IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

PC CIVIL APPEAL NO. 20 OF 2019

(C/F Monduli District Court Civil Appeal No. 7 of 2018)

(Original Kisongo Primary court Civil case No. 11/2018)

LEONARD MKWAVI ..... APPELLANT

VERSUS

ROBERT KISAKA ..... RESPONDENT

JUDGMENT

13th October & 6th November, 2020

MZUNA, J.

Leonard Mkwavi, the appellant herein is challenging the award of Tshs 19,069,850/- issued by Kisongo Primary court in favour of **Robert Kisaka,** the respondent herein as compensation for the demolished two houses of the respondent. The appeal at the District court was unsuccessful hence the present appeal.

Parties appeared in person and unrepresented. Hearing proceeded by way of written submissions. The petition of appeal encompasses four grounds. They boil down to three issues:-

1. *First, whether there were drafted issues.*
2. *Second, whether the evidence were properly scrutinized.*
3. *Third, whether the trial court had jurisdiction to deal with the matter.*

I propose to start with the third ground of appeal. The question is, did the trial court have jurisdiction on the matter? In his submission, the appellant says looking at the title of the case it reads "Shauri la madai No. 11/2018" which literally means "Civil case." It is his view that the trial court had no jurisdiction to deal with a Civil case for two reasons:-

First that the evidence shows there was a dispute on ownership of land Plot No. 597 and 599 situated at Beneti at Monduli where both parties claimed ownership. It is his view that as the matter concerned dispute on land ownership then the Primary court had no jurisdiction based on section 3 (1) read together with section 4 (1) and (2) of the Land Disputes Courts Act, Cap 216 RE 2019 (Cap 216).

Second that under section 18 (1) of the Magistrates Courts Act, Cap 11 RE 2019 (MCA) clearly provides that Primary court has jurisdiction in proceedings of a civil nature "where the law applicable is customary or Islamic law". The Magistrate failed to say which customary law he used in determining the matter. This according to him means the Magistrate

determined the matter which he had no jurisdiction. He referred to the case of **Richard Julius Rukambura v. Issack Ntwa Mwakajila and Another,** Mza Civil Application No. 3 of 2004, CAT (unreported) to insist that *"the question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon..."*

Amplifying further, he said that the disputed plots No. 597 and 599 are situated in the surveyed area at Monduli. This means the Primary court had no jurisdiction to deal with matters on a surveyed land as it does not fall within customary law.

On his part, the respondent says issue of jurisdiction does not feature and is therefore irrelevant. That based on section 18 (1) (a) item (ii) and (iii) of the written Laws Misc. Amendment Act, 3 of 2016, the pecuniary jurisdiction was enhanced from 5 Million to 50 Million for immovable property and Tshs 3 Million to 30 million for movable property. He prayed for this court not to disturb the concurrent findings of the two courts below citing the case of **Salum Mhando v. Republic** [1993] TLR 170. Above all that issue of ownership had long been resolve by the District Council. He prayed for the appeal to be dismissed.

In his rejoinder submission, the appellant insisted that the record does not show the dispute on land ownership was solved by the District council Monduli.

This court has the following to say, on the allegation that the trial Magistrate lacked jurisdiction based on section 18 of the MCA. In the first place, the appellant admitted reported to the police after noticing that his plot was trespassed into instead of reporting to the Land office. This means he admits that the issue was on compensation on the demolished houses not issue of ownership.

I find that the trial court had jurisdiction to deal with the matter given the fact that even the awarded Tshs 19,000,000/- did not exceed the pecuniary jurisdiction of 30,000,000/- under section 18 (1) (a) –(d) of the MCA. The alleged issue of customary and the like is also not a point to deny the respondent his right on civil liability. Above all there was not determined issue of ownership as alleged. It would have been different if the matter was one of criminal trespass as issue of ownership of the two plots where the houses were built was still at stake, that is not the case. Even the argument

that it was a surveyed area is a misdirection on his part. The cited cases are distinguishable.

