

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

LAND APPEAL No. 01 OF 2022

(Arising from the Land Application No. 116 of 2019 of the District Land and Housing Tribunal for Mwanza at Mwanza)

BENJAMIN MUNGO----- APPELLANT

VERSUS

SISI AUCTION MART & GENERAL BROKERS-----1ST RESPONDENT

TUJIJENGE TANZANIA LIMITED-----2ND RESPONDENT

EVELINA CHRISTIAN KUMLAGA-----3RD RESPONDENT

LEAH NKWABI-----4TH RESPONDENT

JUDGMENT

Last Order date: 29.06.2022

Judgement Date: 08.07.2022

M. MNYUKWA, J.

The Appellant Benjamin Mungo is appealing against the decision of the District Land and Housing tribunal (trial tribunal) of Mwanza at Mwanza in Application No. 116 of 2019 which was dismissed. In the record, it goes that; the appellant lodged the Land Application No 116 of 2019 before the Trial Tribunal of Mwanza at Mwanza claiming to be the lawful owner of the plot measured 30 metres width per 30 metres length located at Kisamiko street Luchebele Ward in Mwanza City which he bought by way

of public auction conducted by the first respondent, following the 3rd respondent failure to honor terms of the loan facility advanced to her by the 2nd respondent. That, sometime in October 2018, the 4th respondent showed up claiming ownership of the disputed plot and that, she never pleaded the same as security to any loan. The matter proceeded ex parte before the trial tribunal for Mwanza at Mwanza against the respondents save for the 4th respondent who made a reply to the applicant's application but did not enter appearance and the matter proceeded ex-parte against him, his reply was expunged from records for being filed without the leave of the trial tribunal. In determining the application, the trial tribunal, dismissed it. Agrieved, the appellant filed this instant appeal advancing five grounds of appeal:-

- 1. That the trial tribunal grossly erred in law and in fact for the failure to determine the raised issues.*
- 2. That the trial tribunal erred in law and in fact for failure to address the dispute filed in the tribunal hence misdirected itself on other irrelevant matters which has no connection with the dispute filed.*
- 3. That the trial tribunal erred in law and in fact by relying on the evidence which has never been tendered or produced in court as exhibits.*



4. *That the trial tribunal erred in law and in fact for failure to allow the application as the appellant proved his case on the required standard.*
5. *That the trial tribunal erred in law and in fact for failure to evaluate the evidence tendered in court and proceeded to dismiss the application based on the mere assessor's opinion.*

At the hearing, Mr. Egbert Mujungu learned advocate, appeared for the appellant and the 2nd respondent afforded the services of Gati Deborah Isack. The 1st, 3rd and 4th respondents did not enter appearance and upon the prayer made by the appellant's learned counsel, the matter proceeded ex-parte against them as per order XXXIX Rule 17(2) of the Civil procedure Code, Cap 33 RE: 2019.

The appellant learned counsel was the first to submit and he opted to argue the 1st and 2nd grounds altogether. In his submissions, he avers that the chairman of the tribunal stated that the applicant was supposed to join Mwanza City council as a party. He claims that, Mwanza City Council was not a party to the dispute and the trial tribunal's reference to the written statement of defence of the 4th respondent while the matter proceeded exparte against her was wrong. He went on that, the chairman failed to determine the framed issue as to who is the rightful owner and what are the reliefs entitled to. He referred to the case of **Peoples Bank**

of Zanzibar v Suleiman Haji Suleiman [2000] TLR 347 where the court stated that parties were required to be given an opportunity to address the court on the raised issue. He, therefore, prays for the 1st and 2nd grounds of appeal to be allowed.

On the 3rd ground of Appeal, he avers that, the trial tribunal erred referring to the 4th respondent's letter annexed in her written statement of defence. He insisted that, as the matter proceeded ex-parte against the 4th respondent, it was wrong for the trial tribunal to rely on the annexures of the 4th respondent's written statement of defence as the same was not tendered and admitted as exhibit at the trial tribunal. He refers to the case of **Pasinetti Adriano vs Girogest Ltd and Another** [2001] TLR 89, where the court stated that in civil cases the issue has to be decided based on the pleadings. He, therefore, insisted that the annexures in the 4th respondent's written statement of defence did not form part of the pleadings and therefore it was wrong for the trial tribunal to consider its annexure in forming the judgment.

