

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 35 OF 2017

*(Originating from Resident Magistrate Court of Arusha at Arusha Civil Case. No.
89 of 2015)*

SAMWEL KIVEN KIVUYO..... APPELLANT

VERSUS

ABRAHAM LENGAI LAIZER RESPONDENT

JUDGMENT

Date of Last Order: 17/08/2018.

Date of Judgment.....23/11/2018

BEFORE: S.C. MOSHI, J.

The appellant, herein above was successfully sued by the respondent before the Resident Magistrate Court of Arusha at Arusha for breach of contract in respect of the piece of land. The appellant on being aggrieved has appealed to this court against the judgment and decree of the trial court on the following grounds;

1. That the trial court erred in law and in fact in considering the respondent's claim without any proof of that to wit; the respondent failed to bring any single person who prove to have dispute with the appellant here i.e No any court or tribunal proceeding and judgment which brought to court to prove respondent's claim against the appellant.
2. That the trial court erred in law and in fact by considering hear say from respondent's side without proof of what claimed.
3. That, the trial court erred in law and in fact by reaching into judgement without calling the maker of contract after finding was an essential witness due to the nature of the case.
4. That, after the appellant creating doubt to the produced contract the trial court magistrate was wrong to enter judgment by accepting the produced contract which was tendered by a person who was not maker of it.
5. That, the trial court magistrate erred in law and in fact by entertaining the matter which falls

within land case i.e. the trial court was ought (sic) after listening to the plaintiff's claim could have directed the plaintiff to file a land case as the same was not of a civil nature.

Before me the appellant appeared in person whereas the respondent was represented by Mr. Gwakisa Sambo, advocate. This appeal was heard by way of written submissions whereby all parties duly filed their submissions.

Basically the appellant in the first ground, it is his submission that the trial court reached into an unfair decision for holding that the appellant sold the land which was not his, the allegation which was not true as the respondent did not bring the owner nor any institution which claimed any encumbrance and as such the respondent's claims were unfounded and the trial court had to take that fact into consideration. To him it could be fair had the respondent at least brought a judgment and proceedings to show that there is a dispute over the land that was sold to him. On the second ground, it was submitted that the evidence was hearsay because there was no any witness who witnessed the transaction as narrated by the respondent.

He submitted further that, the contract was never breached to the date of institution of the suit. So the trial court erred to act on hearsay evidence as it had to hear both parties and adjudicate on evidence and reasons adduced so as to know the gist of the dispute. Reference was made to the case of **Stanslaus Kasusura and Attorney General v. Phares Kabuye [1982] TLR 338.**

Submitting in respect of the third and fourth grounds together, the appellant contented that the trial court was wrong to accept the contract and entering judgment against him since it was not tendered by the author. Besides, it was his submission that the contract was wrongly admitted and relied upon for want of payment of stamp duty in terms of sections 46 of the Stamp Duty Act. It was his submission that exhibit P2 be expunged from the record and upon doing so there will be no evidence to establish that there was a contract. Reference was made to the case of **L.K. Lugaimkamu v. Father Kanuti [1986] T.L.R. 69** and that of **Zakaria Barie Bura V. Theresia Maria John Mubiri [1995] T.L.R. 211.** Lastly on the fifth ground, it was his submission that the subject matter was land. It was his prayer that this

appeal be allowed with costs, quash the proceedings and set aside the decision and declare them as a nullity.

On the other hand, the respondent prefaced his written submission by submitting that the trial court wrongly considered the Written Statement of Defense (**WSD**) which was filed outside the prescribed time without an order for extension. His prayer was for this court's expunging the respective proceedings of defense for failure to file WSD. Reference was made to the case of **Dengedo. Vs. A.G. (1972) E.A. 40, Kariji Denji V. Damodar Jinabhai& Co (1934) 1 E.A.C.A.87** and **JUWATA V. KIUTA [1988] T.L.R. 146.**

Submitting on the first ground of appeal, the respondent revisiting the evidence of PW1 and DW1, DW2, and DW4 was of the view that oral testimony apart from the documentary evidence of exhibit P1 established that there was a breach of Contract and therefore the trial magistrate was fully justified under the eyes of law to decide in his favor. It was his further submission that no particular number of witnesses is required to win. Reference was made to section **112** of the **Evidence Act, CAP 6 R.E.2002.** In the second

ground, he disagreed that the evidence of PW1 was not a hear say as he was part of the agreement in question. He also distinguished **Kasusura's, Lugaimkamu's and Zakaria's case** in this respect, he cited section 66 of the **Evidence Act(supra)** and Article 108 of the **Constitution of the United Republic of Tanzania, 1997** (as amended from time to time) and the cases of **Samson Gwalida V. Commissioner General TRA Civil Appeal no.86 of 2008 Court of Appeal at DSM, (unreported)** and **NHC V. Etieness Hotel Civil Application no 10 of 2005, Court of Appeal at DSM, unreported.**

As for the 3rd and 4th grounds, his answer was that since the respondent was one among the signatory then he was justified under the law to tender it and therefore there was no need of calling the author. As far as the submission that the contract was wrongly admitted because it lacked stamp duty it was respondent's reply that it was an afterthought. Reference was also made to the case of the **DPP V. Mirzai Pirbakashe Hadji, Criminal Appeal no. 493 of 2016, Court of Appeal of Tanzania at DSM, unreported.**

On the last ground, the respondent found it as unfounded because the pleadings are geared towards breach of contract and not claims over land. Reference was made to the case of **Reginald T. Sang'ka v. Babati savings Credit Cooperative Society and another Land Appeal no. 20 of 2014** and **Aziz Yunus Chombo v. Pride Tanzania. Land Appeal no. 11 of 2010** both HC- unreported, decisions.