On the second issue of failure to evaluate the evidence. The appellant argued that the first appellate Magistrate failed to know and critically evaluate the evidence which showed the dispute was on land ownership. That, due to such failure to scrutinize the entire evidence it led to an erroneous conclusion. He brought to the attention of this court the case of **Salim Petro Ngalawa vs. The Republic,** Criminal Appeal No. 85 of 2004, CAT at Arusha (unreported) to amplify his point.

On his part, the respondent insisted that the first appellate court's judgment shows clearly that he revised the evidence adduced during the trial. That the issue of ownership in respect of the aforesaid plots did not surface at any stage during the trial as this was not a fact in issue between the parties. Instead, the issue was whether the appellant demolished the two houses belonging to the respondent. The court awarded compensation based on the expenses he incurred in constructing those houses and never made an order be it declaratory or otherwise regarding the ownership of land. It is his view that the cited cases are inapplicable and therefore distinguishable.

My view is that reading from the evidence SM5 Godfrey Laizer, he saw the labourers who were finalizing the demolition of the respondent's houses with the directions of the appellant who was also present. The valuation report (schedule of materials Exhibit P1) was tendered by SM5 Ernest Mwanesewa and its value was Tshs 21,000,000/-. The trial court awarded Tshs 19,000,000/-. The allegation that since issue of ownership was still at stake with due respect does not disentitle the one who has been affected by a wrong. The evidence was accordingly considered. This issue is also bound to fail.

Lastly on the allegation that there was erroneous drafting of issues forming the third issue. The appellant insist that there was an issue of ownership from the judgment of the Primary court. That the first appellate court was in error to hold that issues were properly drafted. His view is that the proper issue ought to have been whether the plots in dispute belongs to SM1 or SU? He brought to the attention of this court the case of **Jammohamed Umerdian v. Hussein Amarshi and Others** (1953) EACA 41 that framing of issues is mandatory stage that governs the conduct of civil proceedings. The appellant prayed for the two lower courts judgments to be nullified for want of jurisdiction citing the case of **Melisho Sindiko v.**

Julius Kaaya (1977) LRT no. 18 (among others) as it vitiated the proceedings.

The respondent countered it by submitting that there is a misdirection on the alleged issue of ownership. That the dispute was on demolition of the two houses. He says the argument by the appellant is baseless as three issues were drafted. It should be dismissed.

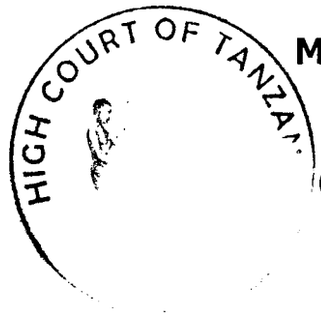
This court has he following to say. It is true, issues were not drafted. The allegation by the respondent that there were drafted three issues with due respect is unfounded. In the case of **Rashid Nkungu v. Ally Mohamed** [1984] TLR 46 (HC) the court found as a material error and therefore fatal, because issues were framed without allowing parties to adduce evidence. Proceedings were declared as a nullity. In the case of **Raza Somji v. Amina Salum** [1993] TLR 208 (CA) the court observed that where the court frame an issue *suo motto* had to allow parties the opportunity to be heard on the issue, failure of which there is an error.

In our case there was no framed issues however parties addressed themselves on the issue of whether the appellant demolished the said two houses and what was the compensation due. This can be seen from the

summary of the claim of which the appellant was called upon to reply. The omission to frame such issues, the appellant never said how was he prejudiced thereby. With the advent of overriding objective principle where substantive justice is paramount, in view of the decision of the Court of Appeal in the case of **Yakobo Magoiga Kichele vs. Peninah Yusuph,** Civil Appeal No. 55/2017 CAT (unreported) this court is not prepared to buy his story.

That said, the decisions of the trial court and appeal court cannot be nullified as I find no any material error.

Appeal stands dismissed with costs.



M. G. MZUNA,

JUDGE.

6/11/2020