On the 4th and 5th grounds of appeal, he avers that the evidence of the applicant was sufficient to prove the matter before the trial tribunal. He avers that, the applicant discharged his legal duty at the trial tribunal tendering exhibit P1 to P5 collectively and he was a bonafide purchaser



of the suit property and it was wrong for the trial tribunal to dismiss the application. Referring this court to the case of **Deemay Daati & Two Others v R**, [2005] TLR 132, that this court can re-evaluate the evidence of the trial tribunal and make its findings if it finds that there was a misapprehension of justice. He insisted that, the appellant's evidence proved the case on the required standards and the trial tribunal ought to declare him as the rightful owner of the suit property and grant the reliefs so prayed. He retires and prays the appeal to be allowed with costs.

Responding, Gati Debora Isack, counsel for the 2nd respondent conceded with the appellant's submissions as he did not object but only prayed for costs to be waived.

Rejoining, the appellant insisted that the respondents should bear the costs of this appeal for the 2nd respondent did not give justifiable reasons as to why costs should be spared.

After the submissions by the appellant learned counsel and the 2nd respondent learned counsel and in absence of 1st, 3rd and 4th respondents whereas this matter proceeded exparte against them, I am now placed to determine this appeal whereby the main issue for consideration and determination is whether the appeal is meritorious.



On the 1st and 2nd grounds of appeal, the appellant learned counsel claims that the trial tribunal erred for giving its judgment out of the framed issues and raised a new issue *suo moto* and made it a subject to its decision without giving parties a right to address the trial tribunal.

Before I proceed to determine the above grounds of appeal, I find it wanting to briefly explain the meaning of an issue and how does it arise. In a simple meaning, an issue is a controversy, disagreement, debate between the contesting parties which is subject to determination by a court. An issue arise when a proposition of fact or law is asserted by one party through a plaint or any other legal document which institute a suit and denied by the other party through a written statement of defence or any other document in which the opponent party may rise defence.

It is the issue which gives the court mandate to direct the parties to confine their evidence on the issues framed and to focus on the relevant matters which may determine the rights and liabilities of the parties. Thus, the issues are very important as it is the backbone of the suit.

The importance of framing issues in a suit has been well written by C.K Takwani in his book titled **Civil Procedure with Limitation Act**, 1963, 7th Edition, Eastern Book Company. In the said book, I find the persuasive decision in the case of **State of Gujarat v Jaipalsingh Jaswantsingh**



Engineers & Contractors ((1994)1994) 35(1) Guj LR 258:(1994)2 Guj LH 403:(1994)2 Guj CD 476 the High Court of Gujarat where it was stated that:

"Such framing of issues in the first instance would facilitate the applicant to lead necessary evidence in support of the claim and the reliefs prayed pursuant thereto. In the second instance it will avail the opponent an opportunity to confront and contradict the particular witness and thereafter to lead the evidence (if he so desires) to bring home the defence pleaded, and in the third instance, enlighten the trial court to test and appreciate the same in proper perspective to enable it to reach a just decision."

In our jurisdiction, the relevancy of framing an issue can be seen in the case of **Barclays Bank Tanzania Limited v Sharaf Shipping Agency (T) Limited and Habibu African Bank Limited and Habib African Bank Limited v Sharaf Shipping Agency (T) Limited and Barclays Bank Tanzania Limited**, Consolidated Civil Appeals No 117/16 of 2018 and 199 of 2019, CAT at Dar es Salaam, where among other things it was observed that:

"Framing of issues is a necessary steps in resolution of civil disputes because it defines and narrows down the scope of the contention and thereby making the trial more focused and short-lived."



It is also the settled position of law that the duty to frame an issue is of the trial Judge or Magistrate but the same to be done by involving the parties to the suit since it is the parties' pleadings which may enable the trial Judge or Magistrate to frame an issue. In the case of **Barclays Bank Tanzania Limited v Sharaf Shipping Agency (T) Limited and Habibu African Bank Limited and Habib African Bank Limited v Sharaf Shipping Agency (T) Limited and Barclays Bank Tanzania Limited**, (supra) the Court held that:

" Although the duty to frame issues is of the trial judge, the same can not be done without involving the parties or their advocates who have both the duty to assist the court on the process and a right of hearing as well."

