

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA**

**IN THE DISTRICT REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**LAND APPEAL NO. 06 OF 2019**

*(Arising from the order in Land Application No 56 of 2018 for Kahama District  
Land and Housing Tribunal dated 17 of January 2019)*

**SIMON JOSEPHAT.....APPELLANT**

**VERSUS**

**JOFREY NG'OMBE.....1<sup>ST</sup> RESPONDENT**

**NMB PLC.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

*Date of Last order: 14/04/2020*

*Date of Judgment: 15/5/2020*

**MKWIZU, J.:**

This appeal originates from application No.56 of 2018 instituted in Kahama District Land and Housing Tribunal. In those proceedings below, the 1<sup>st</sup> respondent had sued the appellant and 2<sup>nd</sup> respondent over a suit premises situate at Kakola Village, within Kahama District in Shinyanga region. The allegation on the pleadings was that the appellant had sold a suit premises to the 1<sup>st</sup> respondent in

consideration of 4,500,000/= on 6<sup>th</sup> November, 2017. After this transaction, the 1<sup>st</sup> respondent developed the suit premises. Later he learnt that appellant had mortgaged the suit premises and the house was about to be sold by the 2<sup>nd</sup> respondent. Following that information and after an oral communication with the appellant, 1<sup>st</sup> respondent paid 2000,000/= to the bank, (2<sup>nd</sup> respondent) to rescue the house from being sold.

As if that was not enough, appellant again, trespassed on the suit premises claiming to be the owner as a result 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent filed a criminal case before Lunguya Primary Court in Criminal Case No. 61 of 2018 for obtaining money by false pretence. Appellant was convicted and sentenced to six months imprisonment and ordered to compensate the 1<sup>st</sup> respondent the purchase price. On appeal before the District court, 1<sup>st</sup> respondent complained of the compensation order, claiming to have paid the appellant the purchase price plus extra money paid to the 2<sup>nd</sup> respondent to clear the debt. He requested the court to be declared a rightful owner and be handed the suit premises. The District Court upheld the conviction and

sentence but it set aside compensation order. The court also advised parties to file a suit at the appropriate Land tribunal for determination of land issue between them.

Untiringly, 1<sup>st</sup> respondent filed before the District Land and Housing Tribunal, Land application No 56 of 2018 subject of this appeal. The tribunal declared the 1<sup>st</sup> respondent a lawful owner of the suit premises and appellant was declared a trespasser and permanently restrained from interfering with the applicant's premises. He was also ordered to reimburse the 1<sup>st</sup> respondent Tsh. 2000,000 paid to the 2<sup>nd</sup> respondent.

Appellant is aggrieved by this decision. He has come to this court with a petition of appeal containing seven grounds of appeal.

1. That, the trial chairman erred in law and fact for failure to consider that there is no contract to sell and that the respondent cannot benefit from illegality.
2. That, the trial chairman erred in law by denying the appellant the right to be heard.

3. That, the trial chairman erred in law by failure to determine the point of preliminary objection raised by the second respondent.
4. That, the Honourable Chairperson of the Tribunal erred in law and fact for failure to properly evaluate the evidence on record thus arriving to a wrong decision.
5. That, the trial chairman failed to consider that the sale agreement was terminated by illegality in the criminal case.
6. That, the Honourable Chairperson of the Tribunal erred in law for failure to make decision on the issue framed and which is a basis of the application, instead decided to depart and un procedurally decided the matter.
7. That, the appeal is not time barred the appellant received the copy of the drawn order on 2<sup>nd</sup> February, 2019 and on 01<sup>st</sup> March,

2019 was supplied with copies of proceedings for appeal purposes.

For the reasons to be apparent in this judgement, I will determine the appeal generally without going into each of the presented grounds of appeal separately. It should be observed that, the application before the tribunal, was not heard on merit. It was decided on the preliminary stage of the proceedings. As the records would reveal, when the application was called on for hearing before the tribunal on 17/1/2019, the 2<sup>nd</sup> respondents expressed his readiness to proceed for hearing of the preliminary objection which he had earlier on raised. Applicant, (present 1<sup>st</sup> respondent) seemingly conceding to the preliminary objection, prayed to withdraw his claims against the 2<sup>nd</sup> respondent and proceed with the case against the 1<sup>st</sup> respondent (who is now the appellant). On his part the appellant (who was 1<sup>st</sup> respondent before the tribunal) had no objection, he conceded to the prayer made and elaborated a little bit on how the dispute arose between him and the then applicant (now 1<sup>st</sup> respondent).

