IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 212 OF 2020

(Originating from the ruling of the District Court of Ilala at Kinyerezi in civil case No. 48 of 2020 before Hon. A.A. Kanje, RM, dated 28/08/2020)

THE TRUSTEES OF JAMAAT ANSWAR SUNNA TANZANIA.....APPELLANT

VERSUS

ADAM YUSUFU MWINYIPINGU.....1ST RESPONDENT

MOHAMED ZUHEIR BUHERO.....2ND RESPONDENT

HASSAN FRANK.....3RD RESPONDENT

ALI MOHAMED MBUI.....4TH RESPONDENT

SULEIMAN M. SEMAMBA.....5TH RESPONDENT

JUDGMENT

Date of last order: 05/04/2022
Date of Judgment: 29/04/2022

E.E. KAKOLAKI, J.

Before the District Court of Ilala at Kinyerezi, the Registered Trustees of JAMAAT Answar Sunna Tanzania instituted a Civil Case No. 48 of 2020 against the above mentioned Defendants for permanent injunction to restrain them from interfering with the affairs of leadership of the Masjid Haq which is under trusteeship of the plaintiff, located at Ulongoni 'B' Gongo

la Mboto within Ilala District Dar es salaam region. The former was therefore seeking for the following reliefs:

(i) A declaration that the plaintiff is the legal trustee of the wakf and the acts of 1st,2nd 4th, and 5th defendants are ultra vires.

(ii) The order to compel the defendants to repair the damaged parts of the mosque on their own costs.

(iii) Courts order for permanent injunction to be issued against defendants and their agents from intervening affairs of the mosque.

(iv) General damages to the tune of Tsh.60,000,000.00

(v) Costs for the suit.

(vi) Any other reliefs the court may deem fit and equitable to grant.

When filed their joint Written Statement of Defence , the defendants raised a Notice of preliminary objection against the plaintiff to the effect that, the trial court had no jurisdiction to entertain the matter. In reply to the WSD the Plaintiff also raised a Notice preliminary objection against the defendants to the effect that, the WSD and the counter affidavit are defective and bad in law. As a matter of practice, the trial Court ordered parties to dispose of the firstly raised preliminary objection.

Briefly on the date fixed for hearing of the defendants' Preliminary objection, defendant/respondents' counsel addressed the court in support of the point of objection contending that, the trial court lacked the requisite jurisdiction to entertain the matter as the plaintiff/appellant's claims were premised on land matters/issues for involving two contesting wakfs touching ownership of the Masjid Haq. On his side, the plaintiff/appellant resisted the preliminary objection and requested the court to dismiss it on the reason that, the alleged involved matter is neither land matter nor touches administration of wakf, but rather concerned defendants' interference with the mosque affairs possessed through wakf which falls within part of the law that deals with probate matters. He insisted that, plaintiff/appellant's prayer was for permanent injunction against the defendant to restrain them from interfering with the plaintiff's affairs in the leadership of Masjid Haq and not otherwise. In composing his ruling the trial magistrate sided with plaintiff/appellant's counsel that the plaintiff's claim was neither land matter nor concerned with administration of the wakf. Nevertheless the trial magistrate went further to make a finding that, under Article 19 (2) of the Constitution of the United Republic of Tanzania the court's jurisdiction in entertaining conflicts arising out of religious institutions disputes is ousted and if the case falls under the

exceptions of Article 19 (2) of the Constitution, then judicial review would be the only remedy. He was of the conclusion therefore that, under the circumstances the trial Court possessed no the requisite jurisdiction under Article 19 (2) of the Constitution and section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap 310 R.E 2019. The suit was therefore ended up being dismissed while the plaintiff/appellant being advised to file his case in appropriate court vested with requisite jurisdiction if at all was interested. Felt aggrieved the appellant preferred the present appeal while fronting four grounds of complaints seeking to assail the Ilala District Court decision. They run thus:

(1) That the trial magistrate erred in law and facts for denying the plaintiff the right to be heard on the new issue raised by the court after hearing the preliminary objection

(2) That, the trial magistrate erred in law and facts for failure to abide to the decisions of the High Court he cited in his ruling

(3) The trial magistrate erred in law and fact for failure to interpret properly the provisions of Article 19 (2) of the Constitution of the United Republic of Tanzania and section 17 of the Law Reform (Fatal accidents and Miscellaneous Provisions) Act Cap 310 R.E 2019

(4) That the trial magistrate erred in law and facts for sustaining the preliminary objection which could not dispose of the case.

On the strength of those grounds, appellant requests the court to quash the whole ruling and orders of the trial court in Civil Case No 48 of 2020, declaration that the trial court has jurisdiction to entertain and determine the suit, and costs to follow the events.

At the hearing of the appeal, Appellant was represented by Mr. Abdallah Ally Mbwana, learned advocate, while the respondents hired the services of Ms. Aisha Ahmed Bwasheikh, learned counsel. The matter was disposed of by way of written submission. Having looked at the grounds of appeal above, I propose to consider the first ground of appeal which in my view, is capable of sufficiently disposing of the appeal.

