

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA

LAND APPEAL NO. 74 OF 2019

(C/f District Land and Housing Tribunal of Arusha Application No. 212 of 2019)

DORIS MARTIN MINJA.....APPELLANT

Versus

DIAMOND TRUST BANK TANZANIA LTD1ST RESPONDENT

KAHELA TRADERS LIMITED.....2ND RESPONDENT

ALEX YAKOBO KAHELA.....3RD RESPONDENT

ASTERIA SUGWEJO KAHELA.....4TH RESPONDENT

DAHLGREE GASPER (as administrator of the

Estate of the late GASPER JOHN MINJA5TH RESPONDENT

FIRST WORLD INVESTMENT

COURT BROKERS.....6TH RESPONDENT

JUDGMENT

18/10/2021 & 29/11/2021

KAMUZORA J,

The appellant Doris Martin Minja was the applicant before the District Land and Housing Tribunal (DLHT) in Application number 212 of

2019 that was filed against the respondents here in. The appellant before the DLHT was seeking for a declaratory order that the disputed property was a matrimonial property and the disposition of the said property by the 1st and 6th respondent was unlawful for want of the applicants' consent, thus she prayed for a permanent injunction restraining the respondents from disposing the disputed land as well as payment of general damages for disturbance and costs. The application was dismissed by the DLHT for being res judicata. The applicant was aggrieved by that decision hence preferred this appeal on the following grounds: -

- 1) That, the trial tribunal proceeds and decided the merit of the case without giving the appellant an opportunity of being heard as required by law, in other words the principle of natural justice was violated.*
- 2) That, the trial tribunal misdirected itself and consequently erred in fact and in law in by skipping to hear the parties with regard to the preliminary objection on point of law raised by first respondent as a result it ended up with wrong and unjust decision.*

When this appeal was called for hearing the appellant was present together with her advocate Mr. John Shirima. The 1st and 6th respondents were present together with their advocate Mr. Charles Adiel Abraham, the 2nd and 3rd respondents were present in person and the 4th respondent was reported sick while the 5th respondent was absent without notice. Mr.

Shirima presented proof of service for the 5th respondent and being satisfied on the service, the matter proceeded ex-parte against the 5th respondent and with consent of the parties, the hearing was conducted by way of written submissions. However, only the appellant, the 1st and 6th respondents complied to the submission scheduling order and for that reason, this court considers that who ever failed to file the submission has waived his/her right to hearing.

Now turning to the matter at hand, the two grounds raised contain one important aspect of the law, *right to be heard*. Mr. Shirima submitted that the trial tribunal did not provide a chance for the parties to be heard before the tribunal could reach its decision. He contended that after the parties filed their pleadings before the trial tribunal and the 1st respondent raised preliminary objection, but parties were not availed an opportunity to be heard as the trial tribunal made a decision of the preliminary objection raised by the respondent's counsel without according the parties right to be heard.

Mr. Shirima submitted further that the raised objection was a means of technically depriving the applicant his right to be heard. He cited Article 13(6) (a), 107 (2) (e) of the Constitution of the United Republic of Tanzania as amended from time to time as well as the case of **Fabian**

Munraha v. Rukaya Munraha [1996] TLR 150, **Jimmy Ngonyan v. National Insurance Company Ltd** [1994] TLR 28 to support the submission that, the appellant was condemned unheard in the trial tribunal and prayed that the proceedings of the trial tribunal be nullified.

Mr. Shirima added that, the preliminary objection was raised in the 1st respondent's written statement of defense, but the parties were not accorded chance to argue the objection for the tribunal to be satisfied that there was a point of law. To support his argument, he referred the case of **National Insurance Corporation (T) Ltd and another Vs Shengena Ltd** and the case of **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors (1969) EA 696**.

Responding to the appellant's submission Mr. Abraham started by narrating the background of the dispute at hand. He submitted that the appellant instituted Land Appeal no 212 of 2019 and Misc. Land Application No.358 of 2019 before the DLHT. That among the reliefs sought is the declaratory order that the disposition of the disputed property by the 1st and 6th respondent is null and void for want of spouse consent. That when the matter was scheduled for necessary orders on 07/11/2019, the tribunal was informed on the existence of the decision of the Commercial Case No. 133 of 2014 involving the same parties and the

same issues. That the tribunal was informed that the application before it was already determined by the High Court Commercial division and the tribunal suo motto directed the parties to address the issue. That the appellant was afforded right to address the tribunal before the decision was made by dismissing the application for being res judicata. That the appellant's advocate did not appear without good reason and the tribunal was satisfied that the appellant did not disclose to the tribunal the existence of another decision before the Commercial Division.

