IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 13 OF 2019

(Arising from Land Application No 143 of 2017 of Kahama District

LAND AND HOUSING TRIBUNAL)

SCOLASTIKA MISANA..... .....APPLELLANT

VERSUS

WILSON DOTO.....1ST RESPONDENT

MARKO DOTTO.....2ND RESPONDENT

NGAILE DOTO.....3RD RESPONDENT

SESILIA DOTO.....4TH RESPONDENT

JUDGMENT

Date of the last Order: - 17th June, 2020
Date of the Ruling: -3rd August, 2020

MKWIZU, J.:

This is an appeal against the decision of the District Land and Housing Tribunal in respect of Land Application No. 143 of 2017. Being the administratix of the estate of the late Misana Mpemba the appellant sued

the Respondents, Wilson Doto,Marko Doto,Ngale Doto, Sesilia Doto and Christina Doto claiming that the unsurveyed piece of land measuring twenty four (24) acres located at Kitwana belongs to the late Misana Mpemba who acquired it by clearing a virgin land since then until the year 1963 when he passed away. In her application, appellant alleged further that, after the death of Misana Mpemba, his son, Robert Misana took care of the land to the year 1994 and upon his death, Sozy Misana was handed the suit land to take care. That, in the year 2014 Sozi Misana passed away then Respondents, children of late Sozi Misana did invade the suit land and sold it to strangers claiming that it belongs to their mother. Appellant prayed for declaration that the suit land belongs to the late Misana Mpemba and that respondents are trespassers.

Having heard the parties, the District tribunal dismissed the claim for lack of merit. Aggrieved by the said decision, the Appellant lodged this appeal in this court on seven grounds as thus:-

1. *That the learned Chairman erred in law and facts as he failed to consider that there is no evidence adduced by the Respondents to show how the suit land came into possession of the late Sozi Misana so as the same to be entitled to distribute it to them.*

2. *That the learned Chairman erred in law and in facts as he failed to consider that the appellant could not take legal action against the late Sozi Misana as the same has never asserted rights over the suit land.*
3. *That the learned Tribunal Chairman erred in law and in facts as he failed to put into account that the late Sozi Misana was a mere guardian of the suit land so that the same cannot exclude the ownership of the true owner whatever the land of her occupation.*

4. *That the learned Chairman erred in law and fact as he delivered his judgment on the basis that the Appellant neglected to take action against the late Sozi Misana since 1963 while the suit land come into her guardianship in 1994 upon the death of the late Robert Misana and the same has never claimed ownership of it in her life time.*

5. *That the learned Chairman erred in law and fact as he failed to consider that the doctrine of principle of adversely possession established when a person who has trespassed into the suit land asserts right over it and the person having title over it neglects to take legal action.*

6. *That the learned Chairman erred in law and fact when he failed to put into account that there is nowhere the respondents denied that the suit land came into guardianship of the Sozi Misana after the death of the Robart Misana.*

7. *That the learned Chairman erred in Law and facts in holding that the Applicant ought to file the land application whilst the same trespassed into the suit land in 2014 upon the death of the late Sozi Misana.*

When the appeal called for hearing, the appellant and 3rd respondents were present in person. The 1st, 2nd and the 4th respondents defaulted appearance. 4th respondent was duly served on 22nd April, 2020 whereas the 1st and 2nd respondents were served through a substituted service in Nipashe News Paper dated 8th May, 2020 at page 18. The Appeal therefore, proceeded ex-parte against 1st, 2nd and 4th respondents.

Submitting for the appeal, appellant stated that the evidence on the record do not show how Sozi Misana got the land. Sosi Misana was just a

care taker of the land in dispute and after her death, her children believed that the land belonged to their mother. Appellant explained that the land was a clan land, and that after the death of their father, the land remained without any conflict. Sozi Misana took care of the said land for about 12 years until when she passed away.

In response, the 3rd respondent submitted that, their mother, Sozi Misana was given the land by the Village authority in the year 1981 and other relatives went to live at Bukene in the year 1980. They stayed at the suit land until Sozi Misana passed away in 2014.

Rejoining, the Appellant submitted that the land she is complaining about measuring 24 acres do not include the land which Sozi Misana got from the Village authority. The land is still bare no one occupies it. The Tribunal did not visit the locus in quo to establish the location of the said suit land and the demarcation of the land Respondent's mother got from the Village authority and that of the clan land.

