of this case fall under this exception, as the allegation goes to the trial Court's jurisdiction. It is on this ground that I overruled the preliminary objection and allowed the appeal to be heard on merits.

The merits of the appeal were argued by way of written submissions. The appellant's counsel began by defining a cause of action. He referred to **Mulla's Code of Civil Procedure** as quoted in Mr. Justice Chipeta in his book, **Civil Procedure in Tanzania, A Student Manual,** at page 48 and the case of **Byombalirwa v Agency Marine Internationale (Tanzania) Ltd.** (1983) TLR 1, which defined a cause of action to mean every fact which is necessary for the plaintiff to prove in order to succeed. He added that a cause of action is determined upon perusal of the plaint alone, together with anything attached so as to form part of it, citing the case of **Dominic P.K.G. Mshana v Almasi Chande and the Attorney General**, Civil Case No. 68 of 1994.

He went on submitting that the respondent's plaint filed at the trial Court particularly paragraphs four and five shows that the claim emanates from demolition of a building. In paragraph 4, the respondent states that the defendant invaded and demolished the building and in paragraph 5 the respondent states that the plaintiff has suffered loss of the building and material therein which is clearly within the definition of word "land" under section 2 of the Land Act Cap 113 (R.E. 2002). He concluded that in view of section 4 (1) of the Land Disputes Courts Act, Cap 219 (R.E. 2002), the trial Court had no jurisdiction.

Responding to these submission, Mr. Dadaya for the respondent submitted that the respondent moved the trial Court to give judgment in his favour solely basing on damaged properties excluding land and house, which are not part of the main case at the trial. He added that the respondent's damaged properties are not structures permanently affixed to the land as defined by law. The material damage being in the demolished house does not fall under the definition of the word "land" under section 2 of the Land Act. He concluded that under those circumstances the preliminary objection raised by the respondent at the trial District Court was rightly dismissed.

In his rejoinder, the appellant's counsel reiterated his earlier submission on the point and insisted that according to paragraph five of the respondent's plaint indicates that the plaintiff did not only suffer loss of his material that they were in the demolished house but also the loss of the building itself. He opined further that the trial magistrate erred in its decision by saying that nowhere in the plaintiff's prayers did he claim to have interest in the demolished house, except for the properties inside the house. It was his view that the trial magistrate ought to have considered all the pleaded facts to know whether the claim was a land matter or not and not only look at the prayers. He referred to the Court the case of **Exim Bank (T) Ltd. v Agro Impex (T) Ltd. & 2 Others,** Land Case Appeal No. 29 of 2008 H.C (Land Division) at Dar es Salaam (unreported) where it was held:

> *"...the issue now for determination is whether the suit by the plaintiff is a land dispute or it related to land, hence giving this Court jurisdiction. Two matters have to be looked upon before deciding whether the Court is clothed with jurisdiction. One, you look at the pleaded facts that may constitute a cause of action. Two, you look at the reliefs claimed and see whether the Court has power to grant and whether they correlate with the cause of action."*

Basing on the above authority, the learned counsel went on submitting that the trial Court ought to have considered the pleaded facts in paragraphs 4 and 5 which show that the respondent's claim is based on a loss of building which was demolished. He added that there is no paragraph in the plaint which shows that the respondent claimed only the lost properties in the said building. He therefore submitted that the trial Court misdirected itself by dealing with facts which did not form part of the pleading, citing the case of **James Funke Ngwagilo v AG (2004)** TLR 161.

It was his further view that in view of what is pleaded in the pleading the trial Court had no jurisdiction to entertain the matter in tems of section 4 (1) of the

Land Disputes Courts Act, 2002 and the holding in the case of **Abdul Rahim Shadhili as Gurdian of Miss Fatuma A.R. Shadhili v Mandhar Govind Raykar**, Civil Appeal No. 296 of 2004 H.C (unreported). He finally prayed for the appeal to be allowed and the suit pending at the trial Court be dismissed for lack of jurisdiction.

The issue is whether the plaintiff's (respondent) suit pending at the trial Court is a dispute relating to land, such as to exclude the jurisdiction of that Court under section 4 (2) of the Land Disputes Courts Act. In determining that question, the decision of this Court in **Exim Bank's Case (supra)** to the effect that one to look at the cause of action and the prayers sought is instructive.

In the present case, looking at the facts pleaded in paragraphs 4 and 5 of the respondent's plaint filed at the trial Court, the respondent lamented, among other things, about the demolition of his building, its actual value and other materials. For proper reference, the two paragraphs read:

> *4. That the Defendant is a construction company constructing Rutamba-Rondo road and in the cause of construction the Defendant invaded and demolished the building located near the said road owned by the plaintiff without any notice nor assessment of the actual value of the said building.*
>
> *5. That the plaintiff has suffered loss of the building and material therein which caused by neither the defendant action of demolishing it without notice nor lawful assessment of the actual value of the said building.*

Clearly, therefore, the submission by the respondent's counsel that the his client's claim was solely based on the properties found in the demolished house is inconsistent with what is pleaded by his client in the above-quoted paragraphs. His claim on the loss of his building falls under the definition of the word "land" under section 2 of the Land Act. The respondent might perhaps have had a point

if his prayers had clearly stated that the damages claimed related only to movable properties damaged during the demolition, but he made no such distinction. Hence, following the statement of principle in **Exim's Bank (T) Ltd.**, the prayers have to be read in correlation with the cause of action as stipulated in paragraphs 4 and 5 of the plaint. That would include a claim for damages in respect to the building, which in trite law is part and parcel of the land.

Having found as above, by deciding that the District Court could exercise jurisdiction over this matter, the learned SRM erred. That holding was not in accordance with the provisions of section 4 (2) of the Land Disputes Courts Act, under which the District Court has no jurisdiction to entertain a land dispute or any dispute related to land.

Consequently, I allow this appeal and, invoking this Courts revisional jurisdiction, I dismiss the respondent's Civil Case No. 4 of 2015 at District Court, Lindi, with costs in favour of the appellant.

DATED and DELIVERED at MTWARA this 3rd day of November, 2016.

F.A. Twaib

Judge