Trial tribunal proceeded to give an order not only on the prayer for withdrawal of the NMB Bank (2<sup>nd</sup> respondent) from the application but in respect of the entire application. The proceedings and the resultant order is reproduced hereunder for easy of reference: -

**"17/01/2019**

**CORAM:** LEKAMOI PLS

**ASSESSORS:** BEATRICE HUSSEIN- Present

PETRONELLA JULIUS – Present

**APPLICANT:** Present

**RESPONDENT:** BIENGO for the 2<sup>nd</sup> Respondent

1<sup>st</sup> Respondent – Present

T/C MORIS

**BIENGO, ADVOCATE:**

*This matter is coming up for hearing of preliminary objection and I am ready for the hearing.*

**APPLICANT:**

*It is true that I want to proceed with the first respondent and to withdraw the claims against the second respondent.*

**BIENGO, ADVOCATE:**

*I don't have any objection.*

**FIRST RESPONDENT:**

*I don't have any objection as I am not the one who file the case against NMB but is true I sold the land to the applicant and it is true that Tshs. 2,000,000/= was deposited on my account to rescue the house to be sold by NMB as before I sold the house to the applicant and he paid me fully I mortgaged the house to NMB to be facilitated a loan; we were to the Primary Court then District Court and the case got determined.*

***TRIBUNAL:***

*Upon heard the applicant and as he decided to withdraw the claims against the second respondent and as other parties conceded the second respondent to be withdrawn from this applicant and upon taking into consideration that the first respondent conceded to have sale the disputed land to the first respondent and upon taking into consideration that the first respondent conceded that the at the time he sold the dispute land to the applicant he defaulted service the loan extended by the NMB PLC and further more upon taking into consideration that the first respondent conceded that the Tshs. 2,000,000/= was done to rescue the house sold fraudulently.*

*It is hereby ordered as follows;*

**ORDER**

- 1. The second respondent is hereby withdrawn from this application without the requirement of any amendment.*
- 2. The applicant is hereby declared the lawful owner of the disputed premises with building (Boma) therein and is free to enter into possession.*
- 3. The respondent being the trespasser is permanently restrained from interfering with the applicant's premises and he is further ordered to reimburse the applicant Tshs. 2,000,000/= being used to rescue his premises upon the first respondent to perform his obligation.*
- 4. That first respondent to pay the applicant and the second respondent costs of this application.*

It is so ordered.



**SGD PAULO S L.S LEKAMO I**  
**CHAIRMAN**  
**17/01/2019"**

Considering the above proceedings, nature of the application that was before the tribunal and the stage at which the application were, I find without reluctance that the tribunal concluded the matter without affording the parties an opportunity to be heard on the merit of the application. The application was concluded before parties said a word on what had brought them before the tribunal. The fact that the appellant's initial explanation gave impression that he admits the application, did not exclude the Chairperson from allowing the parties to present their grievances for and against the application. This was an incurable irregularity which occasioned failure of justice to the appellant.

The tribunal offended the *audi alteram partem* rule of natural justice. In Civil Appeal No. 45 of 2000 - **Mbeya - Rukwa Auto Parts and Transport Ltd Vs. Jestina George Mwakyoma** it was observed that:-

*"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law and stipulates in part;*

***(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kikamilifu. "***

This position was also expressed in the case of Abbas **Sherally And Another Vs. Abdul Fazalboy**, Civil Application No. 33 of 2002 (unreported) where the court insisted that:-


*"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."*


It is for this reason that I find merit in this appeal and on the same line I find no reasons to determine each ground separately. Having said so, the appeal is allowed to the extent explained above, the order of the tribunal and the entire proceeding dated 17/1/2019 is quashed and set aside, the record of the application is remitted back to the trial tribunal for parties to be heard afresh before another chairman and another set of assessors.

Cost in the course.

**Dated at Shinyanga** this 15<sup>th</sup> day of May, 2020.

  
Y. MKWIZU  
JUDGE  
15/05/2020

**COURT:** Right of appeal obtained.

  
E. MKWIZU  
JUDGE  
15/05/2020