After a sensible review of the evidence on the record and the submissions for and against the appeal, I find the pertinent issue for this court's

determination is whether the appeal is merited or not. However, before going into the merits of the appeal I have noted an anomaly on the face of the records that need to be determined first. The trial chairman conclusively decided the matter between the parties on the issue of time limitations without hearing the parties on that issue.

It is evident from the records that, appellant sued the respondents under the capacity of Administratrix after she was appointed on 29th May, 2017 by the Kahama Urban Primary Court to administer the estate of the Late Misana Mpemba who passed away on 13th August, 1963. Upon her appointment, on 6th November, 2017 she started the race claiming the Land in dispute. In its judgement, the tribunal relied on the provisions of section 9 (1) of the Law of Limitations Act and concluded thus:

> *"in this case from evidence on record the late Misana Mpemba passed away on 13/08/1963 and the applicant herein was appointed the administratrix of the Estate of her late father on 29/05/2017 and he (sic) filed this application on 6/11/2017 alleging that the land has been trespassed in the year 2014.*

It is my considered opinion that, if there was any property to be administered by a legally appointed administrator there could be no such delay, such unreasonably(sic) delay have subjected the land to be trespassed if at all because the owner passed away back in 1963. Rushing to get letter of administration subjects the applicant to be barred by law of limitation

Having above observed, this Application is hereby dismissed with no order as to costs"

I think the tribunal was wrong. First of all, the issue of time limitation was neither part of the pleadings nor the formed part of their submissions at the trial. The tribunal raised it *suo motu* in its judgment and adversely decided on that issue specifically and conclusively against the appellant without according her a right to be heard. This, in my view, was an error. The tribunal contravened the rules of natural justice as it tantamount to condemning parties without affording them rights to be heard. In **Scan - Tan Tours Ltd Vs. the Registered Trustee of the Catholic Diocese of Mbulu ,** Civil Appeal No. 78 of 2012 (unreported) , the Court of Appeal

emphasized the need to accord the parties a full hearing ahead of making an adverse decision in line with the *audi alleram partem* rule of natural justice. It said:

> *"It is not disputed that under Order XIV Rule 5 (1) and (2) the trial judge has the power to amend add or strike out an issue. However, when an issue being introduced is so pivotal to the whole case and would form a basis for the decision of the trial court, it is pertinent that the parties should be given a chance to address the court on the new issue."*

In another case of **Abbas Sherally and Another Vs. Abdul Fazalboy,** Civil Application No. 33 of 2002 (unreported), the Court said:

> *"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the 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. *"(Emphasis added).*

See also: **Peter Ng'homango v. The Attorney General**, Civil Appeal No.114 of 2011 (unreported).

I would have proceeded to decide the grounds of appeal, however, as indicated above, the tribunal committed a serious error decided the matter on the issue which was not brought by the parties nor parties given chance to address the court on the same. This is a gross error. Failure to afford parties an opportunity of being heard, renders the challenged trial tribunal's decision a nullity. See also **M/S Darsh Industries Limited V. M/S Mount Meru Milleers Limited,** Civil Appeal No. 144 of 2015**,** (Unreported) .

On the basis of the foregoing, I, under section 43 of the Land Disputes Court Act, Cap 216 R.E 2019, quash and set aside the trial tribunals

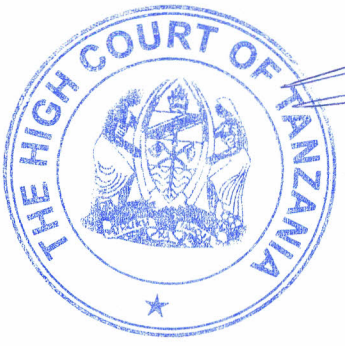
proceedings and the tribunal is directed to rehear Land Application No. 143 of 2017 before another chairperson and a fresh set of assessors. No order as to costs.

It so ordered.

DATED at **Shinyanga** this 3rd day of **August,** 2020.

E.Y.MKWIZU
JUDGE
3/08/2020

COURT: Right of appeal explained.



E.Y.MKWIZU
JUDGE
3/08/2020