It is further the trite position of law that each and every issue that has been framed should be determined . In other words the issue should not remained unresolved as doing so may left the dispute unresolved. As stated in the case of **Alisum Properties Limited v Salum Selenda Msangi (As Administrator of The Estate of The Late Selenda Ramadhani Msangi)**, Civil Appeal No. 39 of 2018 CAT, it was held that:-

"It is an elementary principle of law that an issues formed by the court should be resolved. Therefore, the trial court is required and expected to decide on each and every issue



before it, hence failure to do so renders the judgment defective."

This position was also insisted in the cases of **Alnoor Sheriff Jamal v. Bahadir Ebrahim Shamji**, Civil Appeal No. 25 of 2006 (unreported) which quoted with approval a Kenyan case of **Kukal Properties Development Ltd v. Maloo and Others** (1990) E.A. 281 when faced with a similar situation, it stated that:-

"A judge is obliged to decide on each and every issue framed, failure to do so constitutes a serious breach of procedure."

Now coming to the appeal at hand, what is found on the trial tribunal's judgment specifically on the first page, the trial tribunal raised two issues as to who is the rightful owner of the suit plot and what reliefs are the parties entitled to. The same issues are also reflected on page 23 of the trial tribunal's proceedings as they were framed by the chairman of the trial tribunal without involving the remaining party or his advocate.

Out of a surprise, it seems that the above issues were framed based on the written statement of defence of the 4th respondent in which the same was expunged from record as it is reflected on page 6 of the trial tribunal's proceedings. I say so because issues arise from the contention of the parties, and the written statement of defence which denied the



contents of the application and the same has been expunged from record. It is the trite position of the law that document not admitted in evidence shall not form part of the record. (See the provision of Order XIII Rule 7(2) of the Civil Procedure Code, Cap 33 R.E 2019.)

When turning to page 6 of the same judgment, the trial tribunal did not determine the main issue raised as to who is the rightful owner of the suit land and instead changed its cause to a different direction by raising another issue of joining Mwanza City Council as a party to the suit without affording parties the right to address on that issue as required. As submitted by the appellant, the trial tribunal erred by abandoning the issues framed and considering the new issue raised *suo moto* during the composition of judgement.

It is a settled position of law that, it is fatal for the trial tribunal to raise the issue *suo moto* and take it as a point of its determination without giving parties a right to address on the new raised issue. In **Wegesa Joseph M. Nyamaisa v Chacha Muhogo** Civil Appeal No. 161 of 2016 it was stated that:-

"...we need not belabour the point that it is unacceptable in law for the learned first appellate Judge to raise the two salient jurisdictional issues while composing the judgment

without giving the parties the opportunity to be heard on the issues."

In a different occasion, in the case of **Kumbwandunmi Ndemfoo Ndossi v Mtei Bus Service Limited**, Civil Appeal No 257 of 2018, CAT at Arusha, the Court emphasize on the rights of the parties to be given opportunity to be heard on the new issue raised by the court and the importance of it being placed in the record. The Court decisively held that:

"Basically cases must be decided on the issues or grounds on record and if it is by the court to raise other new issues either found on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given opportunity to be heard by the court."

My mind is settled that, the fatality of this practice of framing the issue without involving parties to the case affects the parties to the extent that it interferes with their constitutional right of a fair hearing. The right to be heard has been stressed in **Mbeya Rukwa Auto Parts And Transport Ltd v Jestina George Mwakyoma** [2003] T.L.R. 251 that:-

"....natural justice is not merely a principle of the common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard among the attributes of equality before the law."



From the above analysis, I find the 1st and 2nd ground of this appeal has merit as it involves the grave serious breach of the matter of procedure as the chairman was not supposed to take such a course. In the event, I find these grounds alone are enough to dispose off this appeal as determination of other grounds will be useless.

I thus, nullify the proceedings and set aside the decision of the trial tribunal and any Order emanated from the Land Application No 116 of 2019.

In the final result, this appeal is allowed, as to the way forward, I order retrial of Land Application No 116 of 2019 before another Chairman with a new set of assessors and for the interest of justice, I order for effective service of summons to the parties of the case and the case should be heard inter-parties. I make no order as to costs.

It is so ordered.

Right of appeal explained to the parties.




M.MNYUKWA

JUDGE

08/07/2022

Court: Judgment delivered in the presence Appellant's counsel and in the absence of Respondents.

A handwritten signature in blue ink, appearing to be 'M. Mnyukwa', is positioned above the printed name.

M.MNYUKWA

JUDGE

08/07/2022