Arguing in respect of the first ground of appeal, Mr. Mbwana submitted that, the point argued during the preliminary objection was to the effect that the trial court had no jurisdiction to entertain the plaintiff/appellant's claims for being premised land dispute, the point which as alluded to above was found to hold no water in the trial magistrate's words. It was his contention that, having so determined the point, in his ruling the trial magistrate went further and came up with the new issue and findings to the effect that, according to

Article 19 (2) of the constitution of the United Republic of Tanzania, the court's jurisdiction in entertaining conflicts arising out of religion institutions disputes is ousted. He referred the court to page 7 last paragraph of the impugned ruling to reinforce his argument while lamenting that, the issue of application of Article 19 (2) the constitution was not the part of the discussion in the trial court during parties' submissions on the point of preliminary objection. According to him, the issue was raised as a surprise during the day of ruling and the trial magistrate disposed the case based on such new issue hence the decision in contravention of the principle of natural justice which provides for the rights to be heard and Article 29(2) of the Constitution of the United Republic of Tanzania which requires for equal protection under the Laws, and Article 7(c) of the Africa (Banjul) Charter on Human and Peoples Right which provides for the right of defence. To fortify his stance, appellant cited the case **of Sheikh Ahmed Said Vs Registered Trustees of Manyema Masjid**, Civil Appeal No 33 of 2004 (2005) TLR 61 where Court of Appeal of Tanzania at Dodoma held thus:

"it is necessary for trial court to make specific findings on each and every issue framed in a case, even where some of the issues cover the same aspect."

In response, Ms. Bwasheikh resisted the appellant's submission and arguing that, the appellant at page 2 paragraph 3 and 4 of his submission admitted that, parties were heard on the point of jurisdiction of the trial court, thus the issue of jurisdiction was not new issue. In her view, although the respondent's advocate arguments were found to hold no water, that does not mean the court had jurisdiction over the matter. She said as it is settled position of law as propounded in a number of case laws that the court has jurisdiction to raise the matter/issue suo moto, in this matter the trial court properly moved itself to determine jurisdiction of the court basing on the already raised point of objection. She therefore prayed this court to find the ground is lacking in merit and proceed to dismiss it.

In a short rejoinder, appellant reiterated his submission in chief while adding that, if the trial court wanted to decide on the newly raised issue covering the same aspect of the court's jurisdiction, ought to have first overruled the preliminary objection which was not sustained, and then table and invite the parties address it on the new one and not to delve alone on discussion and decide it without involving the parties.

After passing through parties' submission on this ground and upon perusal of the trial courts record, it is noted by this court to be a common fact to

both parties that, the trial court after making a finding that, the submission that it was lacking requisite jurisdiction to entertain the suit for being a land matter did not hold water, the trial court suo motu proceeded to expound the issue of jurisdiction of the court before concluding that, the matter involved internal religious, thus could not be entertained by the trial court as per Article 19 (2) of the Constitution of the United Republic of Tanzania. It is also uncontroverted fact that, parties were not accorded with an opportunity to be heard on that issue before the trial court could adjudge on it, the decision which led to dismissal of the appellant's suit.

In her submission, Ms. Bwasheikh contends that, it is the accepted practice that a court can raise any issue suo moto and proceed to decide on it. It is true and I agree with that argument. However, as correctly submitted by Mbwana, when the new issue is raised suo mottu, parties should be given an opportunity first to address the court on the same so as a party has a right to be informed and address the court on the point intended to form part of the decision. That is so as every decision made is likely to affect the interest of either party in the suit so for the court to proceed deciding the issue without involvement of either party is tantamount to violation of the right to be heard guaranteed under Article 13(6)(a) of the Constitution of

the United Republic of Tanzania, 1977. The court of appeal when addressing a similar situation to the present one, in the case of **Hussein Khanbhai vs Kodi Ralph Siara,** Civil Revision No. 25 of 2014, (CAT-unreported), quoted with approval the case of **Hadmor *Productions v. Hamilton*** (1982) 1 AII E.R 1042 at p.1055, where Lord Diplock stated thus:

> "*Under our adversary system of procedure, for a Judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice,* ***the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating what is his answer to it."*** *(Emphasis is added)*

In the present appeal, appellant complaints center on denial of right to be heard. It is my humble view that, the act of the magistrate deciding on the point that, the case was centered on the internal conflicts of the religion, which ousts the jurisdiction of the court as per Article 19(2) of the Constitution, and proceed to dismiss the case on the same ground without affording parties with the right to address the court on the said point was violating the appellant's natural right to be heard.

Notably the right to be heard (*audi alteram partem*) is both elementary and fundamental. Its violation leads to the nullification of the decision arrived at. There is pleothora of cases supporting this stance. In the case of **Mbeya-Rukwa Auto Parts & Transport Limited Vs. Jestina George Mwakyoma,** Civil Appeal No. 45 of 2000 (unreported), the Court stated 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.*

As alluded to above denial of the right to be heard has the effect of vitiating the proceedings. This position was stated in various cases including the case of **Abbas Sherally & Another vs. Abdul S. H. M. Fazal Boy**, Civil Application No. 33 of 2002 (unreported) where the court stated that:

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

In this case as stated above since trial Magistrate when arriving at the decision dismissing the suit dwelt on the point raised suo mottu by the court and in violation fundamental right of parties to be heard before any decision affecting their title is entered, I find the decision is null an void ab initio for being premised irregular proceedings.

As this ground alone sufficiently disposes of the appeal, I see no reason to consider other grounds of appeal. The appeal is consequently allowed. Since part of the proceedings are nullity, I invoke the revisional powers bestowed to this court under section 44(1)(b) of the Magistrates Courts Act, [Cap. 11 R.E 2019] and proceed to quash the trial court proceedings dated 18/08/2020 and 28/08/2020 respectively and set aside the ruling and orders of 28/08/2020. The record is hereby remitted to the trial Court for the parties to be heard on the preliminary point of objection raised by the respondents but before another competent magistrate.

Each party shall bear its own costs.

It is so ordered.

DATED at Dar es salaam this day of 29th Day of April, 2022

E. E. KAKOLAKI

JUDGE

29/04/2022.

The Judgment has been delivered at Dar es Salaam today on 29th day of April, 2022 in the presence of Mr. Abdallah Ally Mbwana representative of the appellant, Mr. Said Sultan Said holding brief for advocate Aisha Bwasheikh for the respondents in person and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
29/04/2022