In rejoinder, the appellant was of the view that the respondent came up with the new story in respect of WSD but was of the view that extension was granted to him to file the WSD late. As to the grounds of appeal it was his view that all five grounds have merits and therefore reiterated his earlier submission

Having gone through the entire records of the trial courts as well as the impugned decision, grounds of appeal and parties written submission. I am of the considered view that this appeal can be easily disposed of without canvassing each and every ground of appeal. In this respect I will start with the fifth ground of appeal which provides that the trial court magistrate erred in law and in fact by entertaining the matter which falls within land dispute.

It is common ground that upon filing a suit in court and the court before entertaining a matter it must ascertain that it actually has jurisdiction to deal with the case. There is a plethora of authorities on the issue of jurisdiction under consideration. In the case of **Tanzania Revenue Authority V. Tango Transport Company Ltd. Civil Appeal no.84 of 2009 (Court of Appeal of Tanzania- Arusha, unreported)**. The court cited the definition of Halsbury's Laws of England, Vol.10 para 314 in the following meaning of jurisdiction.

“the authority which a court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision. The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means. A limitation may be either as to the kind and nature of the claim, or as to the area which jurisdiction extended, or it may partake of both these characteristics”

Besides, the law is now settled that the question of jurisdiction is fundamental. In **TRA's case** cited here in above at page 7, the Court of Appeal observed the question of jurisdiction in the following words

“Jurisdiction is the bedrock on which the court's authority and competence to entertain and decide the matter rests”

From that premises, jurisdiction can be determined by looking at a number of factors including the subject matter. In this instant appeal, the trial courts' pleadings reveal that the respondent was claiming against the appellant to be refunded his money used as consideration in the disposition of land. Under the law disposition of land whether by lease, mortgage or sale is governed by the **Land Act, Cap 113 R.E.2002. part VIII** in particular. As such any dispute which concern land as a subject matter the Land Act has established forum to deal with such disputes in exclusion of other ordinary courts. Under the provisions of section **167 (1)** of the **Land Act**, land disputes are to be settled by the Village Land Council, Ward tribunals, District Land and Housing Tribunals, The High Court (Land Division) and lastly the Court of Appeal. Their procedures and jurisdictional arrangement are set out in the **Land Disputes Courts Act, Cap 216 R.E. 2002**. For instance, section **2** of **Cap 216 R.E. 2002** define dispute to mean:

**“includes any case where a person complains of
and is aggrieved by the actions of another person, or any**

**case in which a complaint is made in an official capacity
or is a complaint against an official act"**

A close look to the complaint by the respondent at the trial court bore allegation that there is a breach of contract. However, looking at the plaint there arose a dispute concerning ownership whereby the respondent alleged to uncover the truth that the respondent was not the owner of the said house and thus demand refund of his purchase price. This is to say had the issue of ownership not been at stake, the respondent could not in any way sue the appellant. Hence there is no escaping that the issue of ownership should be resolved first before the refund of purchase price is done or otherwise. This is because, in order to pass a good title ownership must be established. Even looking at the impugned decision, two of the issues framed for determination were:

- 1. N/A**
- 2. *Whether the said subject matter of the contract was handed over to the plaintiff***
- 3. *Whether the defendant had authority to sell the said land***

4. What relief do the parties entitled to."

With all due respect these issues cannot be successfully decided by a normal court as the trial court did. It is because of usurping powers, no wonder that the trial magistrate answered all these issues superficially in a three typed pages judgment. On the other hand, had these issues dealt with in a proper forum concerning land matter may be even this appeal could not be preferred as the case could be. From this analysis I find that the trial court usurped powers which it did not possess in the eyes of law and went on to determine the suit without having jurisdiction. All considered, with respect, the trial Court by entertaining and determining the land dispute in respect of ownership between the parties travelled beyond its jurisdiction, which expressly ousted by the specific forums established under the **Land Disputes Courts Act, Cap 216 R.E. 2002**. It erroneously crowned itself with jurisdiction that it did not possess in entertaining and determining the suit, which was fundamentally a land dispute.

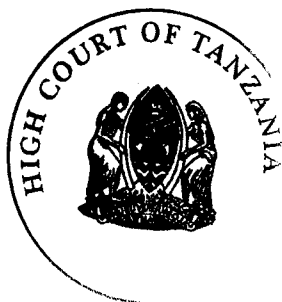
Again the law is now settled on the impact of the court which entertain the matter without having jurisdiction. That is it renders all

the proceedings a nullity. In the case of **Desai v. Warsama (1967) EA 351** at page 352 for instance, at page 352 Hamlyn, J. had remarked;

“The fundamental point which must have primary consideration in this appeal is the question whether the Primary Court had any jurisdiction to hear the case at all, **for if that court lacked jurisdiction in the matter, then the whole proceedings were a nullity and there was, in law no decision against which appeal could be taken**”
(emphasis supplied)

In this respect the fifth ground of appeal has merit it is allowed. Consequently, there is no need to deal with other grounds of appeal since they go to the merit of the case which emanates from irregular proceedings. The proceedings of the trial court are quashed while its judgment and decree are set aside. This appeal is allowed but since the anomaly was contributed by the trial court no orders as to costs.

Order accordingly.




S.C. MOSHI.
JUDGE
21/9/2018.