THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

LAND APPEAL NO 45 OF 2017
(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land Application No. 114 of 2015.)

GOD JOHN NDILE.....APPELLANT

VERSUS

STEVEN ABRAHAM NDILE.....1ST RESPONDENT

HEKIMA MLAWA.....2ND RESPONDENT

HARVEST TANZANIA LIMITED.....3RD RESPONDENT

JUDGEMENT

Date of Last Order : 28/11/2019
Date of Judgement: 21/02/2020

MONGELLA, J.

Dissatisfied with the decision of the District Land and Housing Tribunal (Tribunal), the Appellant has appealed to this Court on eight grounds of appeal. These are:

1. *That the Hon. Chairman erred in law and in fact in holding that the application was time barred while the cause of action in respect of the application accrued in 2015 during execution of Land Appeal No. 126 of 2012 emanating from Land Case No. 25 of 2015 Igamba Ward Tribunal.*

2. *That Hon. Chairman erred in law and fact in holding that the application was constructive res judicata to Land Appeal No. 126 of 2012 emanating from Land Case No. 25 of 2015 Igamba Ward Tribunal, while the cause of action, parties, subject matter were different and actually there was no prior decision in respect of the subject matter in Application No. 114 of 2015*

3. *That the Hon. Chairman erred in law and fact in holding that the Applicant had no cause of action against the Respondents.*

4. *That the Hon. Chairman erred in law and fact in holding that the Applicant had no locus standi to sue in the matter.*

5. *That the Hon. Chairman erred in law and in fact in holding that the Applicant could have proceeded by way of objection proceeding while the Applicant in law was allowed to proceed by fresh suit as he did.*

6. *That the Hon. Chairman erred in law and in fact in holding that there was mis-joinder of parties in respect of the Application.*

7. *That the Hon. Chairman erred in law and in fact in upholding the preliminary objections which required proof and evaluation of evidence before the Tribunal.*

8. *That the Hon. Chairman erred in law and in fact for failure to account for the opinion of assessors and if he deferred, the reasons for so doing.*

The appeal was disposed by written submissions promptly filed in this Court by the parties. The Applicant was represented by Mr. Chapa Alfredy and the 2nd Respondent was represented by Ms. Beatrice Mwahandi, learned advocates. The 1st and 3rd Respondents never appeared in Court or filed their written submissions despite being duly served with the summons. The disposition of this appeal therefore proceeds ex parte against them.

In his written submissions, Mr. Chapa appears to have abandoned ground number eight and argued only on ground one to seven. He started by presenting brief facts of the case. He stated that this appeal emanates from Land Application No. 114 of 2015 in the Tribunal in which the Appellant filed the application against the Respondents. In that matter the Appellant claimed that the 3rd Respondent executed the land which was not subject of Land Case No. 25 of 2012 as the execution order was for two hectors which were subject of the dispute. The 3rd Respondent instead handed over sixteen hectors to the 2nd Respondent which was not part of the dispute. The Appellant thus sued as an administrator for unlawful trespass into his land.

Before embarking into the grounds of appeal, Mr. Chapa pointed irregularities committed by the Tribunal in delivering its ruling. He contended that the Respondents filed their written statement of defence containing two limbs of preliminary objection and the same were argued by the parties. However, the trial court suo motu raised two points of law to the effect that the Appellant's application is time barred and that the matter is constructive res judicata. He said that the Tribunal went ahead to determine the matter basing on the two points it raised without

affording the parties opportunity to be heard and dismissed the whole suit. He argued that cases must be decided on the issues on record and if it is desired by the court to raise other issues not found in the parties' arguments then the said issues should be placed on record and the parties should be given the opportunity to address the court. In support of his argument he cited the case of ***Scan-Tan Tours Ltd. v. The Registered Trustees of the Catholic Diocese of Mbulu***, Civil Appeal No. 78 of 2012 in which the Court of Appeal (CAT) held:

> *"We are of the considered view that in line with the audi alteram partem rule of natural justice, the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit...it is a well-established practice that a decision of the court should be based on issues which are framed by the court and agreed upon by the parties, and failure to do so results in a miscarriage of justice."*

He concluded that the points raised and determined by the Tribunal without affording the parties an opportunity to be heard would result to miscarriage of justice to the parties.

Ms. Mwahandi in her submissions opted not to address on this irregularity committed by the Tribunal as presented by Mr. Chapa. However, I find the issue to be important as it touches on the legality of the whole judgment whose merits are to be addressed by this Court. I have gone through the record of the Tribunal and found that in the WSD the Respondents raised preliminary objection to the effect that the Applicant/Appellant had no *locus standi* and that the Applicant/Appellant had no any cause of action against the Respondents. Upon reading the Tribunal judgment as

well I found that the Tribunal raised a point that the matter was time barred and that the application was constructive res judicata as argued by Mr. Chapa.

I agree with Mr. Chapa that by not inviting the parties to address the Tribunal on these points of law an injustice was carried to the parties particularly the Appellant whom the decision rendered had adverse impact on. The CAT has underscored on this issue in various occasions and ruled that failure to accord the parties the opportunity to address the court on questions or points raised by the court *suo motu* vitiates the decision of the court. The CAT in ***Wegesa Joseph M. Nyamaisa v. Chacha Muhogo***, Civil Appeal No. 161 of 2016 while quoting it previous decision in ***Margwe Erro, Benjamin Margwe & Pater Marwe v. Moshi Bahalulu***, Civil Appeal No. 111 of 2014 held:

> *"It is not in dispute that the learned judge who heard the appeal in the High Court decided the matter on an issue she had raised and answered suo motu in the course of composing judgment…The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied in the circumstances of this case the denial of the right to be heard on the question of time bar vitiated the whole judgment and decree of the High Court.*
> *Without much ado we find there to be merit in this appeal which we accordingly allow. We find the judgment of the High Court to have been a nullity for violation of the right to be heard."*

The CAT also in ***Kluane Drilling (T) Ltd. v. Salvatory Kimboka***, Civil Appeal No. 75 of 2006 while quoting its previous decision in ***Mire Artan Ismail and Another v. Sofia Njati***, Civil Appeal No. 75 of 2008 held:

> *"We are of the considered view that generally a judge is duty bound to decide a case on the issue on record and that if there are other questions to be considered they should be placed on record and parties be given an opportunity to address the court on those questions."*

From the above decisions, the court/tribunal is permitted to raise questions *suo motu*, however, the same must be placed on record and the parties afforded the opportunity to address the court before a decision is issued. It follows therefore that if the court/tribunal comes across a point of law or question not addressed by the parties at the time of composing its decision, it has to postpone the composition of the said decision and call parties to address the court first. Therefore in summing up, the points of law raised *suo motu* by the Tribunal and determined without according the parties the opportunity to address it accordingly, vitiates the ruling of the Tribunal in this matter. I therefore quash the ruling of the Tribunal and order the matter to be remitted back to be Tribunal for the Land Application No. 114 of 2015 to be heard afresh before another Chairman and set of assessors.

Appeal allowed. Since the mistake was occasioned by the Tribunal I make no orders as to costs.

Dated at Mbeya this 21st day of February 2020

THE HIGH COURT OF TANZANIA

L. M. MONGELLA
JUDGE
21/02/2020

Court: Judgement delivered in Mbeya in Chambers on this 21st day of February 2020 in the presence of the parties and their advocates.

L. M. MONGELLA
JUDGE
21/02/2020