Regarding the appeal at hand Mr. Abraham submitted that, the tribunal in its own unlimited powers (suo motto) can address any matter or facts as to double check the legality of cases presented before it. That, the appellant having filled both Land Application No. 122 of 2019 and Misc. Land Application No. 394 of 2019 did not disclose the facts and decision of the High court in Commercial Case No. 133 of 2014. That, when the matter was set for necessary orders both the appellant and his counsel were present and had knowledge. That, the court raised the said concern and required the parties to address it. The counsel for the respondent was of the view that it was not the tribunal fault that the advocate for the Appellant didn't show up thus the Appellant was not denied the forum to address the existence of commercial cases in the High Court commercial division. Mr. Abraham added that, the cited Article of the constitution

intends to seek the sympathy of this court. He referred the case of **Shah Kachra Merag vs Gandhi and Company** (1957) EA 466 to support the argument that the failure to appear by the advocate without a proper notice cannot be an excuse.

In a brief rejoinder Mr. Shirima reiterated his submission in chief and added that it is a cardinal principle of natural justice that a person should not be condemned unheard as fair procedure requires that, both sides should be heard. He supported his argument with the case of **Furnell v Whangarei High School Board (1973) AC 660** and **Mbeya Rukwa Auto Parts & Transport Ltd v Jestina George Mwakagoma**, Civil Appeal No 45 of 2000 CAT (Unreported)

I have considered the submissions by the counsel for the parties and ~~the records of the trial tribunal. In the trial tribunal/the DLHT the records~~ show that the matter was first called before the Hon. Chairperson on 01/10/2019 in the absence of both parties. It was scheduled for mention on 07/11/2019 and on that date, the applicant was present in person while the 1st respondent was represented by Advocate Charles Abraham and other respondents were absent. While addressing the tribunal, the counsel for the 1st respondent raised a concern that the suit before it was properly dealt with by the High Court Commercial Division at Dar es

salaam in Commercial Case No. 133 of 2014 and thus prayed for the suit to be dismissed. The applicant who was present was given opportunity to address the DLHT and as per page 2 of the typed proceedings, her response is reproduced here under: -

"Your honour I pray that I be given time so that my counsel could appear and respondent on the said concern. However, your honor I was allowed by the High Court to file this application in this tribunal."

After recording that response, the DLHT tribunal entered a ruling that the suit was res-judicata as the issues raised in the application before it were properly determined by the High Court in Commercial Case No. 133 of 2014. The tribunal considered the filing of the application before it as the abuse of court process and continued to dismiss the application with no order for costs.

From the above analysis, it is without doubt that there was point of law to which the application was considered res-judicata, but the appellant was not accorded chance to address the same. As opposed to the submission by the counsel for the respondent, when the matter was first called before the tribunal no party was present. On the second scheduled date is when the appellant appeared without her advocate. She informed the Chairperson that her advocate was not in attendance and the tribunal went on to determine the objection. It was contended by the counsel for

the respondent that it was not the tribunal fault that the advocate for the Appellant didn't show up thus the Appellant was not denied the forum to address the existence of commercial cases in the High Court commercial division. I do not agree with such contention on the following reasons; **first**, it was the first date for the parties to appear before the tribunal and on that date the matter was scheduled for mention and not hearing. Although it was raised as a concern, the records of the DLHT shows that the respondent raised it as the preliminary objection in the written statement of defense. Had it been that the Tribunal considered that circumstance, it could have allowed the matter to be adjourned and call for the parties to address the issue or argue the objection before the decision could be made. **Second**, when the issue on the competency of the application aroused, the applicant/appellant requested for time for her advocate to appear and address the objection. However, the Chairperson continues to deliver the ruling and dismissed the application. To me there was a clear disregard of the rule of natural justice. Right to be heard is the paramount rule of natural justice. It is a constitutional right under 13(6) (a) of the Constitution of the United Republic of Tanzania. The Court of Appeal in **Meyya-Rukwa Auto Parts & Transport Limited Vs. Jestina George Mwakyoma, Civil Appeal No.45 of 2000**

(unreported) while addressing the principle of natural justice had this to say: -

"In this country, natural justice is not merely 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 declares in part,"

"Wakati haki na Wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu"

In the case of **Kumbwadumi Ndemfoo Ndossi v Mtei Buss Service Ltd**, Civil Appeal No. 257/2018 CAT at Arusha (Unreported) cited with approval the case of **Abbas Sherally and Another v. Abdul S. H. M. Fa za I boy**, Civil Application No. 33 of 2002 (unreported) which held that: -

*" The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by 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 on the bold].

The circumstance in the present case is the same as those in the above cited. The decision was made without availing the parties a right to be heard thus violating the principle of natural justice. I subscribe to that

decision and proceed to nullify the ruling passed by the DLHT in Application No. 212 of 2019. I order the DLHT file to be remitted back for the matter to be heard before another competent chairperson. The appeal is therefore allowed with no order for costs.

Order accordingly.

DATED at ARUSHA this 29th November 2021




D.C. KAMUZORA

JUDGE